



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 773 OF 2009**

**EQUITY BANK LIMITED.....PLAINTIFF**

**VERSUS**

**BOBBIN (EPZ) LIMITED.....DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 16<sup>th</sup> October, 2009, the Plaintiff, **EQUITY BANK LIMITED**, sued the Defendant seeking judgment for the sum of Kshs. 40,424,270.53/=, interest at contractual rates until payment in full and costs of this suit.
2. In its Statement of Defence dated 24<sup>th</sup> November, 2009, the Defendant denied the Plaintiff's claim.

**The Plaintiff's Case**

3. When the matter came up for hearing, the Plaintiff's sole witness, **PW1 Roseline Kivuva**, a debt recovery manager of the Plaintiff, adopted her Witness Statement dated 2<sup>nd</sup> December, 2020 as her sworn testimony and produced the Plaintiff's Schedule of documents dated 31<sup>st</sup> July, 2014 and List and Bundle of documents dated 23<sup>rd</sup> July, 2014 which were marked as exhibits P1 and P2.
4. In the said Witness Statement, it was the Plaintiff's case that before the commencement of the proceedings herein, there existed a bank-customer relationship between the Plaintiff and the Defendant herein. On the basis of that relationship, the Defendant approached the Plaintiff on various occasions between the months of July and September 2007 for overdraft facilities. This was either on the strength of bank guarantee made by National Bank of Kenya Limited or at the Plaintiff's own discretion. The latter facilities were being granted on the strength of what the Defendant represented as payments due to stated third parties.
5. On 29<sup>th</sup> September, 2007, the Defendant herein through its Managing Director approached the bank for a cheque discounting facility in the sum of Kshs. 42,888,650/= to cover what the Defendant represented to be contractual liability to Kirinyaga Construction Company Limited. The request was approved by the Plaintiff on 2<sup>nd</sup> October, 2007 and a cheque discounting facility for the sum of Kshs. 43,000,000/= was granted to the Defendant who accepted the offer by a directors' resolution dated 10<sup>th</sup> October, 2007. Subsequently, the Defendant was granted several overdraft facilities between the months of October and December. These payments were made by the Plaintiff to third parties in contract with the Defendant in its bitumen business.
6. However, it became apparent that Kirinyaga Construction Company Limited to whom the bulk of the payments were made by the Plaintiff at the request of the Defendant, failed to honor payments of sums of money due to the Defendant such that in turn the Defendant's account with the Plaintiff ran into arrears. This information became apparent to the Plaintiff through a letter dated 11<sup>th</sup> December, 2007 addressed to the Plaintiff by the Defendant which letter was received by the Plaintiff on 4<sup>th</sup> April, 2008. Upon receipt of the aforementioned letter, the Defendant was granted a grace period to re-organize its finances as this is a long standing bank policy to its customers before recovery action is instituted. Thereafter, on 30<sup>th</sup> May, 2008, the Defendant wrote to the Plaintiff expressly acknowledging that its account was heavily overdrawn and requesting for the bank's indulgence as it made efforts to redeem its account.
7. For good cause, the Plaintiff withheld recovery action to give the Defendant a chance to redeem its account. In the meantime however, the account continued to accumulate default interest and penalties as is ordinary banking procedure. On 12<sup>th</sup>, February 2009, the Defendant wrote to the Plaintiff admitting default and requesting that further penalties and interest be suspended as it endeavored to redeem its account. However, to date the Defendant has failed to honor its promises and as at 30<sup>th</sup> August, 2009 when the decision was made to initiate a recovery action, the total amount staggered at Kshs. 40,424,270.53/=.

8. Further, it was the Plaintiff's case that the Defendant has a current account for which certain charges are applicable. The terms aforementioned were agreed upon by the parties herein at the inception of the bank - customer relationship and the charges are enumerated as follows:

- a) Cash withdrawal charge Kshs. 50/=
- b) Cheque stop payment charges Kshs 1,000/=
- c) Instant trade overdraft (tod) charges 10% of the overdraft amount
- d) Unpaid cheque commissions Kshs 2,000/=
- e) Inward clearing charge Kshs 25/=
- f) Techno graphic transfer (tt) commission Kshs 1,500=
- g) Charges for below minimum balance Kshs 1,000/=
- h) Direct debit commission Kshs 100/=
- i) Interim statement charges Kshs 50/= per page
- j) Outward cheque rejected Kshs 1,500/=
- k) Dormant account charge Kshs 200/=

9. This therefore means that all levies against the Defendant's account can be computed from the above charges depending on the magnitude of the transaction involved. These charges were in the contract governing the bank and customer relationship hence the same cannot be wished away by the Defendant.

