



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL SUIT NO. 1182 OF 2002

BETWEEN

CANNON ASSURANCE (KENYA) LIMITED.....PLAINTIFF

AND

MOHANSONS (KENYA) LIMITED..... 1ST DEFENDANT

JASPAUL SINGH KANDHARI2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff is an insurance company. In the Further Amended Plaint dated 9th December 2003, it claims Kshs. 10,000,000/= advanced to the 1st defendant at the request of the 2nd defendant, who was at the material time, its managing director. The 2nd defendant died in the course of these proceedings. The parties agreed that the suit against him has abated.

Plaintiff's Claim

2. The plaintiff's case is that at the request of the 2nd defendant, it agreed to advance to the 1st defendant Kshs. 10,000,000/= which was to be repaid as soon as possible. The 2nd defendant requested for and the plaintiff agreed and did issue Banker's Cheque No. 031786 for Kshs. 10,000,000/= dated 26th July 1999 in favour of Diamond Trust Bank Kenya Limited ("the Bank") for the credit of the 1st defendant's account in order to reduce the liabilities of the 1st defendant and its associated companies to the Bank. The cheque was collected from the plaintiff's offices by a Mr. Roger Wright on behalf of the 1st Defendant.

3. The plaintiff therefore claims Kshs. 10,000,000/= with interest at commercial bank rates from 26th July 1999 until the date of the filing of this suit and thereafter at court's rates until payment in full.

The Defence

4. The 1st defendant relied on the Re-amended Statement of Defence dated 10th June 2004. Although the 1st defendant denied the plaintiff's claim that it was advanced Kshs. 10,000,000/=, it admitted that it paid Kshs. 10,000,000/= to the Bank but not in the manner claimed by the plaintiff. It averred the sum was a refund of a debt owed to the 1st defendant by Mr Inder Jit Talwar, the plaintiff's managing director.

5. The 2nd defendant, in his Amended Statement of Defence dated 10th June 2004, denied the plaintiff's claim. He stated that in July 1999, he requested Mr Inder Jit Talwar to repay him Kshs. 10,000,000.00 through the Bank being money owed to him on account of Kimmo Limited in which he and the 2nd defendant were shareholders and in which the 2nd defendant made a payment on his behalf in May 1998.

6. In the alternative, both defendants pleaded that **section 71** of the **Insurance Act (Chapter 487 of the Laws of Kenya)** prohibits the plaintiff from granting loans or advances without security hence the advance was illegal and unenforceable.

The Hearing

7. This matter was initially heard by Khaminwa J., who took the testimony of Inder Jit Talwal (PW 1) on 9th February 2009. Odunga J., finalized the hearing of the plaintiff's case on 15th November 2012. The defendants did not call any witnesses and on 27th January 2020, they closed their case. Both parties filed written submissions which I shall advert to later.

8. The plaintiff's only witness, Mr Inder Jit Talwar (PW 1), at the material time Chairman and Managing director of the plaintiff, recalled that the 2nd defendant ("Mr Kadhari") was known to him for over 20 years and that they had a business relationship which involved several joint ventures and common directorships in various companies. At the material time, both of them were in fact directors of the plaintiff.

9. PW 1 testified that on 26th July 1999, Mr Kandhari telephoned him and requested the plaintiff to advance the 1st defendant a loan of Kshs. 10,000,000/= to enable the 1st defendant meet some emergencies. Mr Kandhari requested that the amount be paid to the Bank to the credit of the 1st defendant. He promised that the amount would be repaid as soon as possible.

10. Following the request, the plaintiff issued a bankers' cheque No. 0331786 for Kshs. 10,000,000/= dated 26th July 1999 in favour of the Bank. It was collected from the plaintiff's office by a Mr. Roger Wright on behalf of the 1st defendant. By a letter dated 15th August 2003, the plaintiff's banker, Commercial Bank of Africa, confirmed that it issued Bankers Cheque No. 031786 in favour of the Bank for the sum of Kshs. 10,000,000/= on the plaintiff's instructions. The cheque was presented to Commercial Bank of Africa for payment and was honoured on 2nd August 1999.

11. PW 1 testified that the money was not repaid as promised by Mr Kadhari and by a letter dated 22nd November 1999, the plaintiff demanded payment. As no response was forthcoming, the plaintiff issued another demand letter dated 6th March 2001. The 1st defendant responded by a letter dated 9th March 2001 indicating that it was not aware of the loan.

