



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO 104 OF 2010

JOSEPHAT NYINGI PETER.....PLAINTIFF

VERSUS

AFRICAN BANKING CORPORATION LIMITED.....DEFENDANT

JUDGMENT

1. A Bank and its customer are at loggerheads as to whether or not there is default in respect to a facility granted by the Bank. It is the contention of Josphat Nyingi Peter (the Plaintiff or Nyingi) that he has overpaid monies it owed African Banking Corporation Ltd (the Defendant or ABC).

2. Desirous of buying a truck and trailer, Nyingi approached ABC for a loan facility. The request was accepted and on 22nd November 2006, ABC advanced Nyingi a sum of Khs.5,425,000.00. The sum was part payment towards the purchase of truck motor vehicle registration KAW 963X and a trailer.

3. The highlights of the facility, as extracted from the letter of offer of even date, are:-

- a) Facility amount : Kshs.5,425,000.00
- b) Interest rate: 9% flat rate
- c) Repayment: 36 monthly instalment of Khs.191,382.000
- d) Default interest: 30% per month on any overdue instalment until such instalment is paid
- e) The vehicle and trailer were to be registered in the joint names of Nyingi and 'ABC'.

4. In the workings of Nyingi, he ought to have paid a total sum of Khs.6,889,750.00 inclusive of interest. He asserts that he has paid a total sum of Kshs.7,015,993.50 hence an overpayment.

5. Nyingi's case is that the Bank has failed to give him full credit for various payments he has tendered. He tabulates this as follows:-

Date paid	Date posted	Amount Paid (Kshs.)	Amount Credited (Kshs.)
14/11/2007	20/11/2007	567,500	547,937
16/01/2008	16/01/2008	250,000	248,376
16/04/2008	18/04/2008	250,000	246,650
17/04/2008	23/04/2008	250,000	249,400

15/09/2008	16/09/2008	200,000	197,179
16/10/2008	17/10/2008	100,000	99,430.50
16/10/2008	22.10.2008	100,000	96,652
22/12/2008	23/12/2008	400,000	399,499
03/02/2009	04/07/2009	150,000	148,941
10/07/2009	14/07/2009	100,000	95,467
14/09/2009	18/09/2009	200,000	197,970

That further whereas a sum of Kshs.91,500.00 was to be paid to Satelite Tracking Kenya Limited for installation of a tracking kit, the Defendant credited his account with Khs.1,451,260.00.

6. Nyingi also complains that his vehicle has been illegally and unlawfully impounded and repossessed on three occasions being December 2008, 6th February 2009 and 16th February 2010. It is in fact that last repossession that triggered the current proceedings.

7. Of that repossession, Nyingi avers that so as not to lose on a contract he was servicing, he paid Kshs.600,000.00 which he asserts was not due. That, notwithstanding, the Bank's agent refused to release the vehicle.

8. Nyingi contends that the impoundment and repossession was wrongful, illegal, unlawful and void *abinito* for the following reasons:-

a) The Plaintiff had paid the advanced loan inclusive of the interests due in full to the Defendant.

b) There was no proclamation notice which was served upon him prior to the repossession.

c) No demand notice was ever issued to me which is a violation of the law.

d) No chattels mortgage was obtained and registered in favour of the Defendant promoting the Defendant's legal rights to repossess the vehicle.

e) No outstanding amount was brought to my attention.

f) The illegal repossession was made by unauthorized persons which is contrary to the Auctioneers Act.

g) No true accounts have been rendered to me.

h) The Defendant has unceremoniously changed the interest and credited my account with charges which are contrary to the Banking Act, Cap 488 Laws of Kenya.

9. Ultimately, Nyingi prays for the following intervention by Court:-

a) Orders of permanent injunction restraining the Defendant either by itself, its agents, employees, servants and/or otherwise whomsoever, from harassing, intimidating, threatening, disposing of, advertising for sale and/or selling the Plaintiff's M/V Reg No. KAW 963X-ZC5725, Mercedes Benz, Axor Truck and 4 Axle Semi Trailer and a mandatory injunction compelling the Defendant and its authorized agent to release to the Plaintiff the said M/V Reg. No. KAW 963X-ZC5725, Mercedes Benz, Axor Truck and 4 Axle Semi Trailer.

b) A declaration that the impounding and /or repossession of the Plaintiff's M/V Reg No. KAWX-ZC5725, Mercedes Benz, Axor Truck and 4 Axle Semi Trailer by the Defendant is wrongful, illegal, fraudulent, unlawful and void ab initio and general damages for loss of business and wrongful, illegal, unlawful and fraudulent repossession and/or impounding of the Plaintiff's M/V Reg No. KAW 963X-ZC5725, Mercedes Benz, Axor Truck and 4 Axle Semi Trailer.

c) Costs of this suit.

10. On its part, ABC states that whereas the total instalments payable would have been Khs.6,095,589.00, the amount would have to be more by virtue of default interest, increase in interest, repossession charges, late interest and other charges. Essentially, the case of ABC is that Nyingi has defaulted.

