



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 37 OF 2019

FIRST COMMUNITY BANK LTD.....APPELLANT

VERSUS

1. ALL STAR COMPANY LIMITED

2. ALI ABDULKADIR MOHAMED

3. FATMA ABDULKADIR

4. ABDULKADIR ABDULLAHI.....RESPONDENTS

(Being an Appeal from the Judgment and Decree in Mombasa C.M.C.C No.2252 of 2016

by the Hon. E.K Makori (Chief Magistrate) on the 30th January, 2019)

JUDGMENT

1. The borne contention of the dispute leading to this Appeal is a loan facility taken out by the 1st Defendant herein which was allegedly secured inter alia by a personal guarantee of the 2nd, 3rd, 4th Defendants, who are the Directors of the 1st Defendant.
2. In the lower court suit, the Appellant had sued the Respondent vide its **Plaint** dated **31st October, 2016** for breach of their contractual duties of repaying the credit facilities. It was pleaded in that suit that the Appellant, on the request of the Respondents had agreed to finance the 1st Defendant in its business of importation of rice from Pakistan. To formalize the relationship, the parties executed an agreement on/or about **January, 2010** and the 1st Defendant opened a credit line account with the Appellant bank whereof the business transaction by the 1st Defendant would be financed through letters of credit.
3. Subsequently, the Appellant opened four letters of credit on diverse dates, to wit, on **12th July, 2010** the Appellant opened a letter of credit for USD280,000.00, on **16th July, 2010** for USD280,000.00, on **30th July, 2010** for USD50,000.00 and on **29th September, 2010** for USD153,000.00.
4. It was the Appellant's case that those letters of credit were secured by a legal charge in favour of the Appellant over **L.R No.Mombasa/Block XVI/710** owned by the 3rd Respondent and a further condition that the 1st Defendant would maintain an agreed cash margin in the business account opened with the Appellant.
5. However, the grievances by the Appellant revolve around the letter of credit opened on **12th July, 2010** for USD280,000.00 which the Appellant made payment thereof, in two portions; the first on **9th December, 2010** and the second on **14th December, 2010** by paying USD153,000.00 and USD127,000.00 respectively. It is averred those sums were paid by the Appellant through Chase Bank and Respondents were therefore jointly and severally duty bound to reimburse the sums together with the profits as agreed.
6. Additionally, the Appellant pleaded that the parties had specifically agreed that the letter of credit was to be secured by a cash margin of USD183,000.00 but on the contrary, the 1st Respondent's account had insufficient funds to settle the letter of credit as at the **5th December, 2010** and the Appellant only recovered USD127,000.00, leaving a balance of USD153,000.00.
7. The Appellant further averred that the Defendants had approached it seeking to discharge the charge on property **LR No.Mombasa/Block XVI/710** before clearing the debt on the pretext that they wanted to sell the property. The Appellant acceded to the request on the ground of

having a long standing good credit relationship with the Defendants and in observance with the Islamic Banking principles and on the understanding that the outstanding amount would be promptly paid by the Defendants. The outstanding sum was however not settled and this was the basis of the lower court suit wherein together with interests, the Appellant sought to be awarded the sum of USD161,410.03 together with interests and costs of the suit.

8. To support its case, the Appellant called **Mr. Paul Fadili Jengo** as its sole witness and he reiterated the evidence in the pleadings as I have summarized above. However, on cross-examination he conceded that there was no authority given by the bank to testify nor had he stated the capacity in which he was working for the bank. He also admitted that there was nothing in writing to call for discharge of the charge over **LR. No.Mombasa/Block XVI/710** or anything to show that the discharge was conditional. Although he appreciated that unconditional discharge would be in cases where a loan has been fully paid, he stated the case herein was based on the evidence of good credit standing and the observance of Islamic Law.

9. On the other hand, the Respondents had filed a joint **Statement of Defence** on **7th February, 2017**. Their case is that they had complied with the conditions agreed on with the Appellant and have honoured their obligations by paying off the entire loan facility offered by the Appellant. It is on that basis that the security offered was discharged unconditionally. It was also pleaded that at all material times, the 1st Defendant has opened in its account with the Appellant, sufficient funds adequate to secure all the facilities offered by the Appellant.

10. **Ali Abdulkadir Mohamed**, the 2nd Respondent herein testified as the only defence witness. He reiterated that the Defendants do not owe the alleged sum of USD161,410.03 demanded by the Appellant since the same had been paid way back on **1st August, 2011**.

11. On cross-examination, he accepted having entered into agreements with the Appellant bank to offer credits but maintained that he operated within the limits offered by the bank. He added that the property offered as security was discharged after the amount due was cleared but not on account of good relationships. To buttress the assertion he invited the court to consider the bank statements of the 1st Respondent which show that all the debt was cleared.