10. PW1 further stated that at the time of contracting the Defendant, the applicable interest rate was 15% and there was a provision for fluctuation from time to time as per the lender's decision. She averred that to date, no money has been paid and the outstanding amount is Kshs. 52,638,366.78/= inclusive of interest. Finally, she stated that since the bank stopped accruing interest on the said account in September 2010 when it decided to pursue the matter legally, it shall not be seeking any interest from the said time to date.

### **The Defendant's Case**

11. The Defendant's advocates ceased acting on its behalf just before this matter was set down for hearing and despite service of the Hearing Notice on the Defendant through registered post, the company never sought to defend its case by way of adducing evidence.

12. However, in its Statement of Defence, the Defendant stated that over and above its pre-existing financial arrangement with the Plaintiff, it established a specific Cheque Discounting Facility with the Plaintiff in October 2007, which inevitably ran into repayment arrears following breaches of contract committed by Kirinyaga Construction Company (K) Limited on which the said Facility and/or arrangement was exclusively predicated.

13. It averred that however, the amount outstanding on the said Facility has been exaggerated, over-stated and laden with numerous inapplicable, unjustified and illegal charges and other strange levies imposed thereon by the Plaintiff, hence rendering the entire claim unjustified, unacceptable and illegal. That the Defendant repeatedly asked the Plaintiff to suspend and halt the levying of the said interests, levies and illegal charges on its said Facility but the Plaintiff failed to comply, resulting in its now highly exaggerated, unjustified and illegal claim against the Defendant. It thus prayed that the Plaintiff's suit against it be dismissed with costs.

### **Submissions**

14. The Plaintiff filed written submissions dated 19<sup>th</sup> May, 2021 in which it submitted on two issues as hereunder:

***a. Whether the Plaintiff has proved its case against the Defendant.***

15. The Plaintiff submitted that it is the Defendant who approached it to obtain the loans and overdraft facilities and it agreed to accommodate the Defendant.

16. The Plaintiff submitted that in the numerous correspondences exchanged with the Defendant, the latter consistently acknowledged its indebtedness to the Plaintiff while making promises to rectify its default. The Plaintiff submitted that the facts and evidence it has presented in this case remain uncontroverted hence it has accordingly proved its case against the Defendant on a balance of probability.

17. The Plaintiff relied on several cases where courts have held that uncontroverted evidence bears a lot of weight. These were: **Peter Ngigi Kuria & another (Suing as the legal representatives of the Estate of Joan Wambui Ngigi) v Thomas Ondili Oduol & Another [2019] eKLR; Shaneebal Limited v County Government of Machakos [2018] eKLR; Janet Kaphiphe Ouma & Another v Marie Stopes**

**International (Kenya) Kisumu HCCC No. 68 of 2007; Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997; and Isaak Muteti Kisua v Feliz Mwangi Ndegwa [2021] eKLR.**

18. The Plaintiff also relied on the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** where the court stated 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.

***b. What are the Reliefs that the Plaintiff is entitled to as against the Defendant?***

19. On this, the Plaintiff submitted that it has already persuasively proved its case against the Defendant. Further, that it has produced an account statement which indicates that the closing balance on the Defendant's overdraft account was Kshs. 40,424,270.53. The Plaintiff reiterated that the debt owed continued to attract contractual interests and as at September, 2010, the same stood at Kshs. 52,238,366.78 inclusive of interest and costs of the suit.

