



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 425 OF 2005**

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

**VERSUS**

**ISAAC NJOROGE *trading as***

**GOODHOPE SERVICE STATION .....DEFENDANT**

**JUDGMENT OF THE COURT**

**INTRODUCTION**

1. The Plaintiff commenced these proceedings vide a Plaint dated 29<sup>th</sup> July, 2005 and later amended on 25<sup>th</sup> January, 2007. The plaintiff claims against the defendant Shs. 4,513,790.10 plus interests therein at the rate of 30% per annum on a monthly rate calculated on daily balances, together with costs of the suit.
2. The defendant is alleged to have been a customer of the plaintiff and maintained accounts at the plaintiff's Kenyatta Avenue Branch, Nairobi. In the course of the aforesaid relationship, it is alleged by the plaintiff that the Defendant successfully applied to the plaintiff for certain banking facilities including loans and overdrafts which were secured by the defendant's title over L.R.NO. 1/380 Kilimani Estate, Nairobi. In the course of time the defendant fell into arrears, and the said security was sold by the bank through a Private treaty, and Shs. 15,000,000/= was realized. This money was applied to the debt as at 31<sup>st</sup> January, 2005, leaving outstanding balance of Kshs. 4,513,790.10 which the plaintiff now seeks to recover with interests in this suit.
3. The Defendant controverted the claims made in the Plaint through a defence filed on 30<sup>th</sup> November, 2006 and amended on 30<sup>th</sup> January, 2008. In his defence, the defendant denies that he ever represented to the plaintiff that he was a sole proprietor, trading as Good Hope Service Station, nor opened and maintained an account at the plaintiff's Kenyatta Avenue Branch in the capacity stated in the Plaint and put the Plaintiff to the strict proof. The defendant states further that the plaintiff was at all material times aware that Good Hope Service Station was owned by Kenya Star Enterprises Limited. The defendant denies that any contract existed between him and the plaintiff or that he offered his title L.R. No. 1/380 Kilimani Nairobi as security for any facilities granted but rather that he sold the said property by private treaty to settle outstanding amounts on terms agreed with the plaintiff.
4. Parties in compliance with case management filed their Bundle of documents. The plaintiff relied on its List of Documents and Supplementary List of Documents filed herein on 15<sup>th</sup> September, 2007, while the defendant filed his bundle of document and witness statement on 26<sup>th</sup> March, 2014.

## THE PLAINTIFF'S CASE

5. The Plaintiff's sole witness was **John Kibet Tarus** who adopted his witness statement and the plaintiff's Lists of documents. The witness testified that he knew the defendant who had an account with the plaintiff opened on 8<sup>th</sup> December, 1993 under the name Good Hope Service Station. The defendant was given certain financial accommodation which were secured by a charge dated 30<sup>th</sup> August, 1989. The defendant was initially advanced Shs. 1,600,000 as an overdraft. He defaulted in repayment, leading to the renewal of the overdraft over and over again. The witness referred to the plaintiff's Bundle of documents at page 113 where there is a bank statement with credit of Shs. 3.0 and 2.0 million. At page 111 is a credit of Shs. 10 million. Hence a total credit of Shs. 15 million which was credited when the defendant's security was sold, leaving a balance of Shs. 3,962,305.20/= which the plaintiff claims.

6. On cross-examination the witness confirmed that he was not at the time of the transaction employed by the plaintiff but that his evidence is based on the record. He explained that the defendant traded as Good Hope Service Station, and that Kenya Star Enterprise Limited was not known to the plaintiff. The loan was advanced to the defendant trading as Good Hope Service Station. That is why when he defaulted in repaying the loan he gave authority to the plaintiff to sell the security by private treaty. The witness denied that the said sale price of Shs. 15 million was in full and final satisfaction of the debt. The witness referred the court to page 1-3 of the Plaintiff's 1<sup>st</sup> Bundle which are bank signing forms. The defendant in those documents confirms that he is a sole proprietor. The forms filled are for sole proprietorship.

## THE DEFENDANT'S CASE

7. The defendant was the sole witness in his case. He adopted his witness statement and Bundle of document as his evidence. On cross-examination, the defendant stated that Good Hope Service Station was registered by Kenya Star Enterprise Limited. The said service station operated the accounts with the plaintiff. He was not involved in the ownership of the said service station. He merely introduced the Good Hope Services Station to the bank. Any references to him owning the Good Hope Service Station were imposed on him by the bank officials at the time of opening the account.