12. This was the state of evidence before the learned trial Magistrate and having evaluated that evidence, he found that the financial trail in which the parties carried out business left much questions unanswered and concluded that the Appellant had not exercise financial prudence over the matter and dismissed the suit with costs.

13. Dissatisfied with the lower court's decision on **28th February, 2019**, the Appellant filed a **Memorandum of Appeal** on the same date which set out **five grounds** as follows:-

1) That the learned trial Magistrate erred in law and fact by dismissing the suit with costs contrary to the evidence placed before court in support of the claim.

2) That the learned trial magistrate erred in law and fact by failing to determine the issues raised by the parties in the suit and instead proceeded to raise questions which according to him were not clear thereby abdicating his role as a fact finder.

3) That the learned trial Magistrate erred in law and fact by failing to consider the evidence placed before the court despite holding at paragraph 14 of the Judgment that in such cases, court was to look to the documents and the general course of business between the parties before rendering its decision.

4) That the learned trial Magistrate erred in law and fact by failing to appreciate the intricate nature of the transaction between parties, the parties involved in the business arrangement out of which the suit arose and the role played by Chase Bank in the settlement of the letters of credit on behalf of the Appellant.

5) That the learned trial Magistrate erred in law and fact by failing to note the discrepancies in the Respondents' evidence with regard to the status of the cash margin account and the settlement of the dispute letters of credit despite the 1st Respondent's failure to tender evidence of settlement of the same.

14. I have read through the trial court's Judgment and it is clear that the finding arrived at by the learned trial Magistrate is a finding of fact which an appellate tribunal like this court should not readily interfere with unless it be shown that there is no evidence to support a particular conclusion, or that the trial Magistrate failed to appreciate the weight or bearing of circumstances admitted or proved or that the trial Magistrate plainly went wrong (see **Peter V Sunday Post Limited [1958] E.A. 424.**) Of course, it must also not be forgotten that this being a first appeal to this Court, it is entitled, indeed duty bound, to review the evidence to determine whether the conclusions of the learned trial Magistrate should stand, though it must bear in mind that it neither saw nor heard the witnesses as did the learned trial Magistrate.

15. When the Appeal came before me for mention for directions on **18th September, 2020**, it was directed that the Appeal be argued by way of written submissions which both parties dutifully filed.

Appellant's Submissions

16. The Appellant submitted on the first four grounds under the same heading. Here the Appellant reiterated that the parties had opened four letters of credit to facilitate the Respondents' business and it is those letters which governed the parties' relations. It urged the court to consider the terms therein and not other factors outside the letters of credit lest the court would be re-writing the contract between the parties. It was further submitted that the statements from Chase Bank show that the letters of credit had been paid but the Respondent only settled part of it. As such, a wrong has been perpetrated against the appellant and it will be equitable that it is reimbursed.

17. On the fifth ground, the Appellant submitted that pages 47-54 of the **Record of Appeal** shows that the sum of USD153,667.08 is owing to the Appellant. It is reiterated that the discharge of the security was on ground of good relations and the principles of Islamic Banking Law. According to the Appellant, the Defence is not merited for the reason that it is a mere denial that the Respondents do not owe any amount without proof thereof. Be that as it may, the Appellant submits that the existence of the contract between the parties is not denied and the denial of the debt is a general one which does not specifically traverse the allegation that they are still indebted. It is averred that the Respondents therefore shouldered the burden of proving that during the period when the letters of credit were issued, they maintained a cash margin of over USD1,000,000/= but this burden of proof was not discharged.

Respondent's Submissions

18. The Respondents submitted that the credit facilities were offered among other conditions that the letter of credit be secured by a cash margin with the Appellant bank and at the life span of the loan facility. The 1st Respondent's account had an excess cash margin of USD1,100,000.00, which amount was always enough security for the letters of credit. That the account statement issued to the 1st Respondent showed a credit balance of USD4,532.06 and thereafter the charge that had been registered in favour of the Appellant had been discharged after all parties had honoured their part of bargain thereby ending the relationship between the parties.

19. It is therefore unfathomable that four years down the line, for the Appellant to demand the sum of USD153,566.89 alleging that it was the outstanding balance. They term the Appellant's action as simply an abuse of the process of court.

20. In the alternative, the Respondents faulted the Appellant for failing to keep proper records of accounts and as was decided in the case of **Scholastica Nyaguthii Muturi -vs- Housing Finance Co. of Kenya Ltd & Another [2019]eKLR**, the Appellant should be disqualified from making any claims against the Respondents.

21. It is further submitted that the entire case is a scheme by the Appellant to exploit the Respondents since it would be unreasonable for a bank to unconditionally discharge a charge when there is an outstanding loan thereof even without a resolution to that effect. The court was also invited to consider **Section 102** of the **Land Act** which provides that a charge once registered can only be discharged when the money secured ceases to be payable.