12. In order to prove its case, the plaintiff's advocate wrote to the advocates for Diamond Trust Bank Limited, *Harit Sheth Advocates*, a letter dated 20th August 2002 to confirm that the Bank received Kshs. 10,000,000/=. By a letter dated 22nd September 2003, *Harit Sheth Advocates* confirmed that the Bank had received the Bankers Cheque for Kshs. 10,000,000/= drawn on Commercial Bank of Africa. The said amount was thereafter credited to the account of Mohansons Group of Companies.

13. PW 1 produced a bundle of documents as exhibits to support its case.

Issues for Determination

14. From the pleadings, evidence and submissions, I propose to deal with the following issues:

- c. Whether the 1st defendant owes the plaintiff Kshs. 10,000,000/=.
- b. Whether the plaintiff was authorised to lend money to the 1st defendant.
- c. Whether the plaintiff is entitled to interest and costs.

15. Before I deal with the aforesaid issues, I wish to point out that although the defendants filed defences, they did not call any witnesses thus the plaintiff's oral and documentary evidence remained uncontroverted. This, of itself, does not discharge the plaintiff from proving its case. The collective effect of **sections 107, 108 and 109** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* is that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. In a civil case, that burden must be discharged on the balance of probabilities for the plaintiff to succeed in getting judgment in its favour.

16. In **Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau NRB CA Civil Appeal No. 87 of 2014 [2016] eKLR**, the Court of Appeal discussed the effect of failure by a defendant to call any witnesses. It summarized the position as follows:

We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified.

17. The defendants raised affirmative defences regarding certain business dealings with PW 1 relating to their associated companies in which money changed hands. They claimed that it is PW 1 who was paying a debt owed by them to the 1st defendant. Since those averments were not supported by any evidence, they remain bare statements. Of such statements, Madan JA., in **CMC Aviation Ltd v Crusair Ltd (No. 1) [1987] KLR 103** observed as follows:

The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence.

As stated in the definition of “evidence” in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven... The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.

18. The duty of the court in this case is to consider the evidence, determine whether it is credible and sufficient to support the case as pleaded. Even though the defendants did not call any witnesses, they are entitled to defend the suit by raising legal grounds as a defence which may defeat the plaintiff’s claim.

Whether the 1st defendant owes the plaintiff Kshs. 10,000,000/=

19. The primary issue for consideration is whether the defendants are indebted to the plaintiff. Counsel for the defendants submitted that the issue the court must decide is who are the proper parties before the court. In other words, who is indebted to the plaintiff.

20. The tenor of PW 1’s testimony was that Mr Kadhari requested for money which was given to the 1st defendant on a promise that it would be repaid as soon as possible. The plaintiff’s case was that the transaction was supported by PW 1’s sworn testimony and documentary evidence which showed that the money was advanced through a bankers cheque deposited in the favour of the 1st defendant at the Bank. This evidence was not controverted.

21. It further buttressed its case by referring to an admission in the 1st defendant’s re-amended defence that it received Kshs. 10,000,000/= from the plaintiff. As I have stated before, the defendants’ contention that this sum was received on account of debt owed to it by PW 1 were not established by any evidence.

22. The defendants submitted that the interaction was between two individuals, PW 1 and Mr Kadhari, with distinct juristic personalities from those of the plaintiff and 1st defendant which are companies. They contended that the plaintiff did not produce any document from Mr Kadhari to the plaintiff making the request for Kshs. 10,000,000/= and a commitment to repay the money. They submitted that a careful consideration of the documentary evidence leaves the court to speculate against whom the claim is made hence it case was not proved.

23. In order to determine the question to whom and for what purpose the money was paid, I shall examine the documents produced by the plaintiff to see whether they support PW 1’s testimony and the case as pleaded.

