



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 137 OF 2010**

**A TO Z TRANSPORTERS LIMITED.....1<sup>ST</sup> PLAINTIFF**

**KEVAL R. PATEL.....2<sup>ND</sup> PLAINTIFF**

**HASMUKHLALA VIRCHAND.....3<sup>RD</sup> PLAINTIFF**

**SHITAL R. PATEL.....4<sup>TH</sup> PLAINTIFF**

**ATUL C. SHAH.....5<sup>TH</sup> PLAINTIFF**

**SUNIL C. SHAH.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**AFRICAN BANKING CORPORATION LIMITED.....DEFENDANT**

**JUDGMENT**

1. The six plaintiffs herein came to this court vide a plaint dated 10<sup>th</sup> March 2010 filed through counsel Mr. Odera Obar & Company Advocates.
2. The first plaintiff is a limited liability company and the borrower from the defendant and the 2<sup>nd</sup> to 6<sup>th</sup> plaintiffs are the guarantors to 1<sup>st</sup> plaintiff in the said borrowing.
3. According to the plaint, the 1<sup>st</sup> plaintiff was granted several term loans by the defendant between 29<sup>th</sup> December 2003, and 5<sup>th</sup> December 2006, a hire purchase facility, as well as a number of overdraft facilities and the 2<sup>nd</sup> to 6<sup>th</sup> plaintiffs were the guarantors. In particular, a term loan was granted on 29<sup>th</sup> December 2003 – Kshs.15,000,000,000/=; 8<sup>th</sup> January 2005 – term loans of Kshs.20,000,000/=, Kshs.13,446,365/= and a hire purchase facility of Kshs.2,254,701/=; and overdraft facility Kshs.5,000,000/=; 6<sup>th</sup> January 2006 overdraft facility Kshs.5,000,000/= and term loans – Kshs.11,062,987/= and Kshs.17,053,356/=; and lastly 5<sup>th</sup> December 2006 – overdraft facility Kshs. 5,500,000/= and term loans Kshs.8,867,164/= and Kshs.13,637,200/= and Kshs.45,000,000/=.
4. It is averred in the plaint that on 26<sup>th</sup> January 2009 the 1<sup>st</sup> plaintiff sought to restructure the financial facilities for Kshs.36,473,472/= being an amalgamation of the term loans and the overdraft facilities. However, the defendant disputed the request of the 1<sup>st</sup> plaintiff to credit a sum of Kshs.1,691,641/= overcharge to the account of the 1<sup>st</sup> plaintiff, and also the plaintiff disputed a requirement for payment of fresh commitment fees, and that after negotiations failed, on 22<sup>nd</sup> January 2009, the defendant inexplicably withdrew the offer to restructure the financial facilities and demanded immediate payment of Kshs.44,337,008/= as the alleged indebtedness of the 1<sup>st</sup> plaintiff.
5. It was averred lastly that even after the 1<sup>st</sup> plaintiff engaged an expert on interest rates who assessed the indebtedness at Kshs.39,179,627/71 which the 1<sup>st</sup> plaintiff was willing to settle to redeem the securities, the defendant sent a fresh demand for Kshs.53,365,117/57 allegedly being the outstanding balance contrary to the provisions of section 44 of the Banking Act which forbade the defendant from increasing its interest rates of charges except with proper approval of the Minister for Finance, thus necessitating the filing of this suit.
6. The plaintiff also filed a Chamber Summons on 11<sup>th</sup> March, 2010 seeking injunctive orders. The court on 10<sup>th</sup> May 2013 declined to grant injunctive orders, but in the alternative allowed the application on condition that Kshs.42,892,171.06 admitted by the plaintiff in the plaint as

owing to the defendant is paid to the defendant within thirty (30) days from the date of that ruling. I understand this amount was paid per consent in a Notice of Motion by the plaintiff dated 25/6/2013 which consent was dated 3<sup>rd</sup> April 2014 signed by the counsel for the parties and filed in court, which I have seen.

7. The defendant also filed an amended defence and counter claim dated 23<sup>rd</sup> February 2015 – in which they claimed an amount of Kshs.43,790,405/45 as pending payment, and contractual interest until payment in full. This was responded to by the plaintiff in a reply to defence and counter claim.