22. It is argued that since parties had agreed that the charge in favour of the Appellant does last until all the monies advanced are paid in full, it would be tantamount to re-writing the contract between the parties for the court to hold that there is an outstanding debt even after the charge had been discharged. According to the Respondents, it is a bizarre situation to release the original titles and later, after a delay of over four (4) years, come back and seek to recover the same facility which was secured by those title deeds. Based on those grounds, the Respondent has beseeched the court to dismiss the Appeal for being bereft of merit.

Analysis and Determination

23. I have perused the court's proceedings at the trial court as well as the Judgment. I have equally perused the Memorandum of Appeal together with the parties' submissions herein. The issue for deliberation is whether or not the sum of USD161,410.03 is still owing to the Appellant by the Respondents.

24. From the evidence, it is clear that the suit revolved around the letter of credit opened on **12th July, 2010** for USD280,000.00 and whether after honouring that letter of credit, the Appellant was reimbursed the entire sum together with the agreed profit.

25. However, before I proceed to consider the issue, I find the definition of a letter of credit necessary. **Black Law Dictionary, Ninth edition** defines a "***letter of credit***" as,

"An instrument under which the issuer (usually a bank) at a customer's request, agrees to honour a draft or other demand for payment made by a third party (the beneficiary) as long as the draft or payment complies with specified condition, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied."

26. With this in mind, I have scrutinized the **Record of Appeal** and all the documents tendered in evidence by the Appellant but found no specific document that could be pin-pointed as a letter of credit that would befit the definition above. Although at page 32 to page 37 of the **Record of Appeal** are the application forms by the 1st Respondent to the opening of a documentary credit, I am unable to find the specific conditions attached to the letters of credit which were subsequently issued.

27. Nonetheless, the parties seem to agree that the letters of credit were issued on the following conditions, that;

a) The Respondents adequately secure the amount in the letters of credit by cash margin in an accounts opened with the Appellant bank;

b) The 2nd to the 4th Respondents guarantee the repayment of the letters of credit in the event of insufficient funds on those accounts; and

c) Lastly that the Respondents provide security in the form of a legal charge over a suitable property. The latter condition was perfected by creating a legal charge on property LR. No. Mombasa/Block XVI/710.

28. The Appellant submitted that with regard to the letters of credit opened on **12th July, 2010**, the Respondents did not comply with the first

condition agreed upon by the Respondents that they would maintain a cash margin of USD183,000.00 and therefore the amount was not fully recovered. Those allegations were denied by the Respondents by submitting that at all material times they maintained a cash balance of over USD1,000,000/=.

29. The **Record of Appeal** at page 52 shows that as at **14th October, 2010**, the 1st Respondent's account had a debit balance of USD4,947.84. In my view, as at that time, there was simply no credit in the 1st Respondent's account at First Community Bank, the Appellant. Curiously, the 1st Respondent's account had a debit balance as shown in the statement of accounts both at pages 52 and 53 of the **Record of Appeal**. Therefore, in my view the statement of accounts which still reflects a debit balance, cannot be the basis of determining whether or not the Respondents settled the USD153,000.00 without any further evidence to buttress the same.

30. Be that as it may, the letters of credit were secured by a legal charge over property **LR. No.Mombasa/Block XVI/710**. Although it is not clear whether or not there was any charge document since none was produced in evidence, it is clear as shown at page 39 of the **Record of Appeal** that a charge over the said parcel of land was registered in favour of the Appellant on **2nd July, 2010** for the sum of Kshs.60,000,000/=. I am persuaded that the interests of the Appellant bank were protected at that point but without the charge document, it is difficult for me to implore what conditions the parties had agreed should be met before the charge would be discharged. What remains undisputed is that the charge was discharged on **19th August, 2011**. Generally, a charge would be discharged when the Chargor pays the full amount he/she owes the chargee and this is the position taken by the Respondent. I am therefore unable to agree with the Appellant's submission that the defence is simply a mere denial.

31. In view of the foregoing, the Appellant shouldered the burden of proving that the charge over property **LR. No.Mombasa/Block XVI/710** was discharged not because the Respondents had fully paid the sums due but on other arrangements as it is alleged. To wit, the Appellant had onus of proving that discharge was effected at the request of the Respondent and the specific Islamic law which allowed such request. In fact there was no documentation produced to show the alleged request by the Respondents nor was the person to whom the request was made called as witness to affirm those allegations. It was upon the Appellant to prove that the discharge at the request of the Respondents but not because the debt had been fully repaid. Clearly, the Appellant had not met the threshold under **Sections 107(1)** of the **Evidence Act, Cap 80 Laws of Kenya** which provides as follows:

“..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.”

32. From the foregoing analysis, I am not persuaded that this appeal has merit. The same is disallowed with costs to the Respondents.

It is hereby so ordered.-

SIGNED, DATED and DELIVERED VIRTUALLY at MOMBASA this 11th day of May, 2021.

D. O. CHEPKWONY

JUDGE