



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 3459 OF 1995

FUJII AUTO TRADING COMPANY LIMITED.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

1. Fujii Auto Trading Co. Ltd (Fujii or the Plaintiff) brings this claim against National Bank of Kenya Limited (hereafter NBK or the Defendant) regarding 3 letters of credit (or L.C) issued by NBK at the request of Fujii.

2. Fujii is a Limited Liability Company and was at the time material to this suit involved in the importation of used vehicles and spares into Kenya for sale in the local market. To facilitate importation of certain vehicles, Fujii requested NBK for letters of credit in favour of the sellers of the imported vehicles who were domiciled outside Kenya. The first was a letter of credit of 22nd March, 1994 in favour of M/s. J&M Trading Co. Ltd for the purchase of 5 motor vehicles whose value was US\$ 29,650. The second was that of 15th May 1994 in favour of Aro Cargo and Clearing Co. Ltd of United Arab Emirates of US\$ 22,800 as per invoice No. 213. A third was the letter of credit of 23rd May 1994 again in favour of Aro Cargo and Clearing Co. Ltd for 6 motor vehicle units.

3. Fujii's case is that it was a condition of the contract between NBK and itself that the Bank would only honour the letters of credit upon receipt of certain importation and shipping documents which are set out in paragraph 4 of the Amended Plaintiff. One such document is the original Certificate of clean reports of finding as to quality and quantity inspection and price comparison conforming to Exchange Control requirements of the Central Bank of Kenya.

4. Fujii is aggrieved by an alleged breach of the said contract on the part of NBK. Fujii complains that the Bank made payment to the third parties against incomplete, inconsistent and contradictory documents. That the payments were made notwithstanding that:-

1. The original Clean reports of findings were missing.
2. The bills of lading indicated dates of shipments inconsistent with instructions.
3. Some of the goods were not assigned to National Bank of Kenya Ltd, Kenyatta Avenue Branch.
4. The vehicles shipped were not as specified in the commercial invoices.
5. There were no packing lists.

5. It is Fujii's case that as a consequence of the said breach, it lost some of the vehicles through sales by the Customs Department. It incurred huge port and demurrage expenses. It suffered great expenses on repairs of uninspected vehicles and expended additional and operational costs. Lastly it lost anticipated profits. Fujii has given particulars of the losses under various heads to the aggregate sum of Ksh.43,129,946.00/=.

6. Separately, Fujii is aggrieved by a debit of Kshs.1,526,911.00 made in its Account No. 021083282. It contends that the debit was irregular, made without authority and consent and for unknown purpose. Further that NBK unlawfully sold the Fujii's Director's property known and described as LR. No.209/12111.

7. Fujii's prayer is for judgement against NBK for special damages of Kshs.43,129,946/= together with interest at commercial rates, general damages for breach of Contract together with interest and costs.

8. The claim is defended by NBK. NBK makes the argument that the letters of credit issued by it in favour of the Plaintiff's suppliers did not constitute an agreement between the Plaintiff and the Defendant. That the conditions in the letters of credit were an agreement between it and the beneficiaries and were of standard form applicable in financing import transactions. In this regard, it is NBK's case that the conditions were capable of variation at the instance of any of the interested parties.

9. In respect to the payments made to the beneficiaries, NBK denies any impropriety. It is NBK's case that upon noticing certain discrepancies in the import documentation, it notified Fujii and drew its attention to the terms of the letters of credit. NBK avers that Fujii elected to accept the goods as shipped and expressly instructed the Defendant to release payment to the beneficiaries. NBK pleads estoppel and as will turn out this is the centerpiece of its defence.

10. NBK further denies making any unauthorized and/or irregular debit of Kshs.1,526,911/= in Fujii's account and an unlawful sale of the charged property.

11. NBK also sets up a counterclaim. NBK's claim is that at Fujii's request, it duly paid the Plaintiff's Suppliers and other charges to the sum of Kshs. 8,132,770.40. This facility being in the nature of an import credit facility. That it was a condition of the offer that Fujii would repay NBK the facility within 60 days of utilization. NBK contends default on the part of Fujii and claims a sum of Kshs.8,132,770.40 together with interest at 30% p.a from November 1995 until payment in full.

