



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HIGH COURT CIVIL CASE No. 1619 OF 1994

POSTBANK CREDIT LIMITED (IN LIQUIDATION).....PLAINTIFF

VERSUS

LAB CONSTRUCTION LIMITED.....DEFENDANT

JUDGMENT

1. This is a suit for the recovery of a loan advanced. This is an extremely old matter. When the Order of Mabeya J. certified compliance with **Order 11**, the suit was 8 years old (30th July 2012). It was to be fixed for hearing on 10th and 11th December 2012. It was eventually listed for Hearing before this Court on 11th November 2014. On that date the Defendant could not proceed as its witness was indisposed with food poisoning. The matter was re-listed to be heard on 3rd December 2014 when it did proceed.

2. The suit was filed on 3rd May 1994. It was brought by Post Bank Ltd. The Plaintiff is now in liquidation and these proceedings are being pursued by the Deposit Protection Board Fund under the aegis of the Central Bank of Kenya. The Plaintiff's first witness Jane Wangari Kamita gave evidence that the Board is the liquidator of the Post Bank Fund which became insolvent in 1993. She said she was, in 2012, the Liquidation Agent. The Plaintiff had filed a witness statement of Ms Kamita dated 12th June 2012. It was adopted as her Evidence-in-Chief.

3. The Plaintiff's claim is for the recovery of the sum of Kshs.7,410,505.70 together with interest at 30% per annum compounded and the costs of the suit. The Plaintiff was filed on 3rd May 1994 and is dated 28th April 1994. At paragraph 3 it sets out the claim as follows:

“The Plaintiff's claim against the Defendant is for the recovery of Kshs.7,410,565.70 together with compound interest thereon at the rate of 30% as at 31st December 1993 until the date of payment thereon in full, being the amount due and owing by the Defendant to the Plaintiff in respect of a financial facility that was granted to the Defendant by the Plaintiff at the Defendant's request and instance, full particulars whereof are known to the Defendant.”

4. The Defendant is a limited liability company incorporated under the Laws of Kenya and carries on business in Nairobi (at the time of the Plaintiff) it appears to be a construction company. The Defendant has filed a Defence, set off and counterclaim all pleaded together. In relation to a Defence at paragraph 5 it is pleaded that;

“5. The Defendant admits owing the Plaintiff Kshs.7,410,565.70 but denies that the Plaintiff is

entitled to compound interest thereon at a rate of 30% per annum as at 31st December 1993 or at all”.

5. The Defendant has a counterclaim which is introduced at paragraph 3 of the Defence as follows:

“3. That by a Contract between the Plaintiff and the Defendant in 1991 the Defendant did construction to completion and maintenance for six months thereafter of the works at the Plaintiffs branch at Kisumu at a total agreed sum of Kshs.18,786,121.20 and of which the Plaintiff has paid Kshs.9,371,338.30”.

The Plaintiff’s Reply states that the full sum was paid.

6. The Defendant has also pleaded a set-off. At paragraph 4 of the Defence the Defendant avers that;

“4. The Defendant also held a fixed Deposit of Kshs.1,000,000 with the interest earning at fixed rate and has earned interest that the Plaintiff has failed to disclose or account to the Defendant and in breach of the contractual term on which the account was opened.

In its Reply and Defence to the counterclaim the Plaintiff admits the fact and quantum of the fixed deposit, denies breach and avers that it is ready willing and able to provide the Defendant with a complete account of the sums. At Paragraph 7 of the Reply the Plaintiff also states *“That the fixed deposit placed with it by the Defendant should be set off against the amount due and owing from the Defendant as claimed in the Plaintiff”.*

7. At Paragraph 7 of the Defence the Defendant pleads for the alleged outstanding contractual sum to be set of against the sums due to the Plaintiff as follows.

Claim: (7,410,565.70)

Loss: 9,371,338.30

2,960,772.60 together with interest.

Aside from the fact the sum claimed is mathematically incorrect (as presented), the Plaintiff denies that liability. In fact the mathematically correct sum would be 1,960,772.60 that is Kshs.1,000,000 less than claimed. It may be the pleading conflated the deposit with the alleged outstanding contractual sum.

8. The Issues that arise for resolution are:

- (1) Is 30% compound interest the correct rate of interest applicable?
- (2) Does the Plaintiff owe the Defendant the contractual sums as claimed or at all?
- (3) Who should pay the costs?

As to the admissions, the loan and its quantum as pleaded is admitted. The building contract and the work done is admitted, and the deposit account and its treatment as a set off to the claim is also admitted.