## ANALYSIS AND DISPOSITION

8. I have carefully considered the evidence of the parties and the submissions filed herein. It is clear from the evidence that the only issue for determination is whether or not the defendant was advanced the money in his name trading as Good Hope Service Station, or whether or not the loan was advanced to the Kenya Star Enterprises Limited. The other issue is whether or not the entire loan was repaid when the suit property was sold at Shs. 15 million and whether the doctrine of **In Duplum Rule** applies. Finally there is the issue of applicable interest. I will address all these three issues hereunder.

9. It is not in dispute that at all material times prior to this suit the Defendant was a long time customer of the Plaintiff, who operated several bank accounts with it, in his own names and in his personal capacity and while trading under the umbrella of Good Hope Service Station, and his company Kenya Star Enterprises Limited. Of importance, the Defendant opened a personal bank account NO. 021 027 978 with the Plaintiff on 8<sup>th</sup> November, 1983 when he unequivocally held out himself as carrying out business as a sole proprietor in the name and style of "Good Hope Service Station". In the undertaking given on even date, the Defendant personally undertook to fully indemnify the Plaintiff of all liabilities incurred by Good Hope Service Station while operating the said account mandate from time to time. The numbering designation of the account changed to 021 030 871 and 01020 107 245 00 from time to time following automation and upgrade of the Plaintiff's bank facilities.

10. On several instances, the Plaintiff, at the request of the Defendant in writing, granted several overdraft facilities from time to time aggregating to Ksh. 4,354,389.50. The granted overdraft facilities were short term credit facilities repayable within a period not exceeding one year. Some were granted for one month, six months and a year. The plaintiff expressly reserved its right to apply interest on the overdraft facilities, amongst other usual bank charges. There is no dispute on the lending, or plaintiff's right to apply interest on rates reserved by it, or on the outstanding level of Defendant's indebtedness to the

Plaintiff.

11. The defendant in his several letters applying for various overdraft facilities, and in the letter of offer dated 12<sup>th</sup> August, 1996, provided Land Reference No. 1/380, Kilimani (*hereafter called "the Charged Property"*) as security for the overdraft facilities granted to his business through Good Hope Service Station, and through his company Kenya Star Enterprises Limited. The Plaintiff held legal charges over the property registered way back in 1989 and 1992.

12. The defendant did not abide by the express terms of the lending. The short term overdraft facilities were not cleared on due dates and the account was overdrawn. The plaintiff issued several demand for the defendant to rectify default, and operate his bank account in a regular manner. In cross-examination the defendant admitted default in the following terms:-

***"I did not repay the debt in 6 months but some money was paid. But the debt was not cleared".***

The defendant made several proposals wherein he expressly acknowledged the outstanding debt and made promises to secure full repayment, but failed to honour them.

13. The charged property was put up for auction, which was postponed severally, to allow the defendant to redeem the property. Initially, the defendant resisted recovery of the debt through sale of the charged property by instituting an injunction suit in Milimani HCCC NO. 2977 of 1997. On 27<sup>th</sup> January, 2000, this Court (Retired Justice Kuloba) dismissed the injunction suit after a detailed analysis of the defendant's defence and materially similar evidence availed to this court, and observed that:

***"The facts clearly are, that irrespective of how the indebtedness of the plaintiff (read defendant) to the defendant (read plaintiff) commenced, it is acknowledged in writing by the plaintiff. Whether you call the Plaintiff by his real personal name, of Isaac Njoroge, or by his business name of Good Hope Service Station, it is the plaintiff who sought and obtained from the defendant bank the loan or overdraft facilities and the monies. It is the Plaintiff who promised to repay those sums. When things did not get on well, it is the plaintiff personally and by his lawyers who begged and pleaded with the bank to give him indulgence and more time to enable him find funds with which to repay. It is the plaintiff who had begged the bank to continue holding his title documents relating to his land as the securities for the monies advanced after the plaintiff did not intimate to the defendant that formality was of essence to the lending transaction".***

14. Following successful negotiations with the Plaintiff, the Defendant was at liberty to look for a potential buyer in redemption of the charged property at market price. During these negotiations, the defendant willfully concluded several separate binding agreements with the Plaintiffs, wherein he acknowledged the outstanding debt and undertook to meet any resulting shortfall following the sale. The Defendant subsequently concluded private treaty sale with Hon. Sudi and a purchase price of Kshs. 15 million was realized.

