



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO.719 OF 1998**

**NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**ELIJAH K. ARAP CHEPKWONY.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff came to Court by way of the Plaint dated **1<sup>st</sup> October 1998** and filed on **13<sup>th</sup> November, 1998** seeking judgment in its favour against the Defendant for:-

a) **Kshs. 8,496,146.05**

b) **Interest on (a) above at 35% p.a as from 1<sup>st</sup> August, 1998 until full payment.**

c) **Costs of this suit and interest thereon.**

2. The sum aforementioned was claimed by the Plaintiff as being the amount due to it from the Defendant in the form of monies lent to the Defendant and for monies paid for and on behalf of the Defendant at his request at the Plaintiff's Kenyatta Avenue Branch in Nairobi. The Plaintiff also claimed interest on the aforesaid sum at the rate of 35% per annum as from **1<sup>st</sup> August, 1998** until payment in full.

3. In response to the claim, the Defendant relied on his Statement of Defence dated **10<sup>th</sup> December 1998** and filed on **11<sup>th</sup> December 1998**. Although the Defendant denied the Plaintiff's claim, he admitted to having an account with the Plaintiff and conceded that the Plaintiff granted him financial accommodation in the sum of **Kshs. 1,300,000**. He further averred that the said facility was fully secured by a legal charge over his immovable property, which the Plaintiff sold to pay itself off; and that despite repeated requests for statements of accounts the Plaintiff had refused to render accounts. He therefore suspected that the property had been grossly undervalued. It was further the Defendant's contention that after the sale of the security, it was inequitable for the Plaintiff to require him to pay any further sums.

4. At the hearing of the case, the Plaintiff called one witness, **John Tarus (PW1)**, who worked for the Plaintiff as a Credit Officer in the Plaintiff Bank at the Kenyatta Avenue Branch from **1996 to 2007**. He adopted his witness statement dated **7<sup>th</sup> February 2012** and filed on **15<sup>th</sup> February 2012**. He also relied on the Plaintiff's Bundle of documents dated **5<sup>th</sup> March 2009** and filed in Court on **10<sup>th</sup> March, 2009**.

5. It was the testimony of **PW1** that the Defendant was once an employee of the Plaintiff, and that he operated a current account at the aforesaid branch of the Bank with effect from **17<sup>th</sup> March 1993**. **PW1** added that on diverse dates between **2<sup>nd</sup> April 1993** and **7<sup>th</sup> May 1993**, the Defendant applied to the Bank for the following facilities:

- [a] An Overdraft Facility of **Kshs. 220,000/=**;
- [b] An enhancement of the Overdraft facilities to **Kshs. 450,000/=**
- [c] A loan facility of **Kshs. 100,000/=**.
- [d] A term loan of **Kshs. 2,000,000/=** and an overdraft facility of **Kshs. 3,000,000/=** to enable him buy a piece of land in Ololunga.

6. It was **PW1's** assertion that the Plaintiff approved the aforesaid applications and the Letters of Offer dated **19<sup>th</sup> April 1993**, **7<sup>th</sup> May 1993**, **10<sup>th</sup> June 1993** and **26<sup>th</sup> January 1994** were issued and signed by the Defendant in acceptance; and that the Defendant offered various properties as securities for the monies advanced him namely:-

- a) **Legal Charge over L.R No. 209/9621 securing Kshs. 500,000/=.**
- b) **Further Charge over L.R No. 209/9621 securing Kshs. 400,000/=**
- c) **Further Charge over L.R No. 209/9621 raising the security from Kshs. 400,000/= to Kshs. 900,000/=.**
- d) **Fixed deposit of Kshs. 2,000,000/= to be held under lien to the Bank.**

7. **PW1** further averred that the said securities were duly registered and the loans and facilities disbursed to the Defendant; whereupon the Defendant utilized the facilities and issued several cheques totaling **Kshs. 5,885,471.50/=**. However, the Defendant defaulted in repaying the loan, thus prompting the Plaintiff to demand the outstanding amounts. **PW1** further testified that the Defendant acknowledged the outstanding debt and made several proposals towards clearing the loan, but failed to follow through on the same. It was further the evidence of the Plaintiff that, on the Defendant's request, the Bank restructured the loans to enable the Defendant settle the same but still the Defendant failed to settle the debt; whereupon the Bank instructed its lawyers to proceed towards realization of the securities.

8. According to **PW1**, the Plaintiff made several attempts to realize its security under the charge in vain as the property had been inhabited by squatters. It was therefore the evidence of **PW1** that the Defendant's allegation that the property had been sold was not true. **PW1** added that at one point the Plaintiff called upon **Savings & Loan Kenya limited** to retire the fixed deposit which was the subject of lien in its favour and the said company paid the Bank **Kshs. 1,598,111.05** which it credited in the Defendant's account to reduce his indebtedness.

9. It was thus **PW1's** testimony that the Defendant was truly and justly indebted to the Plaintiff in the sum of **Kshs. 8,496,146.05** and that since the beginning of the recovery process, the Defendant had made only two deposits of **Kshs. 100,000** and **Kshs. 135,220.30** toward reducing the debt. **PW1** accordingly urged the Court to enter judgment in the Plaintiff's favour for the sum claimed of **Kshs. 8,496,146.05** together with interest and costs.

