



REPUBLIC OF KENYA



**Family Bank Limited v Mubwana (Civil Suit E46A of 2020)
[2023] KEHC 22607 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E46A OF 2020
DKN MAGARE, J
SEPTEMBER 19, 2023**

BETWEEN

FAMILY BANK LIMITED PLAINTIFF

AND

YUSUF HASSAN MUBWANA DEFENDANT

JUDGMENT

1. The plaintiff filed suit against the defendant that in the year 2014, the defendant applied for a loan of 13,800,000/= with security of Kwale/ Vanga/23, with a forced sale value of 13,800,000/=
2. The plaintiff agreed to give an accommodation of 15,800,000/= which was accepted on February 9, 2015. The plaintiff, was to pay 60 months' equal instalments of Kshs 401,446.
3. The security was the land and motor vehicle registration No KBT 268L. The plaintiff applied for another loan secured by LR Kwale/Shimini/ADS/590 with forced value of Kshs 20,000,000/=. The plaintiff was given financial accommodation 11,200,000, on June 15, 2015. The payment was Kshs 285,906/= per month with 60 instalments.
4. In August 2017 the defendant applied for a third loan for security for LR Kwale/Shimoni Adj/671 with forced valuation of 15,000,000/=.
5. The same was accepted at Kshs 8,250,000/=. The letter of offer was accepted on August 17, 2018. Payment was Kshs 223,772 over security of LR Kwale/Shimoni/671 for Kshs 8,250,000/=.
6. In 2016, there was a consolidation for Kshs 36,360,379.07 on August 8, 2016. It was accepted. The plaintiff stated that there was breach of contract. A demand was made for arrears of Kshs 661,597.29. A sum of 2,038,542.43 and credit card arrears of 434,440/=.
7. A 40-day notice was issued for Kshs 37,732,000.35. The defendant on November 13, 2017 committed to clear in vain.



8. The plaintiff's claim is for Kshs 48,795,347.44 with interest at 13%. The plaintiff prayed for Kshs 48,795,347.44. The plaintiff's witness Simon Kamau Mwangi wrote a statement dated July 8, 2020. He reiterated the statement, following the averments in the plaint. He stated Kshs 48,795,347.44 as at June 30, 2020 plus interest at 13%. He produced the letters of offer and account.
9. A sum of Kshs 48,785,674.31 was claimed. The defendant file defence on November 30, 2020. They state that the interest is inflated unreasonable and illegal interest and extra hidden charges. The defence does not answer the questions. In the case of the case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the Court of Appeal stated as doth: -

“The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in *Thorp v Holdworth* (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible}” (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a).”

10. The defendant does not answer the questions of payment. Under order 2 rule 4(1) of the *Civil Procedure Rules* provides as follows: -

“4. Matters which must be specifically pleaded

- (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—
 - (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
 - (c) which raises issues of fact not arising out of the preceding pleading.
- (2) Without prejudice to sub rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.



(3) In this “land” includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.

11. The defendant did not tender any evidence. At the time of defence hearing the defendant stated that they had a preliminary objection.
12. I directed that the same be heard in the main suit. It was a gimmick to adjourn the hearing of the case.
13. Upon declining adjournment, they stated they had no witness without evidence the defence remains bare. It is not evidence. In *Leo Investment Limited v Mau West Limited & another* [2019] eKLR, Justice C Kariuki stated as doth: -

51. The appellant chose not to call any witness despite it having filed a defence. In *Shaneebal Limited vs County Government of Machakos* [2018] eKLR, Odunga J while quoting with approval various court decisions held as follows (in relation to failure to tender evidence in support of averments in a defence:

“.....According to *Edward Muriga through Stanley Muriga v Nathaniel D. Shulter* Civil Appeal No 23 of 1997, where a defendant does not adduce evidence the plaintiff’s evidence is to be believed as allegations by the defence is not evidence. In *CMC Aviation Ltd v Cruisair Ltd (No 1)* [1978] KLR 103; [1976-80] 1KLR 835, Madan J (as he then was) expressed himself as hereunder:

Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth....”

52. But what is the effect of failure by the appellant to tender evidence in rebuttal? The court in *Shaneebal Limited v County Government of Machakos* [2018] eKLR (supra) addressed this issue in paragraphs 24 to 29 and while citing other case laws it held that where no defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the plaintiff’s case unchallenged.
53. That where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.
14. The issue of time bar does not arise for 2 reason. The suit was filed on July 10, 2020. The issue of limitations of action is not raised in the defence.
15. This is an issue which can take the other party by surprise. Under order 2 rule 4 (1) of the *Civil Procedure Rules*, it must be specifically pleaded. Secondly the claim relates to a continuum of offers.



The last acknowledgment of prior indebted and restructure through consolidation was on August 8, 2016. It is barely 4 years since the debt was incurred.:

4.

Matters which must be specifically pleaded

- (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—
 - 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
 - c. which raises issues of fact not arising out of the preceding pleading.
- (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

16. Default did not occur till after August 8, 2016. The claim is therefore not time barred. Section 4(1) of the *Limitation of Actions Act* 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.

17. Having found that the claim is time bared it is my humble duty to interrogate the claim for 48,795,347 as at June 30, 2020. This was said to be money due and owing The letters of offer are accepted by the defendant. The defendant has not shown that he has paid. The bank statement shows indebtedness of Kshs 48,795,347.44.

18. To be able to defeat a claim for money had and received, the defendant has a burden to show he paid. In the case of *Ragbbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the Court of Appeal stated as doth: -

“The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in *Thorpe v Holdworth* (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, }}(underling supplied).



I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

19. The burden of proof in these cases is on whoever seeks the court to believe them. In this case it was incumbent on the plaintiff to show indebtedness. This is in consonance with sections 107-109 of the *Evidence Act*.

“Burden of proof

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

20. The same were not shown.

21. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 as follows:

“a. In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

b. 12. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

c. “Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

i. “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it



more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

22. The evidence available show that a sum of Kshs 48,795,347.44 is due and owing.
23. Consequently, I enter judgment for the plaintiff;
 - a. For a sum of Kshs 48,795,347.44 together with interest at court rates from the date of filing till payment in full.
 - b. The plaintiff shall have costs of the suit of Kshs 1,045,000.
 - c. There be 30 days stay of execution.
 - d. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF SEPTEMBER, 2023.

KIZITO MAGARE

JUDGE