11. ABC contends that apart from the loan account, Nyingi opened current account No.0002000010221 being the operative account partly in compliance with a special condition set out in the letter of offer. The Bank explains that Nyingi would make loan repayments into this account but because on many occasions the loan was overdrawn, such repayment would be out rightly dishonored or reduced because it first had to clear an overdrawn amount. And that was the amount paid.

12. On the supposed overpayment to the Tracking company, ABC's answer is that the sum of Kshs.141,260.00 was the actual sum charged by the service provider.

13. Regarding the incidents of repossession complained of, the Bank defends them as being lawful and justified on the ground that Nyingi was in default of his obligation to repay the facility.

14. Taking an offensive stance, the Bank asserts that as at 13th August 2013 Nyingi owed it the sum of Kshs.3,002,325.00. It is this sum that the Bank seeks by way of counter claim dated 22nd September 2014 and filed on 23rd September 2014.

15. The Plaintiff's case was heard and closed on 10th July, 2018. Nyingi (PW.1) to a large extent rehashed what he had pleaded. On the part of the Bank, one Doris Mugwika gave evidence on 13th November, 2014. The evidence of these two witnesses shall be evaluated in so far as they are relevant in resolving the issues that emerge for determination.

16. The parties herein did not file an agreed set of issues. In the closing submissions each side made proposals in that regard. This Court has considered those proposals in light of the pleadings and what may have emerged as being matters left to the Court by parties to determine. The substantial issue to be determined is whether the Plaintiff has repaid the loan as contemplated in the facility letter. The subsequent questions would be whether or not the Plaintiff is then entitled to prayers for injunction sought or whether or not the Bank should succeed in its counterclaim. Emerging also in the course of the proceedings is whether the Plaintiff's negative reference to the credit reference Bureau should be recalled.

17. As I turn to consider the evidence and the law in regard to the issues to be determined, I note that the subject vehicle and trailer are no longer with the agents of the Bank as they were released on the strength of a Court order made herein.

18. It is not in dispute that the contracted monthly repayment was Kshs.191,382.00. As to where the payment of the loan ought to be made, the facility letter provided this special condition,

"You will be required to open an operative account for serving the monthly installments".

The evidence by the Bank was that the special operative account was A/C No.002000010221.

19. Although Nyingi denied the requirement to open this account, his own evidence shows that some of the payments made towards servicing the loan were paid into Account No.0002000010221 (see for example P. Exhibit pages 10 to 22). That said, other payments were directly into account NO.0004400010046 (see for example P Exhibit pages 30 to 33). This latter account is the loan account. The evidence available is that repayments were made through these two accounts.

20. Regardless of where the payment was made, of concern would be whether the Plaintiff kept up with the monthly payment of Kshs.191,382.00 as contracted. On this the picture sought to be painted by Nyingi in the Plaintiff was that of a debtor who kept to his loan repayment schedule. But a somewhat different story emerges from the evidence.

21. On 13th April, 2007 (P Exhibit page 6) the Bank wrote a letter to him demanding a sum of Kshs.5,440,148.00. He would have fallen into arrears hence the demand.

22. There is then the letter of Nyingi dated 14th November 2007 (P Exhibit page 7) in which he makes a plea to clear his arrears. A similar acknowledgement of arrears is to be found in Nyingi's letter of 18th April, 2008 to the Bank (D Exhibit page 8). The letter is reproduced below:-

Date:- 18th April, 2008

Josphart Nyingi Peter

P.O. Box 758

TALA

ABC Bank

P.O. Box 46452,00100

NAIROBI.

Dear Sir/Madam

RE: LOAN ASSET FINANCE A/C 0004400010046

In acknowledgement of my account in arrears, I have deposited Khs.500,000/=. Further it is my humble request that you consider giving me a period of four months to clear the arrears as the rate of Khs.310,000/= every month to enable me service my account promptly.

Meeting was made between me & Karanja, Humari and Mariti.

It will be my honour if you change my submission date from 7th to 15th of every month.

Thanking you in advance.

Faithfully yours

Signed

Josphat Nyingi Matolo

Managing Director

23. There was still default as at 19th December, 2008 (D Exhibit page 10) when Nyingi writes as follows:-

Josphat Nyingi

P.O. Box 758

TALA

19.2.2008

Ginted Manage

ABC Bank

Koinange Branch

P.O Box

NAIROBI

ATT: Jelf Karanja

Dear Sir

Re: LOAN PAYMENT OF KAW 963K

I cordially request you to allow me to pay (400,000/) Four Hundred Thousand only my loan of a Truck and because the instalment is big to me also allow me for the extension of the period which I want you to add me one year so that the installment can come down for me to swallow.

I hope my request will be highly considered by you.

Signed.

