



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL CASE NO. 135 OF 2003

NATIONAL BANK OF KENYA LTD.....PLAINTIFF

-VERSUS-

ISAAC K. MENGICH.....1ST DEFENDANT

JOSHUA K. SIGILAI T/A SIGMEN

MERCHANTS ENTERPRISES.....2ND DEFENDANT

JUDGMENT

1. The plaintiff, by a plaint dated 28th July 2003 sought judgment in the sum of Kshs.600,000/= plus interest at Bank rates at 21% per annum from 31st April 1993 until payment in full against the defendants trading as **Sigmen Merchants Enterprises**.

2. The plaintiff's claim is that upon request, the plaintiff by a letter of offer dated 21st April 1993 (PExt 14) addressed to M/S Sigmen General Merchants and upon terms, it advanced the defendants the said sum of Kshs.600,000/= that was secured by a security in form of **Land Title Number Kericho/Koiwa/519** registered in the name of Kipkeigi A. Korir who also guaranteed payment of the Loan and executed a charge over the said property dated the 3rd May 1993 and registered on the 5th May 1993. – PExt 12.

3. The defendants defaulted in repayment of the loan and the plaintiff was unable to realise the security due to numerous court case injunctions resulting to filing of this suit on the 12th August 2003.

4. The 2nd Defendant Joshua K. Sigilai did not file a defence. Interlocutory judgment was therefore entered against him on the 15th May 2004 while the 1st defendant defended the suit by a defence dated 14th November 2003 whereof he denied the plaintiff's claim in its totality.

In particular, it is his defence that he never traded in the name of Sigmen Merchants Enterprises as alluded to by the plaintiff nor did he execute any charge document nor was he advanced the said loan by the plaintiff.

He further denied knowledge of a guarantee by one Kipkeigi Arap Korir to secure the loan.

5. When the suit came up for hearing on the 22nd January 2019 the 1st Defendant's advocates nor the 1st defendant attended court. I was satisfied that M/S M.C Getanga & Co. Advocates were properly served with the hearing notice and an affidavit of service duly filed – **Order 5 rule 15 Civil Procedure Rules (CPR)**.

There being interlocutory judgment against the 2nd Defendant, and the 1st defendant's failure to attend court to prosecute his defence, the case proceeded ex parte – **Order 12 rule 2 (a) CPR**.

6. The plaintiff called one witness, one Paul Chelanga the Recovery Manager of the plaintiff.

He testified as PW1.

He relied on a recorded and filed statement dated the 22nd June 2018. In his testimony, he averred that **Sigmen General Merchants** applied for a loan for Kshs.600,000/= from the plaintiff Bank and was granted upon execution of a charge over property registered in the name of Kipkeigi Arap Korir being Kericho/Koiwa/519.

7. He produced as exhibits the Letter of Application dated 24th February 1994-PEXt2, Bank statements – PEXt 4, Statutory notices for sale of charged property - PEXt 5, Instructions letter to Auctioneers to sell the property – PEXt 6, Charge document – PEXt 7, Letter of guarantee – PEXt 8, Official search for the property – PEXt 9, Consent by the Land Board dated 3rd May 1993 – PEXt 10, and a bundle of Letters on proposals and restructuring of payment of the loan – PEXt 11, as well as the Title for the charged property PEXt No. 12.

8. It was his evidence that as at 17th April 2004 the outstanding Loan amount including recovery costs, penalties and interest stood at Kshs.5,314,390/90 and continued to accrue interest at the agreed rate of 21% Per Annum.

He thus urged the court to enter judgment for the plaintiff against the defendants jointly and severally as prayed in the plaint.

9. I have considered the pleadings and the evidence of the plaintiff's witness as well as all documents produced in support of the claim.

The issue for determination is whether the defendants are liable to pay the loan.

It is trite that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the pleadings, or which is at variance with the averments of the pleadings goes to no issue and must be disregarded – **IEBC and Others -vs- Stephen Mutinda Mule & 3 Others (2014) e KLR**. The Supreme Court of Kenya in a ruling in **Raila Amolo Odinga & Another -vs- IEBC & 2 Others (2017) e KLR** re-emphasized that

“... No party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them...”

10. The two defendants are sued as trading under the business name **Sigmen Merchants Enterprises**.

The 1st defendant denied having traded under the said business name, nor having executed the charge documents to secure the loan granted to him and the 2nd defendant in the year 1993. No evidence was adduced to contradict the above material facts.