12. The hearing of this matter commenced before Hon. Ogola J. and by the agreement of parties it was concluded from where the Judge had reached. It fell upon me to conclude the hearing. Only two witnesses testified, one for each side. Ali Mohamed Mwanzia a shareholder and Managing Director of Fujii and John Kibet Tarus an employee of NBK. Their testimony in so far as is relevant to resolving this controversy is discussed in the body of this discussion.

13. There has been one set of amendments to the pleadings herein. Prior to the amendments, the parties had agreed on issues. Save for amending the Plaintiff's claim of special damages from Kshs.12,952,323/= to Kshs.43,129,946/=, the case of Fujii remained the same. The changes attracted a reaction in NBK's defence but which was not substantial. This Court therefore takes the view that the issues agreed by the parties before the amendments are still worthy of consideration but collapses them into the following:-

1. Were there discrepancies in the import documents in respect to the goods for which the letters of credit were issued?
2. Did Fujii issue written instructions to the Bank implying acceptance of the goods imported notwithstanding the discrepancies or otherwise authorizing in writing the making of the payments?.
3. If the answer to (2) is in the negative what loss, if any, did Fujii suffer as a result of the payments?
4. Was the debit of Kshs.1,526,911.00/= in Fujii's account wrongful, unlawful and/or without authority of Fujii?
5. Was the sale of LR No.209/12111 by the Bank unlawful?
6. Is Fujii entitled to the prayers sought?
7. Does Fujii owe the Bank Kshs.8,132,770.40 together with interest at 30% p.a from November 1995 as sought in the counterclaim?
8. Is NBK deserving of the prayers on the counterclaim?

14. Before commencing a discussion of the evidence and submissions, an important issue needs to be settled right from outset. When Mr. Mwanzia began his testimony, he sought to produce 3 bundles of documents in support of Fujii's case. These are bundle 1 of 4th October 2004, agreed bundle of 30th September, 2004 (Bundle 2) and a supplementary bundle filed on 6th October 2009 (bundle 6). Counsel for NBK objected to production of bundles 1 and 3. Hon. Ogola J. directed as follows:-

“The Plaintiff's bundle 2 is admitted as part of Plaintiff's evidence since it is agreed. As for bundles 1 and 3 the Defendant has objected to parts thereof. The Defendant shall be allowed to raise particular objection in those 2 bundles whenever it becomes necessary”.

15. So as to get a clarity on the issue of the documents admitted into evidence, this Court invited further testimony by Mwanzia. Abridged, Mwanzia while confirming that he would not be relying on bundle 3 urged the Court to admit bundle 1 into evidence. The basis being that upon the objection by NBK, the Court directed that Fujii supplies the originals of the documents therein to the defence and this was done.

16. Fujii's Counsel have submitted that all the three (3) sets of documents were duly admitted while Counsel for the NBK insists that only the agreed bundle was admitted into evidence. The Court has considered the background leading to the making of the agreed bundle, the order of Ogola J., the further evidence of Mr. Mwanzia and the arguments of Counsel. It would seem to me that the Judge's order that *“the Plaintiff bundle 2 is admitted as part of Plaintiff's evidence since it was agreed”* does not brook of ambiguity. Bundle 2 which was the agreed bundle was duly admitted into evidence.

17. In respect to the other two bundles, the Court granted liberty to the defence to raise particular objections to the documents contained therein whenever it became necessary. Fujii suggests that the two be treated differently. Mr. Mwanzia testified in respect to bundle 3,

“I introduced this before Ogola J. Counsel refused the bundle and insisted that we carry on with agreed bundle. That is why I did not call the C.I.D to testify. We never used bundle 3...I do not wish to rely on it”.

Fujii was in my view conceding that bundle 3 had not been admitted into evidence.

18. Yet it takes an entirely different position in respect to bundle 1. He says that this should form part of his evidence as originals were supplied.