10. The Defendant opted not to call any witnesses and at the close of the hearing, Learned Counsel filed their respective submissions herein. The Plaintiff filed its written submissions dated **1<sup>st</sup> December 2015** on even date; while the Defendant filed his written submissions dated **4<sup>th</sup> March 2016** on **6<sup>th</sup> June 2016**. The Plaintiff further filed a reply to the Defendant's written submissions on **14<sup>th</sup> June 2016**.

11. The court has gone through the parties' pleadings herein, the Plaintiff's Witness Statement and the bundles of documents attached thereto, the *viva voce* evidence presented herein as well as the written submissions filed by Learned Counsel. I note that the parties filed a joint Statement of Issues dated **24<sup>th</sup> March, 2003** on **25<sup>th</sup> March, 2003**. Having considered the same in light of the evidence adduced, the Court has narrowed them down to one main issue for determination as follows:-

**Whether the Plaintiff is entitled to Judgment against the Defendant for Kshs.8,496,146.05 together with interest thereon at the rate of 35% p.a from 1<sup>st</sup> August 1998 until payment in full.**

12. It is not in dispute that the Defendant was granted Overdraft Facilities that were later converted into term loans. Thus, the Plaintiff lent to the Defendant at his request overdraft facilities to the tune of **Kshs. 3 million** and short term loan facilities to the tune of **Kshs. 2.3 million**. There are duly signed Letters of Offer to this effect setting out the terms of repayment, the interest rates and the securities; which documents were exhibited by **PW1** as part of the Plaintiff's bundle of documents. It is evident from the evidence adduced herein that the Defendant was unable to repay the loan in accordance with the terms set out in the aforementioned Letters of Offer despite several demands having been made by the Plaintiff, save for the payment of a few sporadic installments.

13. It is therefore manifest that the Defendant was in default when the Plaintiff instituted this suit. It is noteworthy too that the Defendant did admit his default and that it was for this reason that he requested the Plaintiff to restructure the outstanding Overdraft Facilities into a term loan for ease of repayment. At **page 63 of the Plaintiff's Bundle of Documents** is a letter from the Defendant dated **6 August 1996** to the Plaintiff's Advocates to this effect. The Plaintiff exhibited a Letter of Offer dated **6 September 1996** agreeing to the Plaintiff's proposal to restructure the Banking Facilities on terms. Needless to say that the Defendant failed to abide by the terms of that Letter of Offer.

14. The basic defence put forward by the Defendant in the Defence dated **10 December 1998** is that the Plaintiff had sold the charged property and paid itself; and that the reason for any shortfall could only be that the charged property may have been sold at an undervalue. However, this was expressly denied by the Plaintiff. **PW1's** evidence was that attempts to auction the charged property were unsuccessful due to the fact that the property had been invaded by squatters. It is noteworthy that the Defendant did not testify or call any witnesses and therefore there was no evidence in rebuttal of **PW1's** evidence or to substantiate the Defendant's allegations; or to even prove that the property had been sold or that the debt had been repaid in full. In fact, the Defendant seems to have abandoned these allegations in its submissions and instead picked the issue of accounts and questioned how the sum claimed was arrived at. He also argued that it would contravene the **Banking Act** for the Court to simply accept the principal sum in the Plaintiff without any specification of the dates in respect of which each loan became non-performing for the purposes of working out the interest rate cut off date.

15. It is noteworthy however that, in the various Letters of Offer, copies of which have been exhibited at pages 8 to 15 of the Plaintiff's Bundle of Documents, it is evident that the facilities were offered on express terms, including stipulations as to the specific rates of interests, ranging from 21% to 30%; and that the Bank reserved the right to give notice of variation as and when such variation was necessary. Furthermore, the Legal Charge dated **21<sup>st</sup> April 1993** provided at Clause 2(a) that the facilities were to be repaid:

**"...together with commission, bank charges, legal and other costs, charges and expenses together with interest at a rate (not exceeding that allowed by law) decided by the Lender and calculated on daily balances and debited monthly by way of compound interest and the Lender need not advise the Borrower of any change in the rate of interest charged..."**

The evidence adduced herein by the Plaintiff is that the interest rate variations were sanctioned by the Regulator. It is instructive however that all along, the Defendant did not question the Bank's right to vary the applicable interest rate from time to time during the various instances that the Bank demanded for payment.

16. In any case, the Defendant did not plead the issue of interest rates in its statement of Defence as required of him under **Order 2 Rule 4(1)(b)** of the **Civil Procedure Rules**. He was therefore estopped from raising the same in the submissions. It is trite law that parties are bound by their pleadings. In this connection, the Court of appeal, in the case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR** cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC SC 91/2002** where **Pius Adereji, JSC** stated as follows:

**“... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”**

17. In view of the foregoing, it is the Court’s finding that the Plaintiff has proved its case on a balance of probability that it is entitled to Judgment for **Kshs. 8,496,146.05** together with interest and costs. However, the rate of interest thereon should be, and is hereby allowed, at 28% per annum, this being the rate at which the restructured loan was offered vide the letter dated **6<sup>th</sup> September 1996**. The interest is payable from the aforesaid date of 6<sup>th</sup> September 1996 until payment in full.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>th</sup> DAY OF FEBRUARY, 2017**

**OLGA SEWE**

**JUDGE**