11. The application letter for the Loan is signed by Joshua K. Sigilai, the Bank Account at the plaintiff's bank is in the name **Sigmen General Merchants**. The letter of offer is directed to **Sigmen General Merchants** and the Card where the partners signed their names shows that both **Joshua Kipsigei Sigilai** and **Isaac Kiplimo Mengich** appended their signatures thereto and attached their photographs (PEXt 15).

12. Correspondence to the plaintiff bank on rescheduling of the repayment of the loan are signed by both, the named parties above. Further the plaintiff bank correspondence is addressed to both the above parties. In particular, the **1st defendant Isaac Kiplimo Mengich** wrote and signed a letter dated 24th January 1995 addressed to the plaintiff bank seeking indulgence to forestall sale of the charged property as he sought to sell a property at Buru-Buru Nairobi to pay off the Loan.

13. From the above it is evident that the two parties were parties to the borrowing of the loan from the plaintiff bank, and that they indeed defaulted in the repayment of the Loan.

By the documents produced by the plaintiff's Recoveries Manager (PW1), it is evident that the defendants were granted the loan upon the agreed terms including the interest rate agreed at 21% per annum, and that their failure to pay resulted to the Kshs.600,000/= loan to grow to Kshs.5,314,390/90 as at 17th April 2004 including bank charges and penalties.

14. The **Court of Appeal in Pius Kimaiyo Langat -vs- Co-operative Bank of Kenya Ltd (2014) e KLR** rendered that parties are bound by their contracts, unless coercion, fraud or undue influence are pleaded and proved.

The 1st defendant tactfully denied having been trading with the 2nd defendant as Sigmen Merchants Enterprises, but stated that the 2nd defendant was the proprietor of the said business. If indeed that was the case, one would then ask what business he had writing letters to the plaintiff over the loan on behalf of the partnership seeking for indulgence by the bank to restructure the mode of payment. He ought to have adduced evidence to support his averment in his defence. He failed to do so.

15. The Court of Appeal in the **Pius Kimaiyo Langat** case (Supra) was very similar in its circumstances to the present matter. The appellant therein had borrowed Kshs.400,000/= in 1997. There was default in payment. The loan rose to Kshs.6.2 Million in 2009. It rendered that the appellants were liable to pay the loan.

16. **Section 44A of the Banking Act** placed a ceiling on interest rates and bank charges to an amount not exceeding the principal sum lent. This ceiling became effective from 1st May 2007. The defendants in the present case did not plead high interest rates, nor did they plead high penalties or bank charges.

As I rendered above, parties are bound by their own pleadings. The above provision - **Section 44A** - cannot be applied to this case firstly because the section does not apply the effective date being 1st May 2007, and secondly, it is not pleaded.

17. No fraud, coercion or misrepresentation is pleaded by the 1st defendant. The court would not have failed to declare the contract between the parties unconscionable if such were pleaded and strictly proved, and evidence adduced in support.

18. The 1st defendant failed to testify in support of his defence.

What are the consequence thereof? In the **Charterhouse Bank Ltd(under Statutory Management -vs- Frank N. Kamau (2016) e KLR**, the Court of Appeal considered numerous decisions on the matter among them, **Motex Knitwear -vs- Gopitex Knitwear Mills Ltd – Nairobi Milimani HCCC No.834 of 2002, Trust Bank Ltd -vs- Paramount Universal Bank Ltd & 2 Others Nairobi Milimani HCC No. 1243 of 2001, and Janet Kaphiphe Ouma & Another -vs- Marie Stopes International (Kenya) Ltd Kisumu HCCC 68 of 2007.**

19. The thread running across all the above decisions is that a defence without any evidence tendered to support the facts stated hereto remain as mere statements of fact, and are of no evidential value.

That leaves the plaintiff's evidence unchallenged and uncontroverted. This is in line with provisions of **Section 107 and 108 of the Evidence Act** that he who asserts or pleads must support the same by evidence.

20. In the absence of any evidence by the defendants, and in particular the 1st defendant, the plaintiff's claim is bound to succeed. And I find so.

Consequently, I find that the plaintiff has proved its case against the defendants jointly and severally on a balance of probability, the required standard of proof.

21. Judgment is therefore entered against the defendants jointly and severally in the sum of Kshs.600,000/= plus interest at 21% Per Annum from the 31st April 1993 until payment in full as pleaded in the plaint.

22. The defendants shall also pay costs of the suit to the plaintiff.

Dated, signed and delivered this 2nd Day of May 2019.

J.N. MULWA

JUDGE