19. It seems to me that since the Judge did not formally admit the 2 bundles they cannot be said to form part of the Plaintiff’s case. And Fujii does seem accept this position in regard to bundle 3 but not bundle 1. But there should be no reason to treat them differently. The Judge’s order was that the Defendant was a liberty to raise specific objections to the contents of the 2 bundles when need arose. Need would only arise if a witness intended to make reference to the contents of the 2 bundles and to seek to rely on them. But as the Court record shows, Mwanzia makes reference only to the agreed bundle. This is evident in his witness statement of 28th October 2011 (which was adopted as his evidence in chief) and testimony in cross-examination. I have no difficulty in finding that the 2 bundles are not part of the evidence before Court.

20. The fulcrum of Fujii’s case in respect to the Letters of credit is that the Bank effected payment to the beneficiaries against incomplete, inconsistent and contradictory documents. It is common fact that 3 letters of credit were issued:-

LC KA 27/14 dated 13th April, 1994 (Exhibit page 6-7)

LC KA 27/21 dated 26th May, 1994 (Exhibit pages 28-29)

LC 27/22 (Exhibit P.43) of 25th May 1994.

LC KA 27/21 and KA 27/22

21. The Court propose to begin by reviewing the circumstances under which the last two letters of credit being KA 27/21 and KA 27/22 were paid because, as will be apparent shortly, it narrows the scope of the dispute. It is conceded by the Bank that it noticed certain discrepancies in the import documentation but only paid the beneficiaries after getting express instruction from Fujii to pay. What does the evidence reveal?

22. LC Number KA 27/21 was for the importation of 5 motor vehicles. The letter of credit was issued in favour of Aro Cargo and Clearing Co. Ltd. In a letter of 30th June, 1994 (page 40), the Bank notified Fujii that it had noted the following discrepancies in the documents:-

1. No drafts
2. No packing list
3. No certificate of origin
4. Documents not bearing IDF NO. 001820.

The Bank’s case is that it is on this letter that Fujii gave it a go ahead to settle the L.Cs notwithstanding the discrepancies.

23. Mwanzia’s reaction was that he signed a letter of 30th June 1994 under reference KA LC 27/23 (page 39) but not the letter of 30th June 1994 under a reference which appears altered from KA LC 27/23 to KA LC 27/21. He further testified that the following handwritten words appearing at the bottom of the letter are a forgery,

“I accept the documents despite of the noted discrepancies”.

24. The Bank has sought to rely on those handwritten instructions as express instructions from Fujii to honour the letter of credit notwithstanding the shortcomings on the documents.

25. There are somewhat similar circumstances in respect to LC 29/22. There is a letter from the Bank dated 30th June, 1994 (page 57) addressed to ‘Ferari Auto Sports’ after cancellation of the address “Fujii Auto Trading Co. Ltd”. Again at the bottom are the words,

“I accept the documents despite of the noted discrepancies”.

Below these words is a signature allegedly of Mr. Mwanzia.

26. Mr. Mwanzia reaction is that,

“The address was changed from Fujii Auto Trading to read Ferari Auto Sports Ltd after I had signed. I was never consulted on

this change, therefore this is a forgery”.

He similarly asserts that the signature on the document is a forgery.

27. Let me start with the allegation that the signatures are a forgery. Forgery is a crime. The documents said to have the forgeries were in the agreed bundle of documents filed in this Court on 4th October 2004. Mwanzia signed his witness statement on 28th October 2017 in which he makes the allegation of forgeries. Yet Fujii did not bother to amend its pleadings to allege forgery. Further Fujii did not lead any evidence whatsoever to prove this crucial issue. Although Mwanzia told Court that he had made a report to the police in respect to the forgeries, he did not provide any proof of the report or outcome. That allegation is not proved to the threshold of proof of quasi-criminal matters in civil proceedings even less on a balance of probabilities.

28. Regarding the alleged wrongful overwriting of the letter 1 over 3 on the second letter of the Bank (page 40), it is common ground that KA LC 27/21 was for US\$ 25,800. There was no KA LC 27/23 and so a correction of the error would not be unexpected. I am not inclined to believe Fujii (who made an unproved allegation of a forgery on the document) when they assert that the alteration was unlawful and came after the document was signed.