15. The sale proceeds of Kshs. 15 million were applied in credit to the Defendant's account resulting to a substantial shortfall of Kshs. 3,962,305.20. It is this sum on application of interest, that has escalated to Kshs. 4,513,790.10 for which the plaintiff seeks judgment against the defendant, with interest thereon at the rate of 30% on monthly rates calculated on daily balances as from 31<sup>st</sup> January, 2015 until payment in full.

16. In his evidence in chief, at cross examination, the defendant made the following admissions:-

***"I undertook to sell the suit property and to repay the debt... I confirm that the property was sold at Kshs. 15 million. It was applied to the debt but it did not clear the entire debt. However the bank had promised that they would accept Kshs. 15 million in full satisfaction of the debt, but they later changed their mind. Pg 55 is a letter of demand from National Bank of Kenya Limited for Kshs. 4,513,790.10. This was the balance after the sale proceeds of Kshs. 15 million was***

***paid. However, it was supposed to be written off by the National Bank. I talked to the bank manager who verbally promised me that the debt would be written off”.***

17. I find that the defendant’s defence that the loan was not advanced to him personally is simply untenable. The defendant was part and parcel, and in fact the only recipient of the loan. The allegation that the Shs. 15 million was to be paid in full and final satisfaction is also not proved. In the letter dated 8<sup>th</sup> January, 2002 written by the defendant to the plaintiff, the defendant explains how the purchase price of the Shs. 15 million was to be applied. It is not stated that it was in full and final satisfaction of the accounts. It is evident that the said Shs. 15 million only paid part of the debt. There was a balance which was demanded by the plaintiff, and which was not paid leading to this suit. Now, the defendant pleads the doctrine in the **In Duplum Rule**. The simple answer to this submission is the rule under **Section 44(a)** of the **Banking Act** came into force in May, 2007 and did not affect the case before the court. That submission is therefore not applicable in this case. This is so because **Section 44 A(6)** states that;

***“This Section shall apply with respect to loans made before this Section comes into operation, including loans that have become non performing before this Section comes into operation:***

***Provided that where loans became non performing before this Section comes into operation, the maximum amount referred to in subsection (1) shall be the following-***

***(a) The principal and interest owing on the day this Section comes into operation”.***

This means that since the Plaintiff filed his case in 2005 the sum which was due then is still recoverable with interests upto the date **Section 44A** come into operation, that is in 2007. So, clearly the rule in the **In Duplum Rule** favours principal sums and interests accruing on a non-performing loan after the date **Section 44A** came into force. In this case, the plaintiff’s claim is not affected by the said **Section 44 (A)** of the **Banking Act**.

18. The last issue is the claim of interest at 30% per annum. It is trite law that applicability of particular interest rate is discretionary to the court. The court exercising this discretion judiciously and in the interest of justice can order any particular interest or rate of interest to be payable or not to be payable. In the matter at hand, the plaintiff was advanced Shs. 1,600,000= which was renewed and or restructured. He paid part of it and then got stuck. Subsequently his property was sold at Shs. 15,000,000/= and all this went towards the repayment of the said loan and interests. There was nothing stopping the plaintiff bank from writing off the balance once the said Shs. 15 million was paid. The bank did not do that, and this court is not a court enforcing moral conduct, so I will not say more. What I say further, however is that to allow further interests on the amount now claimed by the plaintiff would be simply unjust. This is a court of justice. While I am satisfied that the plaintiff has proved its case on a balance of probability and that it is entitled to Shs. 4,513,790.10, the plaintiff will not be entitled to any further interest on that money, except interest at court rate from the date of judgment.

19. In the upshot, judgment is hereby entered for the plaintiff against the defendant as follows;

*c) Shs. 4,513,790.10*

*b) Interest therein at court rates from the date of this judgment until payment in full.*

*c) Costs for the suit shall be for the plaintiff.*

**That** is the judgment of the court.

**E.K.O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JULY 2016**

**LADY JUSTICE G. NZIOKA**

**JUDGE**

**Present**