24. The contents of that letter are telling because Nyingi confesses of a difficulty in meeting the monthly instalments and makes two requests:-

(a) Reduction of the monthly instalment

(b) Extension of the period of the loan

25. On this evidence the Court does not agree with Nyingi that he paid the loan on schedule as promised in the facility letter. Indeed, confronted in cross-examination with his letters of 14th November 2007 and 8th April, 2008 he admitted that he was "sometimes" late in making payments of the loan.

26. Let me now turn to the specific complaint that the Bank would occasionally not give him full credit for the payments he made. He tabulated that as follows:-

Date paid	Date posted	Amount Paid (Kshs.)	Amount Credited (Kshs.)
14/11/2007	20/11/2007	567,500	547,937
16/01/2008	16/01/2008	250,000	248,376
16/04/2008	18/04/2008	250,000	246,650
17/04/2008	23/04/2008	250,000	249,400
15/09/2008	16/09/2008	200,000	197,179
16/10/2008	17/10/2008	100,000	99,430.50
16/10/2008	22.10.2008	100,000	96,652
22/12/2008	23/12/2008	400,000	399,499
03/02/2009	04/07/2009	150,000	148,941
10/07/2009	14/07/2009	100,000	95,467
14/09/2009	18/09/2009	200,000	197,970

27. The Bank's attempted to explain the differences as follows:-

“f) Arising from the said position, an account No.0002000010221 (PG.18) was opened in the name of the Plaintiff. The Plaintiff did thereafter indeed himself credit the payments that he has listed as having not reflected in his account, to that specific account to facilitate the same being credited to his loan account.

g) The Plaintiff's current account was however on numerous occasions overdrawn, sometimes due to the Plaintiff having issued cheques that were dishonored and as is the norm, once any such funds credited by the Plaintiff cleared, the same would be used to offset the overdrawn amount on the current account with the credit amount being credited to the loan account No.0004400010046 (pg 14-17) on the due date'.

28. Let me consider the evidence. In doing so I note that all the deposits complained of were made into A/C No.0002000010221.

Date posted	Deposit (Kshs.)	Position of current account before deposit (Kshs.)	Sum posted into loan account (Kshs.)
14/11/2007	(217,500+350,00.00)	19,563 (over drawn)	547,937
16/01/2008	250,000	1624	248,370
17/04/2008	250,000	3350	246,650
17/04/2008	250,000	600	249,400
15/9/2009	200,000	2821	197,179
16/10/2008	200,000	2252	197,179
17/10/2008	100,000	570	99,430
17/1/2008	100,000	-	96,652

22/12/2008	400,000	501	399,495
3/2/2009	150,000	1059	148,941
13/7/2009	100,000	4533	95,467
14/09/2009	200,000	2030	197,970

29. The above demonstrates that the explanation given by the Bank is valid. A portion of the deposits, usually small, were taken to cover the overdrawn position of the current account. Only then would the balance be available for transfer into the loan account towards repayment.

30. I now turn to the complaint in respect to the payment for the Tracking system. Although Nyingi had in his pleadings and witness statement, averred that the Bank paid Kshs.1,451,260.00 for it, his oral testimony was a retraction and blaming it on a typing error, he said the amount paid was Kshs.145,200.00. In regard to this payment the Bank produced an invoice for the said amount raised by Track Kenya Limited on 23rd April 2008 (see D Exhibit page 9). Nothing can turn on this.

31. The Plaintiff has not been able to prove his case on a balance of probabilities. Worse still he made no effort to prove loss of business or make a case for damages.

32. As for the Bank's counterclaim, the Bank states that the Plaintiff owed it Kshs.3,002,325.00 as at 13th September 2013. The Plaintiff's Bank statement (D Exhibit page 17) shows a debit entry of that amount as at 13th August 2013. The accuracy of this entry was not challenged by Nyingi. Whilst I see further entries thereafter that suggest that the debt was paid off, Nyingi himself was fairly clear that the last repayment he made was on 17th February 2010 when he made a payment of Kshs.395,000.00. As there no evidence of payment of that outstanding sum, I hold that it is due.

33. I find that the Bank has proved its claim on a balance of probabilities. But whilst I make an order in its favour, recovery thereof must be *induplum* sensitive. Recovery shall be subject to the provision of Section 44A of the Banking Act.

34. The outcome is that:-

34.1 The Plaintiff's case is dismissed with costs.

34.2 Judgment is entered in favour of the Defendant as against the Plaintiff for Kshs.3,002,325 with interest at the contractual rates until payment in full.

34.3. The amount to be recovered from the Plaintiff shall be subject to the provisions of section 44A of the Banking Act. (Chapter 488 Laws of Kenya).

34.4. Costs on the counterclaim to the Defendant.

Dated, delivered and signed in open Court at Nairobi this 19th day of July, 2019.

F. TUIYOTT

JUDGE

Present:-

Awanzo for Mulanya for Defendant

Bwire h/b Mega for Plaintiff

Nixon -Court Assistant