29. The other letter of 30th June 1994 (p.57) from National Bank and in respect to KA LC 27/22 is addressed to Ferari after cancellation of Fujii. Mwanzia had explained as follows regarding the relationship between Ferari and Fujii:-

“On the advice of an officer of the Bank the letter of credit would be under Ferari which is a sister Company of Fujii. So that Ferrari would be used as agent of Fujii for the importation of 6 vehicles. And that the letters of credit KA 27/22 was issued accordingly”.

To corroborate this would be an application for issue of a letter of credit (page 44) in which Ferari is the applicant. Given these set of facts there would be nothing untoward for the correspondence in respect to KA LC 27/22 to be addressed to Ferari Auto Sports Ltd, so as to be consistent with reality of the arrangement between the parties.

30. The conclusion to be drawn is that Fujii duly authorized the Bank to pay the beneficiaries under KA LC 27/21 and LC 27/22 notwithstanding that it was fully aware that it was in the basis of incomplete or problematic documents. There is no contest that NBK subsequently paid the beneficiaries. As rightly pleaded by the defence, Fujii is estopped from denying this or blaming the Bank from any losses that resulted from the payment. On these two letters of credit, Fujii cannot go any further.

LC KA 27/14

31. This Court now addresses the Plaintiff's case on LC KA 27/14. Fujii initially made a request for a letter of credit facility to import 5 motor vehicles from Japan at a cost of US dollars 29,650. The Bank acceded to the request and a letter of credit dated 13th April 1994 was issued in favour of M/s. J & M Trading Co, Ltd, Toyko for a value of US Dollars 29,650/= (see pages 6,7, and 8).

32. It turned out that one of the five vehicles being a Nissan caravan DXVHGE23 was unavailable and Fujii agreed with J & M Trading to supply 3 Nissan Sunny B vehicles instead. The value of the 3 replacement vehicles was US dollars 8,870/=. Mwanzia requested for an amendment of the letter of credit LC KA 27/14 and this was duly done by the Bank (page 11). A further amendment was done by extending the validity date to 20th October 1999 (page 18).

33. The 7 vehicles covered under LC KA 22/14 came in two batches of 4 and 3. The case by Fujii is that for the 4 vehicles the following documents were missing:-

1. Certificate of clear report of findings.
2. Certificate of origin from Japan.
3. Logbooks.
4. Translated logbooks.

The Bank on the other hand stated that it received a duly executed and certified invoice for the vehicles, the packing list and bill of lading. However, Mr. Tarus, the witness for the Bank revealed,

“There were no certificate of origin and clear report of findings for this shipment”.

34. The terms of LC KA 27/14 was unequivocal that it would only be honoured upon receipt of the shipment accompanied by the following documents:-

- Signed certified commercial invoices in triplicate for the amount of the draft showing the CFR value of goods and certifying that proforma invoices NO. EIK 33987 has been complied with.
- Packing list in triplicate.
- Full set of clean (on board) bills of lading marked “freight paid” by shipping company made out to order of the National Bank of

Kenya Ltd Kenyatta Avenue Branch P.O. Box 30645 Nairobi Account Fujii Auto Trading Company Ltd P.O. Box 76240 Nairobi.

- Certificate of origin
- Original and copy clean report of findings as to quality and quantity inspection and price comparison conforming to the exchange control requirements of the Central Bank of Kenya.

It is clear therefore that of the above essential documents at least two were missing i.e. Certificate of origin and Certificate of clear report of findings.

35. The evidence available is that the Bank made payment of the 4 vehicles on 8th August 1994 (page 21). On what basis was the payment made when crucial documents were missing? This has not been explained by the Bank and Fujii would have a point. The other complaint with merit is that the letter instructing payment may have been erroneous in stating the due date of the LC as 13th August 1994 when the validity date in respect to the entire LC KA 27/14 had been extended to 20th October 1994 (page 18).

36. But the third complaint that part payment of the letter of credit was not permitted may not have merit. This is because in the first amendment to LC KA 27/14 provided that partial shipment was allowed (page 11). If that was so, then payment for the partial shipment was envisaged.