24. The first letter is dated 22nd November 1999 from K V Krishnan, the plaintiff’s Executive Director, addressed to Mr Kadhari. The letter reaffirms the discussion between PW 1 and Mr Kadhari. It stated, in part, as follows;

While you were overseas, you will recall that you had phoned Mr I. J. Talwal for a payment of Kshs. 10,000,000/= to Diamond Trust of Kenya Limited – Mombasa to meet an emergency there. Accordingly, we paid Kshs. 10,000,000/= to Diamond Trust Kenya Limited by a Bank Cheque No. 0131786 of Commercial Bank of Africa dated 26/07/99 (which was collected by Mr. Roger Wright personally)

25. Nothing came of that letter but the next letter is one dated 6th March 2001 by Mr Krishnan addressed to Mohansons Food Distributors Limited relating to outstanding premiums due as at 31st December 2000 for Mohansons Kenya Limited (Kshs. 1,421,993/=), Mohansons Food Distributors Limited (Kshs. 6,404,176/=) and Kadhari Brothers Limited (Kshs. 4,194,392/=). As regards the amount in issue, he added that:

The amount of Shs. 10 million paid at your request to meet some emergency need in December 1999, is also not paid back. This amount was paid on the assurance that it will be paid back immediately. Please ensure that this is also paid immediately. Interest payable on this amount will be advised separately by our Accounts Dept.

26. In response to the aforesaid letter, the Chief Accountant, Mohansons Food Distributors Limited, addressed Mr Krishnan by a letter dated 9th March 2001, inter alia, on the following terms:

I believe there are a lot of queries you have not answered. We are not aware of the amount of Kshs. 10,000,000.00 (Ten Million) as demanded by yourselves.

27. It appears no progress was made in resolving the issue as PW 1 wrote a letter dated 10th August 2001 to Mr Kadhari under the subject, “*OUTSTANDING PREMIUMS*” in which he set out the amount outstanding for the three related companies and included the sum of Kshs. 10,000,000.00 as due from Mohansons (Kenya) Limited. He added that, “*Also note that the amount of Shs. 10 million has been the subject of a specific mention by our Auditors in our Annual Accounts.*”

28. Mr Kadhari responded to PW 1’s letter by his letter dated 23rd August 2001. He explained that regarding the claim for premiums, there were a lot of queries which were still to be resolved. He stated that the sum of Kshs. 10,000,000/= was not a premium. He further stated that he wished to discuss the matter personally with PW 1 and in particular he wanted to resolve other matters relating to their partnerships. PW 1 then responded to that letter by his letter dated 30th August 2001. He stated, in part, as follows:

The Kshs 10 million is certainly not a premium but an advance to Mohanson (K) Ltd by CAKL to Diamond Trust at your request. This amount has become a problem with our Auditors and the Commissioner’s office. It has to be cleared.

29. The next letter was the advocates demand letter dated 22nd July 2002 addressed to Mohansons (Kenya) Limited demanding payment of Kshs. 10,000,000/= as the matter was not resolved.

30. In addition to the correspondence, the plaintiff's case is that 1st defendant was reflected as a debtor in the plaintiff's accounts for the 1999 and 2000. In both lists of debtors, the sum of Kshs. 10,000,000/= is shown as due from Mohansons Limited. In the plaintiff's Annual Report and Accounts for the year ending 31st December 1999 the debt of Kshs 10,000,000/= is incorporated in the amount of Kshs. 14,693,484/- included as Sundry debtors consistent with the disaggregated list of debtors for the year 1999 which incorporated the debt.

31. Based on this evidence, counsel for the defendants submitted that from the documentary evidence, it was not clear from whom the plaintiff was demanding the money whether Mohansons Food Distributors or Mohansons Limited who are not parties to the suit or from the 1st defendant. They relied on *Apex Finance International Limited and Another v Kenya Anti-Corruption Commission* NKU HC JR No. 64 of 2011 [2012] eKLR to support the proposition that the issue of juristic personality is a material consideration in a case for a party to succeed. In that case, the court cited with approval the decision of the Supreme Court of Nigeria in *Goodwill and Trust Investment Limited and Another v Witt and Bush Nigeria SC 266/2005* where the court observed that:

It is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before an action can succeed, the parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court, the court lacks jurisdiction to hear the suit, and , "where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned."

32. Counsel for the defendants further submitted, that it was not even clear whether the money was on account of a loan or on account of premiums. In counsel's view, the plaintiff has failed to show the 1st or 2nd defendants were indebted to the plaintiff as pleaded in the plaint.

33. In determining the nature of the relationship between the parties, I must take into account the fact that PW 1 and Mr Kadhari were close business associates. Further, they were both directors of the plaintiff. Mr Kadhari was a director of various companies associated with the plaintiff. Those associated companies did business with the plaintiff and that is why it is not difficult to see that although Mohansons Kenya Limited and Mohanson Food Distributors Limited were different entities, their issues were often addressed together. I therefore do not put too much stock in the fact that different companies were addressed from time to time together in light of the relationship between the parties.

