



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 813 OF 2009

EQUITY BANK LIMITED.....PLAINTIFF

VERSUS

DAVID KARIUKI ESTON

T/A CONARCH BUILDING SERVICES.....DEFENDANT

JUDGMENT

1. Two issues determine this suit which is between Equity Bank Limited (**The Bank**) and David Kariuki Eston t/a Conarch Building Services (**The Defendant or Eston**). Did the Bank grant certain financial accommodation and advance financial facilities to Eston? If so, is Eston still indebted to the Bank?

2. The Bank is a financial institution registered under The Banking Act Cap 405 Laws of Kenya. Its case is that vide various letters of offer issued by the Plaintiff and accepted by Eston made in the years 2007 and 2008 ,it advanced to Eston loan, overdraft and other credit facilities. That Eston has defaulted and he owed it Kshs.21,433,223.26 as at 8th October 2009. It claims that amount and interest thereon at 18% per annum.

3. Eston denies the debt and in a defence dated 9th July 2010 and filed on 12th July 2010, he avers that the Bank did not advance the facilities as alleged and if so the same were fully secured by various securities which the Bank can attach and sell off. Eston also asserts that the amount sought from him by the Bank is excessive and exaggerated.

4. At the hearing, one Gerald Gakiri Wanjama, a Relationship Manager with the Bank gave evidence on its behalf. For the defence, Eston and one Geoffrey Mwangi (**DW2**) testified. Geoffrey is an accountant by profession. The evidence of all the witnesses, as is relevant to the issues herein, and submission by Counsel are considered in the next part of this judgment.

5. It is common ground that the parties executed various letters of offer dated 6th June 2007 (**P. Exhibit Pages 1-6**), 22nd August 2007 (**P. Exhibit pages 7-12**), 14th September 2007 (**P. Exhibit Pages 13-18**), 3rd October 2007 (**P. Exhibit pages 19-24**), 18th October 2007 (**P. Exhibit pages 25-30**) and 18th March 2008 (**P Exhibit Pages 31-36**). Although Eston had, in his statement of Defence, denied receiving any advances or facilities from the Bank, he changes the position in his written statement of 2nd February 2015. Save for those facilities in respect to the last letter of offer (**18th March 2000**), Eston conceded to receiving certain advances. His defence however is that he repaid them in full. In respect to the letter of offer of 18th March 2008 he explains that he executed it under an honest but mistaken belief that he still owed the Bank some money.

6. The Court now turns to examine whether Eston indeed repaid the amounts under the various facility letters in full and the circumstances under which the offer in the letter dated 18th March 2008 was made and accepted.

7. The Bank produced the statement to Account No.0240291014558 in the name of Conarch Building Services (**which is acknowledged as a trade name of Eston**) for the period 30th May 2005 to 8th February 2012 (**P. Exhibit Pages 52-80**). The claim of the Bank is at 8th October 2009 but with interest thereon until payment in full. The statement shows that as at 14th September 2009, the current account was overdrawn to Kshs.12,373,409.70. There is then loan Account No. 0180592062427. The statement in respect to this account was also produced (**P. Exhibit Pages 81 and 82**). It shows an outstanding amount of Kshs.9,060,313.56 as at 2nd October 2009.

8. Of significance as well is the demand made by the Bank to Conarch dated 2nd April 2009 (**P Exhibit Page 83**). In this letter the Bank demands the immediate payment of Kshs.8,239,026 on the loan account and Kshs.10,983,612.20 on the overdrawn current account. Eston does not deny receiving this letter. What is telling however, is the letter he wrote on 13th June 2009 (**P. Exhibit Page 85**) which would be a

letter coming about two months after the demand. Although Eston states that the letter was not a response to the letter of 2nd April 2009 and was not an admission of his debt, it is crucial in resolving this matter.

9. The letter of 13th June 2009 reads:

13th June, 2009

The Credit Manager,

Equity Bank Limited,

NAIROBI.

Dear Sir,

RE: ACCOUNT NO. [...] AND LOAN ACCOUNT NO. [...]