37. The evidence by Mwanzia is that because of incomplete documentation, pointing at lack of the certificate of clean report of finding, there was a long delay in clearing the 4 vehicles. Fujii therefore had to pay for local inspection, additional duty, additional port charges, additional port warehouse rent and late registration penalties. Fujii also asserts that by the time it sold the vehicles the prices had dropped and hence a loss of profits.

38. At the time the Bank made payment for the 4 vehicles, the vehicles had reached Mombasa. Because of lack of the certificates of clean report of findings, local inspection was necessary for the vehicles (page 62) and the inspection reports issued on 30th November 1999 (page 65). While there was no evidence that the long delay upto September was inevitable, this Court has to find that some delay could not be avoided because the incomplete documents necessitated a local inspection of the vehicles. Any loss caused by that delay is attributed to the Bank which made payments on the basis of incomplete documents.

39. Fujii has made claims under 7 heads. Proof of some of the losses must turn out to be problematic for two reasons. The loss in respect to inspection charges, additional duty, port charges, additional port rent and penalty charges are all in the nature of special damages. There was need for these to be proved specifically. Of these I am only able to discern proof of the Inspection fees which was set out in the letter of Fujii to the Bank (pages 83 to 84). The rest do not have proof of payment and where they do, there has been no effort by Fujii to point out the "additional" element with any clarity. This being critical because it is only the additional portion that the Bank would be liable to pay. The Court has no option but to find that the only loss proved is Kshs.22,080 being the inspection fees.

40. The evidence of loss of profits and interest was even more the hazy. Although Fujii gives some figures, there is no attempt to provide evidence to support them. This is also the case on the interest foregone.

41. Then the second batch of 3 vehicles under LC 27/14. In regard to these, Fujii's case is that while the rest of the documents were available, what was received in respect to the certificates of clear report of finding were copies and not the originals. Fujii states that because of this, it was not able to process the clearance and registration of the 3 vehicles. Mwanzia then testifies,

"It took time for Fuji Auto Trading Co. Ltd to take the copy of Bureau veritas inspectors for verification EXG 20".

42. Yet even if the Court were to believe Fujii, two issues challenge the credibility of the claim. The first is that there is no evidence of the extent of delay caused by the need to verify the copies so as to relate it to the losses allegedly caused by that delay. Secondly, in his testimony to Court, Mwanzia appeared contented with the manner in which the 3 vehicles were dealt with, complaining about the 4 only. In examination in chief he stated:-

"For the 1st letter of credit the Bank paid for all 7 vehicles despite not receiving documents for 4 vehicles. We are claiming damages and expenses in respect of the 4 vehicles for the letter of credit". (my emphasis)

43. That Fujii seems to have abandoned the claim for the 3 vehicles under LC KA 27/14 emerges further in the following evidence by the same witness in re-examination:-

"See pages 14-20 – There are documents for the said 3 vehicles for which we had no problem".

44. In the totality of the evidence, the Court is not able to find any liability on the part of the Bank in respect to the 3 vehicles under LC KA 27/14.

Payment of Kshs.1,526,911.00

45. There is then a contest as to whether some Kshs.1,526,911.00/= debited from Fujii account No. 021083282 was lawful and on the basis of authority and consent of the account holder. It is common ground that there was a transfer of Kshs.1,526,911.00/= out of the account on 30th August 1994. The evidence of Mwanzia is that upon learning of the allegedly unauthorized transfer he wrote to the Bank to clear the entry, but his letter of 12th September 1994 (page 85) did not elicit a reply. On 12th May 1999 (page 85) Fujii revisited the issue. First, it

denies making a request for Kshs.2,000,000/= and the authenticity of an alleged request of 23rd August 2014 is denied by both Fujii and Mwanzia. Secondly he bespeaks details of the beneficiary of the payment and receipt from the payee. A similar request is made again on 14th May 1999 (pages 89,90).