34. Likewise, the fact that the request for money came from the 2nd defendant is not necessarily decisive. Companies conduct business through their directors and in this case, it is clear that Mr Kadhari was a person representing the 1st defendant in its business dealings. More particularly because of the close relationship between PW 1 and Mr Kadhari, business would be conducted through them. This is evident because when the banker's cheque for Kshs. 10,000,000/= was received from the plaintiff, it was not banked in Mr Kadhari's personal account. According to the letter dated 22nd December 2003 from *Harit Sheth Advocates*, the amount was credited to the account of Mohanson Group of Companies which also confirms my earlier point about how Mr Kadhari related to his other companies.

35. The defendants also raised the issue that the Kshs. 10,000,000/= was not for repayment of loan but for payment of insurance premiums as confirmed by the plaintiff's letter dated 10th August 2001 in which PW 1 was demanding the sum as part of outstanding premiums. It also referred to the statement of account from the plaintiff's bankers, Commercial Bank of Africa, which shows the transactions detail for the debit of Kshs. 10,000,035/= as, "EFT Insurance Payment."

36. In my view, all the conflicting characterization of the money is due to the relationship between the parties. What is decisive though is the fact that the Kshs. 10,000,000/= was recognised as a debt due from Mohansons Limited in the plaintiff's list of debtors. That money was included as a debt in the plaintiff's Annual Report and Accounts for the year ending 31st December 1999. I find this evidence decisive because, the accounts must have been approved by Mr Kadhari as a director of the plaintiff before publication. He never raised any issue on those accounts and the same are now a matter of public record. The same issue was drawn to his attention by PW 1 in his letter of 10th August 2001 and he said nothing of it. I therefore hold that the 1st defendant is indebted to the plaintiff in the sum Kshs. 10,000,000/=.

37. Although the plaintiff's statement of sundry debtors for 1999 and 2002 shows that the debt was due from Mohansons Limited, I find that this is mere misdescription for reason that in all the letters emanating from the plaintiff and PW 1, the reference was to either Mohansons Food Distributors Limited or Mohansons Kenya Limited. There is no reference to Mohansons Limited and that name only appears in list of debtors. Even in the last letter dated 30th August 2001, PW 1 was clear the advance of Kshs. 10,000,000/- was made to Mohansons (Kenya) Limited. Lastly, the 1st defendant is bound by its statement of defence, at para. 4, in which it admitted that the plaintiff paid and that it received the sum of Kshs. 10,000,000/= which it paid to the Bank. That is the same money which is now claimed by the plaintiff.

38. Having reviewed all the evidence, I find that the plaintiff proved, on the balance of probabilities, that it advanced the 1st defendant Kshs 10,000,000/= which it has not paid back.

Whether the plaintiff was authorised to lend money.

39. The defendants relied on **section 71(1)** of the *Insurance Act* to oppose the plaintiff's claim. It provides, at the material part, as follows:

71. An insurer shall not in Kenya –

(a) grant financial accommodation on the security of its own shares; or

(b) grant, or permit to be outstanding without adequate security, other financial accommodation (not being a loan) on and within the surrender value on a policy of life assurance issued by the insurer –

(i) to a shareholder, officer or employee of the insurer or to a family member of such a shareholder, officer or employee; or

(ii) to a company of which the shareholder, officer or employee or family member is a shareholder, director, officer or employee.

40. Counsel for the defendant submitted that the advance of Kshs. 10,000,000/= was manifestly illegal and unenforceable. It was contended that PW 1 abused his position within the corporate structure by utilizing the plaintiff's funds for personal gain.

41. Counsel for the plaintiff submitted that the plaintiff's contention was untenable for two reasons. First, that Article 27 of the plaintiff's Articles of Association authorised the plaintiff, "to lend money with or without security ..." hence it was erroneous to allege that the plaintiff was not authorised to lend money. Secondly, that while **section 71** aforesaid requires the plaintiff to take security for loan advanced to the defendant, it does not render the loan illegal or unenforceable.