We wish to request that the above account which is overdrawn be restructured. The overdrawnment has been due to:

- Slow down in award of new projects.*
- High bills resulting from rents, wages, electricity bills, maintaining staff, Godown/workshop which are in the meantime not very busy.*
- Materials bought/imported but lying in stores awaiting new projects.*

In view of the above, we are requesting that:-

- You Consolidate the loan account and the current account.*
- We be paying Kshs.275,000 every month till such a time that the outstanding loan is fully paid.*
- The account is re-structured/re-instated to enable us transact using the account immediately.*
- Consider waiving interests and accrued penalties on the above.*

We hope our request will get a positive approval soonest and hope the assistance that you have always accorded us will continue.

Yours faithfully,

D. Kariuki

ConArch Building Services

10. In cross-examination Eston was confronted on the circumstances under which he wrote that letter. He stated:-

“I wrote this letter. At the time of writing this letter my current account was overdrawn. As at 30th June 2009 my account reads debit of Kshs.11,653,358.70. I was in negative. I confirm that to be true”.

11. Upto that point it would seem that letter was undoubtedly an admission of debt but Eston shifted gear and went on to state:

“I was under duress when I wrote the letter of 13th June 2009..... I was asked to write a letter to assist an officer explain the state of my account with the understanding that the contents would not bind me”

12. Eston is asserting that he wrote this incriminating letter under duress or misrepresentation. These defences are however not available to him as they were not expressly pleaded as required by Order 2 Rule 10 of the Civil Procedure Rules which reads:-

[Order 2, rule 10.] Particulars of pleading.

10. (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

(3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party —

(a) where he alleges knowledge, particulars of the facts on which he relies; and

(b) where he alleges notice, particulars of the notice.

(4) An order under this rule shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reason.

(5) No order for costs shall be made in favour of a party applying for an order who has not first applied by notice in Form No. 2 of Appendix B which shall be served in duplicate.

(6) Particulars delivered shall be in Form No. 3 of Appendix A which shall be filed by the party delivering it together with the original notice and shall form part of the pleadings.

13. As Eston cannot seek refuge in the defences of duress or misrepresentation, the claim by the Bank is, in the view of this Court, credible.

14. Even the evidence of his witness does not help Eston because although his (DW2) testimony was that the loan facilities had been repaid, he conceded that the current account was left in deficit. This is because the current account was the operational account from which the loan account would be serviced. If no monies were available in the current account to pay the monthly loan repayments as they fell due, then the current account would have to be overdrawn. This then takes us to the letter of offer dated 18th March 2008 and its place in this dispute.

15. In that letter, the Bank offers to Eston a loan facility of Kshs.14,000,000. The stated purpose of the facility is:-

“The proposed facility will be utilized by the borrower to refinance overdrawn position due to bills discounting payments”.

16. When one relates this letter to the overdrawn position of the current account, one quickly notices that as at 2nd April 2008 the account was overdrawn to the extent by Kshs.18,269,442.14 (**P. Exhibit Page 71**). Once the account was credited with the loan amount of Kshs.14,000,000.00, then the overdrawn position was reduced to Kshs.4,269,442.14. It is the loan of Kshs.14,000,000.00 (**see statement P. Exhibit 81 and 82**) and the overdrawn sum of Kshs.4,269,442.14 that was not repaid and therefore ballooned overtime because of interest. Although the loan was to be repaid in 12 monthly instalments of Kshs.1,263,617 per month, the statements show that Eston did not keep up with the repayment.

17. The Bank has proved its case on overwhelming evidence. The Court enters judgment against the Defendant for the Plaintiff at the sum of Kshs.21,473,723.26 with interest at rates contracted by the parties until payment in full. Costs to the Plaintiff.

Dated, delivered and signed in open Court at Nairobi this 2nd day of October 2019.

F. TUIYOTT

JUDGE

Present:

Mwangi holding brief Mutai for Plaintiff

Oduor holding brief for Gakaria for Defendant

Court Assistant: Nixon