46. In his evidence in chief Mwanzia asserts that the letter of 23rd August 1994 must be a forgery for the following reasons:-

a. Fujii Auto Trading did not need these funds because the Company (Fujii Auto Trading Co.) had already paid duty for most of these vehicles during local inspection in June 1994 per the receipts in Exhibits 93 to 109 for receipts and analysis on claim A5 and A10.

b. One of the vehicles in this list was Charade Chasis number G100S-008458 which Fujii Auto Trading never got. Therefore, Fujii Auto Trading could not ask for money to pay duty for this car.

c. For the Nissan Caravan VYGE 24-001374, this vehicle was auctioned at Mombasa port and the Bankers cheque for shs.135,138 which had been financed by Fujii Auto Trading Company cheque of 21/6/1994 Ref.898305 of Kshs.735,117 Exh 120 was later re-banked on 26th July 1994(Exh 147(2) and (claim A10), much before 23rd August 1994, the date that I am alleged to have requested the said shs.2,000,000/=.

d. The duty for the 11 vehicles for which Fujii Auto Trading Co.Ltd was supposed to need shs.2 million funding was in fact 1,526,871 and had been financed through cash of shs.421,754 and two Fujii Auto Trading cheques as follows:-

- **Cheque Number 898305 dated 21st June 1994 for Kshs.735,117 (Exh 120 and**
- **Cheque Number 898320 dated 25th August 1994 for shs.370,000 (Exh 121). See also summary – claim A5.**

e. All the banker's cheques which were obtained to pay duty by Fujii Auto Trading were supported by official request per Exh 122 to 136). The modes of funding were also shown in these requests.

f. National Bank has refused to give Fujii Auto Trading the originals of the two company cheques (Exh 120 and Exh 121) even after writing to the Bank on 12th May 1999 (Exh 91,92) and on 9th March 2000 (Exhibit 69) and also filing notice to produce on 25th June 2010. The back-side of the company cheque had itemized the duty which was being paid for each vehicle. When we finally managed to get copies of these Two company cheques (Exh 120 and 121) in 2000 from the National Bank, I found that the backside has been messed up and covered with black ink to hide the details of the duty, which we were paying (Exh 118 and 119 backside)!

47. That position is countered by the Bank with its own version. The testimony of the witness for the Bank was that by a letter of 23rd August 1994 (83), Fujii made a request for a facility of Ksh.2,000,000/= to enable it pay duty, inspection fees, port and warehouse charges. The Bank granted an overdraft facility and these enabled Fujii to buy bankers cheque (pages 122-136). All bankers cheques were dated 26th August 1994 and were used to pay various charges.

48. That the Bank then debited Fujii's account on 30th August 1994 with a sum of Kshs.1,526,911/= being the total value of the cheques issued. The Bank argues that the validity of this payment was confirmed by Fujii on 12th September 1994 (page 85).

49. Who is to be believed? The crux of Fujii's case in respect to the entry for Kshs.1,526,911.00/= is that the purported request for a facility of Kshs.2,000,000/= (page 83,84) is not authentic. That the letter of 23rd August 1994 purportedly written by Fujii and signed by Mwanzia is a forgery. But the documents were brought to the attention of Mwanzia way back and it should be curious that Fujii did not plead forgery in its main claim nor in the defence to the counterclaim. Furthermore, it did not bother to adduce evidence that this important document was a forgery.

50. On the other end of the pendulum is the letter of 12th September, 1994 from Fujii to the Bank (page 85). This letter which is admitted by Fujii as authentic is reproduced below because of its importance to the issue at hand:-

12.9.94

Dear Sir

RE: ENTRY 1.526.911

We request you clear the above cash from our A/c since its accumulating interest. It will be inappropriate to incur interest since we have charged our property to this A/c 021-083-082.

We request if the Bank can convert the two L/Cs into a long-term loan since we received documents late and were not correct.

We hope you shall consider our application.

Yours sincerely

Ali Mwanzia

Managing Director

FUJII AUTO TRADING CO. LTD

At least three things are revealed by this letter. One that Fujii was aware of the debit entry of Khs.1,526,911 from its account. Secondly there was no complaint that the entry was unauthorized or otherwise unlawful. Lastly the requests made by Fujii was to clear the debit from the Account as it was accumulating interest since it had now charged a property to secure its indebtedness. This Court takes this letter as an affirmation that Kshs.1,526,911 was debited to Fujii's account for payment of certain charges to its benefit. The Court on evaluation of the evidence before it is inclined to believe the Bank.

