



**Abdullahi v First Community Bank Ltd & another (Civil Suit 344 of 2016)
[2024] KEHC 15745 (KLR) (Commercial and Tax) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 344 OF 2016
FG MUGAMBI, J
DECEMBER 6, 2024**

BETWEEN

ABDI MAALIM ABDULLAHI PLAINTIFF

AND

FIRST COMMUNITY BANK LTD 1ST DEFENDANT

CENTRAL BANK OF KENYA 2ND DEFENDANT

JUDGMENT

Introduction and Background

1. At all material times to this suit, the plaintiff was a customer of the 1st defendant (“the Bank”). Pursuant to this relationship, the plaintiff approached the Bank for a financing facility to purchase a Mitsubishi Canter motor vehicle registration number KBR *H from MSM at a price of Kshs. 3,400,000/=. The Bank acceded to the request and by way of a letter of offer dated 28th May 2012, the parties agreed as follows:
 - a. The total investment towards purchasing the vehicle would be Kshs 3,400,000/=;
 - b. The plaintiff’s share of the total investment would be 30% meaning he would invest Kshs 1,020,000/= towards the vehicle’s purchase price;
 - c. The Bank’s share of the total investment would be 70% meaning that the Bank would invest Kshs 2,380,000.00 towards purchase of the vehicle; and
 - d. The Plaintiff was to repay the bank its investment through thirty-six (36) monthly installments at a financing rate of 25% per annum (on reducing balance).



2. It is the Bank's case that it disbursed the Kshs. 2,380,000.00 being 70% of the total investment. Subsequently, the plaintiff approached the Bank for a further facility to purchase a Mitsubishi Canter registration number KBT *X from BC Company Limited at a total investment of Kshs 4,500,000/=. The Bank acceded to this request and by way of a letter of offer dated 8th February 2013, the parties agreed as follows:
 - a. The total investment towards purchasing the motor vehicle would be Kshs 4,500,000/=,
 - b. The Plaintiff's share of the total investment would be 30% meaning that he would invest Kshs 1,350,000/= towards purchasing the vehicle,
 - c. The Bank's share of the total investment would be 70% meaning that the Bank would invest Kshs 3,150,000/= towards purchasing the vehicle,
 - d. The Plaintiff was to repay the bank its investment through thirty-six (36) monthly installments at a financing rate of 23.5% per annum (on reducing balance).
3. The Bank avers that it disbursed the said Kshs. 3,150,000/= to the plaintiff being the 70% share of the total investment. It claims that the parties agreed that the shares of the Bank would be further subdivided into 36 shares/units. This meant that the plaintiff was to purchase one vehicle unit from the Bank for a period of 36 months after which the motor vehicles would be entirely owned by the plaintiff and subsequently transferred to him.
4. The plaintiff executed a personal guarantee for the amount borrowed and a chattel mortgage was registered. It is the Bank's case that the Musharaka agreement model was exhaustively explained to the plaintiff by both the Bank and his Advocates who witnessed his execution of the Letter of Offer and the chattels mortgage instrument. From the foregoing, the Bank avers that it ought to have recouped over the three years its total investments of 70% along with income/profit distributed to it.
5. On 24th August 2016, the plaintiff filed the present suit challenging the aforementioned financial agreements. The plaintiff contends that there were no chattels mortgage instruments and that if there was any, then the same was fraudulently obtained or registered contrary to the requirement of the [*Chattel Transfer Act*](#) (Chapter 28 of the Laws of Kenya). He contends that the Bank misrepresented to him the import of the financing agreements and that he was never given the benefit of independent legal advice prior to signing. He states that he only took the product due to his Islamic faith and representations made.
6. He avers that the agreements between him and the Bank were a fundamental mistake and totally different from his expectation of the Islamic faith and his understanding of the term Musharaka. As such, the plaintiff urges the said agreements were illegalities and void ab initio.
7. The plaintiff states that he was issued with a demand for repayment of arrears of Kshs. 3,662,893.77 and thereafter the Bank impounded the two motor vehicles but without any notice of auction and without due regard to the well laid out laws on notices of sale and auction. That the Bank claimed that the vehicles had been sold but refused to disclose details of how much was realized after the sale and how the amount realized was employed and/or credited.
8. For these reasons, the plaintiff sought to nullify the financing agreements and sought a refund of the sum of Kshs. 2,370,000/=, general and punitive damages and an order for accounts to determine the share of profit and/or loss of each party.
9. In response to the suit, the Bank filed a statement of defence and counterclaim dated 6th October 2016. The Bank contends that the plaintiff breached the terms of the agreement by failing to pay the monthly



instalments as required. This prompted the Bank to repossess and sell the motor vehicles to recover the amounts due. The Bank counterclaims for the balance of Kshs. 4,313,903.70 together with costs and interest as the sale of the motor vehicles did not realize an amount sufficient to clear the outstanding balance.