8. At the hearing of the case, the plaintiff called two witnesses and the defendant called one witness. PW1 was KEVAL RAMESH BHAI PATEL who is the 2<sup>nd</sup> plaintiff and a director of the 1<sup>st</sup> plaintiff. He adopted his witness statement and documents filed by the plaintiffs. It was his position that the loans and overdrafts were all paid and that the defendant bank was making cooked demands related to a previous borrower. He did not name the previous borrower.

9. PW2 was WILFRED ABIROCHA ONONO a member of Certified Public Accountants (CPA) Kenya and a consultant practitioner in interest rates recalculation and analysis. He stated that he carried out calculations on the indebtedness of the 1<sup>st</sup> plaintiff and that though as at 31/7/2014 the defendant said that the overdraft amount was Kshs.19,994,406/= his findings were that the account was actually in credit of Kshs.2,027,491/47 a difference of Kshs.22,021,898/31. He however admitted that as at 19/12/2018 the 1<sup>st</sup> plaintiff was still indebted to the defendant, and confirmed that interest would continue accumulating.

10. The defendant's witness DW1 was JOSEPH KIPKORIR SAWE - Manager Debt Recovery of the defendant. He stated that the 1<sup>st</sup> plaintiff was still indebted to the defendant and that according to him, the intended amalgamation of indebtedness was only for the loan and excess overdraft, not for the Kshs.5.5 million overdraft facility which was to continue running.

11. Though parties counsel agreed to file written submissions, only the plaintiff's counsel filed written submissions. Since the defendant's counsel failed to file written submissions by 24/10/2019 as earlier directed, the Deputy Registrar forwarded the file to the Judge to write judgment.

12. I have considered the evidence and submissions filed. In the submissions, the plaintiff's counsel listed issues for determination. In my view, the issues for determination are as follows –

A. Whether the defendant breached the terms of contract by refusing to allow the 1<sup>st</sup> plaintiff to benefit from the equity of redemption.

B. Whether the defendant levied illegal charges and penalties on the 1<sup>st</sup> plaintiff's account without the approval of the Minister for Finance in contravention of section 44 of the Banking Act and Central Bank of Kenya (Amendment) Act 2000.

C. Whether The 2<sup>nd</sup> to 6<sup>th</sup> plaintiffs have been discharged from the guarantees.

D. Whether the plaintiffs are liable to the defendant to the extent demanded in the counter – claim or at all.

E. Who bears the costs?

**A. Whether the defendant breached the terms of contract by refusing to allow the 1<sup>st</sup> plaintiff to benefit from the equity of redemption.**

13. The equity of redemption is a recognized legal right of a borrower. In Kenya, it is codified under the Registered Land Act (Cap.300) section 72 (2) now repealed. It is the right to redeem or repay the outstanding amount of the loan before due date and discharge the security. In our present case, the 1<sup>st</sup> plaintiff sought that another bank (Prime Bank Ltd) redeems the indebtedness from the defendant. However that proposal did not go through because of a disagreement on amounts owed. In my view from the contents of the consent dated 3<sup>rd</sup> April 2014 signed by counsel for the parties herein, the ruling of Ogola J. on the application filed by the plaintiff on 11/3/2010, it cannot be said that before the suit herein was filed, the defendant denied the plaintiffs their right to the equity of redemption, as there were issues on the actual amount payable. Under section 72 (2) of the Registered Land Act, the presumption is that the amount outstanding is clear which was not the case herein.

**B. Whether the defendant levied illegal charges and penalties on the plaintiffs account without the approval of the minister for Finance in contravention of section 44 of the Banking Act and Central Bank of Kenya (Amendment) Act 2000.**

14. It is of note that the defendant has been making demands from the plaintiffs of staggering amount without any explanation. At one time they demanded Kshs.36,473,472/=. Shortly thereafter they demanded Kshs.44,337,008/=. Shortly thereafter, they demanded Kshs.53,363,117/= also without explanation. The plaintiffs claim that the defendant was varying the applicable loan interest charges and penalties without the Finance Minister's approval contrary to the written law. The defendant has not either stated that it obtained the said Minister's approval nor provided the plaintiff with a tabulation of the charges to support their claim. I have perused the statement filed by the defendant and they are all silent on interest, penalties or any other charges. The burden was on them to provide an explanation as they were the custodians of the records, as well as the people levying the charges. This in my view is the legal requirement under section 112 of the Evidence Act (Cap. 80). The defendant cannot thus claim that it did not vary the charges.