51. As I turn to determine the last two aspects of this matter, I set out the following backdrop. It is common ground that LC No.27/21 and 27/11 were wholly paid for by the Bank at the request of Fujii. In addition this Court has found that a further sum of Khs.1,526,911/= was incurred by Fujii. These were facilities granted by the Bank to Fujii. It is not in contention that a third party charge over LR No.209/12111 by Mwanzia was created and registered in favour of the Bank to secure Fujii's debt to the Bank. There is also evidence that in exercise of its power of sale, the Bank sold the charged property to Twin Star Development Limited and a transfer effected (pages 142-144).

52. In the Plaintiff, Fujii shows its displeasure of the sale and pleads,

“The Defendant.....further unlaw(sic) sold the Plaintiff's Director's property No. LR NO.209/12111”.

But Fujii does not elaborate on why the sale was unlawful. However there is an improvement on this in the testimony of Mr. Mwanzia. He sees the wrongdoing of the Bank as :-

- a) Fraudulent payment of Khs.1,526,911/=.
- b) Unauthorized and early payment of LC 27/11 – Kshs.1,140,974.50.
- c) Unauthorized payment of LC 27/21 Kshs.1,452,306.65

53. These he contends created an unlawful and oppressive overdrawn state of Fujii's account. In addition that the Bank charged high interest rates (between 27-40). In the end, it is argued by Fujii that the Bank contributed to the financial problems of Fujii and for this reason could not service the facility.

54. As earlier held this Court has found that the disputed payments, save for the payment in respect to the 4 vehicles on LC No.27/14 were lawfully and properly made. And in respect to the premature payment of LC No.27/14, Fujii has only managed to prove a loss of 22,080 in respect to inspection fees. For that reason the Court is unable to find that the payments drastically altered the financial situation of Fujii so as to make it unable to pay its obligation.

55. As regards the interest rates charged, while Fuji complains that they are high, it does not argue that they are either unlawful or otherwise uncontracted. In addition and importantly the issue of interest was not pleaded at all!

56. All in all the Bank cannot be faulted for exercising its power of sale. Fujii was in default. A fact acknowledged by Fujii but for which it has unsuccessfully sought to blame the Bank. And this Court must add that in regard to the sale of the charged property, the charge creating the security was a third party charge created by Mwanzia. Mwanzia was then the owner of the property. He is not party to this suit. It is doubtful whether Fujii which is a distinct and separate legal entity from its shareholders and directors could step into the shoes of Mwanzia and properly sue for the loss of the land.

57. As to the Bank's counterclaim, there is evidence that facilities were granted to Fujii and there was default. Upon the sale of the charged property Kshs.4,000,000 was realized. After deduction of certain charges, a net balance of Kshs.4,132,132/= was credited to Fujii's account on 14th March, 1997 (page 175). The Bank statement whose veracity has not been debunked shows that this payment reduced the exposure of Fujii from Kshs.12,251,895.40 to 8,120,763.40 as at that date. There is no evidence that this has been paid. The Bank has made out a case on a balance of probabilities, that is deserving of judgement for the sum of Kshs.8,132,774.90 and the contracted rate of interest.

58. The upshot is that:-

58.1 Judgment is entered for the Plaintiff against the Defendant for Kshs.22,080/- and interest thereon at Court rates from the date of filing of the suit until payment in full.

58.2 As the Plaintiff's claim otherwise failed, each party shall bear its own costs on the main suit.

58.3 On the counterclaim Judgment is entered for the Defendant against the Plaintiff for the sum of Kshs.8,132,770.40/= plus the contracted interest from November 1995 until payment in full.

58.4 In working out the interest in 58.3 above, parties will have to consider whether section 44A(2) and (4) of The Banking Act applies.

58.5 The Defendant shall have costs on the counter claim.

Dated, delivered and signed in open Court at Nairobi this 1st day of March, 2019.

F. TUIYOTT

JUDGE

Present:

Odhiambo for Defendant

Kariuki (miss) h/b for Kingara for Plaintiff

Nixon-Court Assistant