10. The Bank confirms that prior to repossessing the motor vehicles, the plaintiff was served with a demand letter calling upon him to pay up the outstanding amount which he failed to do.
11. The plaintiff responded to the counterclaim through his defence dated 31st October 2016 where reiterated his averments in the plaint that I have already summarized above.
12. During the course of the proceedings, an issue arose as to whether the plaintiff had paid the requisite filing fees in this matter and the court directed him to remedy and regularize the same at the registry. However, by 23rd May 2024, the plaintiff was yet to provide evidence of payment of the court filing fees and the court thus dismissed his suit on this ground. The Bank's counterclaim proceeded for hearing where the Bank called its Remedial Manager, Mohamed Aden Mohamed as its witness (PW 1).
13. He relied on his witness statement dated 29th October 2023 as his evidence in chief and produced the Bank's List and Bundle of Documents dated 25th September 2023 (P Exhibit 1-11). The plaintiff chose to stay away from the hearing and as such he did not call any witnesses or produce any evidence. After the hearing, the court directed the parties to file written submissions but only those of the Bank are on record.

Analysis and Determination

14. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability. Further, 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 sections 107 (1) and (2) of the *Evidence Act* 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”.

15. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited*, [2019] KECA 1058 (KLR) put it that:

“Courts will make a finding based on which party's version of the story is more believable”.

16. As stated, the plaintiff filed a defence to the counterclaim but he did not call any witness or produce any evidence. I agree with the Bank's submission that this means that its case is unchallenged (See *Avtar Singh Babra & Amarjit Kaur Babra v Raju Govindji Ganatra T/A Sweetbite Manufacturers*, [2001] KEHC 375 (KLR)) and *Motex Knitwear Limited v Gopitex Knitwear Mills Ltd*, [2009] KEHC 4017 (KLR)]. Even then, the onus on the Bank to still prove its case on a balance of probabilities as required by law remains.
17. This position was upheld by the Court of Appeal in *Karugi & Another v Kabiya & 3 Others*, [1983] KECA 38 (KLR) where the court stated:

“The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof.”



18. Likewise, in *Gichinga Kibutha v Caroline Nduku*, [2018] KEELC 3981 (KLR) the court reiterated:

“It is not automatic that in instances where the evidence is not controverted the claimant shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

19. With the above in hindsight, I will now proceed to determine this matter which from the Bank’s submissions, the court is being called to determine whether the plaintiff defaulted on his obligation to repay the loan facilities as per the agreement between the parties and whether the Bank is entitled to the prayers sought in the counterclaim.

20. The facilities advanced by the Bank of Kshs. 2,380,000/= and Kshs. 3,150,000/= are uncontroverted. The two facilities are evidenced by the letters of offer dated 28th May 2012 and 8th February 2013 respectively, which are found at pages 1-28 of the bundle of documents. Both facilities were in the form of a Musharaka ending with ownership and were to be repaid by the plaintiff in 36 months.

21. Clause 8 of the Chattels Mortgage at page 73 grants power to the Bank to enter, repossess and sell the vehicles in the case of default. It states:

“If at any time during the continuance of this Instrument default is made by the Grantor in payment of any amount on its due date for payment according to the terms hereof or if the Grantor shall commit a breach of or shall fail to observe or perform any of the other undertakings, ... then and in every such case the secured obligations shall thereupon immediately become due and payable and the Grantee shall be entitled to exercise all or any of the rights hereby or by the *Chattels Transfer Act* (Cap 28) conferred on the Grantee, and, without prejudice to the foregoing, the Grantee or its agents may immediately thereupon or at any time thereafter without any previous or further notice or concurrence on the part of the Grantor and notwithstanding any subsequent acceptance of any payment of the maximum transaction value or return due on this security enter upon any lands or premises whereon the chattel for the time being may be and take possession thereof and sell or dispose of the same by private sale or public auction subject to such stipulations as the Grantee may think fit.”

22. It is evident from the evidence placed before the court that a demand was sent by the Bank to the plaintiff. The same is dated 19th July 2016 and is at page 80 of the documents. The letter clearly states the amount of arrears as Kshs. 4,313,903.70. This is corroborated by the statements of account at pages 37 to 65 evidencing the amount paid and the amount in arrears. The statement depicts debit balances. Section 176 of the *Evidence Act* creates a presumption in favour of the Bank as follows:

“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.”

23. Since the statements of account were not controverted, it remains that the debit balances indicated therein are prima facie and conclusive proof that the plaintiff is indebted to the Bank. The plaintiff was therefore in breach of the agreement between himself and the Bank by not repaying the facilities as agreed. As such, the Bank was entitled to claim the outstanding sum from the plaintiff which has been demonstrated to be Kshs. 4,313,903.00 as at 19th July 2016.

24. The Bank is also entitled to interest on this sum at the default and contractual rate indicated in the Chattels Mortgage.



Conclusion and Disposition

25. The 1st defendant's counterclaim dated 6th October 2016 is merited. Judgment is hereby entered for the 1st defendant against the plaintiff for the sum of Kshs. 4,313,903.70 plus interest at the rate of 15% from 19th July 2016 until payment in full together with costs of the suit and the counterclaim.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 6TH DAY OF DECEMBER 2024.

F. MUGAMBI

JUDGE