42. Counsel relied on *Githunguri v Jimba Credit Corporation Ltd [1988] KLR 825* where the court rejected the contention that since the bank loaned money in contravention of **section 10(1)** of the *Banking Act (Chapter 488 of the Laws of Kenya)*, the money was irrecoverable. The court held that the bank was entitled to recover its money as the contract was valid and binding between both parties. Counsel also cited *Groom v Shaw [1970] 2 QB 502* and *St John Shipping Corp v Joseph Rank Limited [1957] 2 QB 267* to support the proposition that illegal performance of a contract does not render it null and void where the contract itself is not in any way prohibited by statute.

43. In deciding this issue, I only wish to emphasise what I have already stated that PW 1 and the 2nd defendant business partners and directors of the plaintiff when the advance of Kshs. 10,000,000/= was made. It would therefore be improper for the defendants to turn around and say that the plaintiff's claim is illegal and unenforceable. They cannot approbate and reprobate. As Lord Reid stated in *Steadman v Steadman [1976] AC 536, 540*;

If one part to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not be allowed to turn around and assert that the agreement is unenforceable.

44. Section 71 of the *Insurance Act* restricts financial accommodation, to inter alia, to a company associated with a shareholder without adequate security. The provision does not state the any loan made to a shareholder cannot be recovered or enforced. The right to recover monies improperly advanced by the directors would obviously benefit the policyholders and shareholders. In this case though, I would adopt the position now accepted that a party should not benefit from an illegality and the court should not refuse to enforce an illegal contract if the effect is to unjustly enrich a party (see *Patel v Mirza [2016] UKSC 42*). The 1st defendant would be unjustly enriched by retaining the benefit of Kshs. 10,000,000/= to the detriment of the Company. I therefore dismiss this line of defence.

Whether the plaintiff is entitled to interest.

45. In the further amended plaint, the plaintiff claimed interest on Kshs. 10,000,000/- at, "bank's rate from 26th July 1999 to the date of the filing of this suit" and interest at court rates from the date of the filing suit until payment in full on the main claim.

46. The plaintiff relied on **section 26** of the *Civil Procedure Act* to submit that the court has discretion to award it interest as it has been kept out of its money as a result of the failure of the defendants to pay the debt. The plaintiff cited *Prem Lata v Peter Musa Mbiyu [1965] EA 592* and *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited [1970] EA 469* to support its case. In the latter case, the court held as follows:

The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment.

47. The power of the court to award interest in civil cases is to be found in **section 26** of the *Civil Procedure Rules* as follows:

26.(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

48. Under **section 26(1)** aforesaid, the Court has discretion to award and fix the rate of interest to cover two stages: First, the period from the date the suit is filed to the date when the Court gives its judgment and second, the period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion fix. Interest for the period prior to filing suit is determined by substantive law either under the contract or by custom and usage (See *Gulamhussein v French Somaliland Shipping Company Limited [1959] EA 25* and *Highway Furniture Mart Limited v The Permanent Secretary & Another EALR [2006] 2 EA 94*).

49. Counsel for the plaintiff conceded that there was no agreement that the loan amount would attract interest and that it would be payable. However, it was submitted that the demand letters issued were clear that the plaintiff would claim interest on the outstanding amount.

50. The plaintiff prayed for interest at bank rates applicable to the time before filing suit. Neither the basis nor rate of interest was pleaded. The documents produced by the plaintiff do not show that the parties agreed on the rate of interest to apply. The reference to “*bank’s rate*” is vague and does not assist the court in determining the appropriate rate of interest. The plaintiff did not plead any custom or usage that implied that a non-payment of loan would attract interest or interest at bank rates. I therefore find and hold that the plaintiff has not established a case for the claim of interest prior to filing the claim.

51. As this is a liquidated claim, the plaintiff is entitled to interest at court rates from the date of filing suit.

Disposition

52. For the reasons I have set out above, I find and hold that the plaintiff has proved its claim on the balance of probabilities. Since the suit against the 2nd defendant has abated, I enter judgment for the plaintiff against the 1st defendant for:

- a. Kshs. 10,000,000.00.
- b. Interest on (a) at court rates from the date of filing suit, 13th November 2002, until payment in full.
- c. Costs of this suit

DATED and **DELIVERED** at **NAIROBI** this 3rd day of **APRIL** 2020.

D. S. MAJANJA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms Kirimi instructed by Hamilton Harrison and Mathews Advocates for the plaintiff.

Mr Ondego instructed by A. B. Patel and Patel Advocates for the defendants.