15. Section 44 of the Banking Act (Cap. 488) provides as follows –

44. No institution shall increase its rates of banking or other charges except with the prior approval of the minister”.

16. From the evidence before me, I find that the defendant raised or increased illegal charges not approved by the Minister for Finance whose cumulative amount has not been determined.

**C. Whether The 2<sup>nd</sup> to 6<sup>th</sup> plaintiffs have been discharged from the guarantees.**

17. The contention that the 2<sup>nd</sup> to 6<sup>th</sup> plaintiff were discharged from the guarantees they entered into with the defendant on the financial facilities provided to the 1<sup>st</sup> plaintiff is on the basis that the defendant violated the terms of contract by varying the terms without the Finance Minister’s approval. Though i have found that the defendant actually violated the terms of the contract, I am not able to find that the 2<sup>nd</sup> to 6<sup>th</sup> plaintiffs were discharged from the guarantees at that point. This is because, the 1<sup>st</sup> plaintiff still owed money to the defendant which had not been paid but admitted resulting in the consent letter above. In my view, if there was a breach of any particular term of the contracts, such a breach did not vitiate the entire respective contracts. I thus find and hold that the 2<sup>nd</sup> to 6<sup>th</sup> plaintiffs were not discharged from their guarantees by the mere breach of the defendant in raising illegal charges against the 1<sup>st</sup> plaintiff without approval of the Minister of Finance. Their discharge will arise only when all contractual money lawfully due from the 1<sup>st</sup> plaintiff to the defendant is paid.

**D. Whether the plaintiffs are liable to the defendant to the extent demanded in the counter – claim or at all.**

18. The amount claimed by the defendant in the counter – claim is Kshs.43,790,405/45 as at 31<sup>st</sup> October 2014, which is over and above the consent amount earlier agreed. The plaintiffs deny the whole of the additional amount claiming that there was no legal basis for supporting the amount.

19. The defendant’s witness DW1 JOSEPH KIPKORIR SAWE filed a further witness statement dated 03/09/2019 annexing bank statements for A/C [...] for the period between 20/12/2006 to 28/07/2017; and A/C [...] for the period 01/06/2004 to 28/07/2017. The entries therein show that the 1<sup>st</sup> plaintiff had not been repaying any amounts for some years now, certainly after the payment of the consent amount. The figures however do not reflect how the amount paid by the 1<sup>st</sup> plaintiff as per the court consent order of 2014 was factored in the amounts owing, and significantly also does not show the monthly amounts of interest and penalties accruing, if any, though the total amounts said to be outstanding have been on a substantial upward rise.

20. The respondent had the burden of proving the amount of their counter – claim on the balance of probabilities as required under section 109 of the Evidence Act (Cap. 80). From the evidence on record, in my view, they did not discharge that burden. Though the plaintiffs witness PW2 WILFRED ABINCHA ONONO said generally in cross-examination that interest would accrue and there could be an amount outstanding, that was very general and did not discharge the defendant’s burden of proving the amount claimed by then as due and owing.

21. The upshot of this in my view, is that I find that the amount of Kshs.42,892,171.06 admitted by the plaintiff in the consent recorded in court dated 3<sup>rd</sup> April 2014, was the amount due from the 1<sup>st</sup> plaintiff to the defendant. That amount which was paid, in my view, discharged both the liability for the all loan facilities and overdraft facilities herein. Payment of the amount in the consent, discharges the liability of all the plaintiffs, and also discharges the guarantees provided by the 2<sup>nd</sup> to 6<sup>th</sup> plaintiffs. Therefore payment of the amount in the consent, settles the whole matter, and the plaintiffs ceased to be liable to the defendant thereat.

**E. Who bears the costs?**

22. In my view, in the circumstances of this case which was filed by the plaintiff who later admitted to an outstanding amount, and a counter claim filed by the defendant which was not successful, each party will bear their respective costs of the case.

**Dated and delivered at Nairobi this 6<sup>th</sup> February 2020.**

**GEORGE DULU**

**JUDGE**

**In the presence of -**

Court Assistant .....

For the plaintiff.....

For the defendant.....