20. In totality, the Plaintiff prayed that its case be allowed as prayed in the Plaintiff and submitted hereinabove.

***Analysis and Determination***

21. I have considered the pleadings, the evidence adduced as well as the submissions filed in this case. In my considered view, the following are the issues for determination:-

***a. Whether the Plaintiff has proved its case to the required standard.***

***b. Whether the Plaintiff is entitled to the orders sought?***

22. On proof of the case, the Plaintiff's uncontroverted evidence was that on the request of the Defendant's managing director, it advanced the Defendant a cheque discounting facility in the sum of Kshs. 43,000,000/= to cover what the Defendant represented as contractual liability to Kirinyaga Construction Company Limited. Subsequently, the Defendant was granted several overdraft facilities which payments were made to third parties who were in contract with the Defendant in its bitumen business until 4<sup>th</sup> April, 2008 when the Defendant informed the Plaintiff that Kirinyaga Construction Company Limited, to whom the bulk of the payments were made by the Plaintiff at the request of the Defendant, had failed to honor payments of sums of money due to the Defendant thereby causing the Defendant's account with the Plaintiff to fall into arrears. The Plaintiff allowed the Defendant a grace period to re-organize its finances but to date the Defendant has failed to honor its promises. According to the Plaintiff, as at 30<sup>th</sup> August, 2009 when the decision was made to initiate a recovery action, the total amount staggered at Kshs. 40,424,270.53/=.

23. I note that the Plaintiff's case is duly supported by both the evidence of PW1 and documentary evidence in form of correspondences between the parties, the letter of offer dated 2<sup>nd</sup> December 2007 and bank account statements. I also note that there was a clear admission by the Defendant that it was advanced the said facility by the Plaintiff but it avers the amount outstanding on the same has been exaggerated, over-stated and is laden with numerous inapplicable, unjustified and illegal charges.

24. However, the Defendant did not attend court during the hearing of this case and thus did not call any witness nor adduce any evidence in support of its pleadings. This therefore means that the averments in its pleadings have no probative value. **Section 107 of the Evidence Act (Cap 80), Laws of Kenya**, 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."***

25. **From the above provision**, it is clear that a party who wishes the court to give a judgment or to declare any legal right or liability dependent on the existence of particular fact or sets of facts, has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts.

26. In the case of **Francis Otile v Uganda Motors Kampala HCCS No. 210 of 1989**, it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute for the same. Further, in **Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997**, the court stated that where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence.

27. In **CMC Aviation Ltd. v Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 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."***

28. The consequences of failing to adduce evidence were also addressed in the case of **Motex Knitwear Limited v Gopitex Knitwear**

**Mills Limited Nairobi (Milimani) HCCC No.834 of 2002**, where Lesiit J. citing the case of **Autar Singh Bahra and Another v Raju Govindji, HCCC No.548 of 1998** appreciated that:

*"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."*

29. Again in the case of **Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001**, the learned judge citing the same decision stated that it is trite 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.

30. In the case of **Karuru Munyororo v Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988**, Makhandia, J (as he then was) held that:

*"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon".*

31. In view of the foregoing authorities, it is evident that the Plaintiff's case is uncontroverted. It failed to call evidence despite being served and notified to come to court. The Plaintiff's evidence thus remains to be believed by the court as it was unchallenged. I therefore find that the Plaintiff has accordingly proved to the standard, on a balance of probabilities, that as at 30<sup>th</sup> August, 2009, the Defendant loan arrears stood at Kshs. 40,424,270.53/=.

32. As regards the claim for interest, I note that in the Letter of Offer dated 2<sup>nd</sup> October, 2007, the parties expressly agreed at Clause 5 thereof that all advances made under the proposed facility would attract interest from the date of the draw down at a reducing rate of 15% or such other rate determined by the Lender from time to time. However, PW1 categorically stated in her evidence in chief that the Plaintiff shall not be seeking interest for the period from September 2010 to date. PW1 stated that the Plaintiff shall only be claiming the sum of KShs. 52,638,366.78 which already is inclusive of the interest for the relevant period.

33. As regards the issue of costs of this suit, Section 27 of the Civil Procedure Act stipulates that costs follow the event and the same can be granted at the discretion of the court, which discretion should be exercised judiciously. In the instant case, I note that these proceedings arose due to the Defendant's default in repaying the loan advanced to it. In the premises and noting that the Plaintiff is successful in its claim, the Defendant shall bear the costs of the suit.

#### ***Deposition***

34. I sum, I enter judgment in favour of the Plaintiff against the Defendant as follows:-

- a) **The Plaintiff is awarded Kshs. 40,424,270.53/=**
- b) **Interest on (a) above at the contractual rate of 15% from 30<sup>th</sup> August, 2007 until 31<sup>st</sup> December, 2009.**
- c) **Costs of the suit to the Plaintiff.**

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> JULY, 2021.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

#### **In the presence of:**

1. *Mr. Khisa for the Plaintiff.*
2. *No attendance for the Defendant.*