9. The Parties filed a Joint Statement of Issues (filed on 13th June 2012 that the issues dated 17th November 1997 but not filed until 9th February 1998. It lists the issues as:

1. Did the Plaintiff pay to the Defendant the amount due under the building contract entered into between the Plaintiff and the Defendant in 1991?

2. Does the Plaintiff owe the Defendant the sum of Kshs.9,371,338.30 as claimed in the Plaintiff (sic).

3. *What rate of interest is the Defendant entitled to charge on the sum of Kshs.7,410,565.75 (sic) being the unpaid balance in the Plaintiff's account with the Defendant.*

4. *Has the Plaintiff acted in breach of any of the contractual terms upon which the Defendant's account with the Plaintiff was opened?.*

5. *Is the Defendant entitled to set off of the sum of Kshs.7,410,565.75 against the Plaintiff's claim as set out in the Plaint (sic).*

6. *Is the Defendant entitled to the reliefs claimed in the Defendant's Defence, set-off and counter-claim.*

7. *Who is liable to pay costs?*

10. However, the Plaintiff's only witness states in her Witness Statement (filed on 13th June 2012) said that the issues for determination is whether the Plaintiff is entitled to compound interest at the rate of 30% on the sums claimed and whether the Defendant has a right to set-off and counterclaim”.

11. In relation to the contractual sum for building works, the Witness Statement sets out and explains that the sum of Kshs.9,371,388.80 was paid to various sub-contractors on dates not specified and the sum of Kshs.9,414,782.40 was paid directly to the contractor (the Defendant) that evidence is at odds with the Plaintiff's pleaded case which is that;

“the entire contract sum of Kshs.18,786,121.20 was paid to the Defendant“ and that;

“the Defendant acknowledged receipt of money and is now estopped by its conduct from alleging that there is still any money due”.

However, Document 9 of the Bundle shows that Kshs.9,414,782.20 was paid and Kshs.9,371,338.30 was still outstanding.

12. The Plaintiff's Bundle of Documents includes a Letter from Messrs Waweru & Associates Architects to the Plaintiff dated 3rd May 1993 which encloses a Final Certificate for Payment and a “Records of Payment” dated 7th March 1993. Those payments are said to amount to Kshs.9,371,338.80. As at the date of the Certificate the sum of Kshs.2,690,127.40 was still outstanding. The Architects received no response to that letter, see Document 7, the Plaintiff's List dated 12th October 1993. The Plaintiff's documents do not include any admission from the Defendant of receiving the sum of Kshs.9,371,338.80.

13. In fact, at Document No. 9 of the Plaintiff's List of Documents is a further letter from the Defendant's then Advocates which states:

"Out of the sum of Kshs.18,786,121.20, you made five payments totalling Kshs.9,414,782.90 leaving a balance owing to our client of Kshs.9,371,338.30. Taking the above sum of Kshs.9,371,338.30 and adding the sum of Kshs.1,000,000.00 held on deposit, would you be kind enough to set-off your principal and interest to date and let us have a cheque for the balance payable to our client."

14. Therefore the only evidence before the Court of direct payments to the sub-contractors is the document dated 7th March 1993 and attached to the Architect's Final Certificate. It is noteworthy that the file and therefore the record shows that there was a Summons issued for the attendance of that architect. In fact at the Hearing the Architect did not attend. It is not clear from the record whether he attended on some other date. The document listing the payments is the Plaintiff's own document prepared by its own Architect stating that the sub-contractors have been paid. There is no corroboration from the sub-contractors themselves acknowledging or confirming receipt of those alleged payments. Surprisingly, those payments were not referred to in response the Defendant's Letter of Demand dated 5th January 1994

and 19th January 1994. In addition on 12th October 1993 the Architect identified that there was payment to the sub-contractors (Athi River Mining) that was still outstanding.

15. The Defendant filed a List and Bundle of Documents on 21st June 2012. The Defendant tendered only one witness, Mr Lalji Karsan Rabadia who has also filed a witness statement on the same day. At paragraph 13 Mr Rabadia says that he has no knowledge of the sub-contractors being paid directly. He says, if they were so paid then that would be a breach of the Lending Agreement. At paragraph 14 it is said that there was no privity between the Plaintiff and the sub-contractors and therefore the Plaintiff had no right to pay the sub-contractors directly. The Defendant's witness also points to the fact that the Defence now raised to the Counterclaim was not stated in response to its Advocate's Letter.

16. It is also important to consider how the debt arose. The Plaintiff alleges that there was a loan or sums advanced to the Defendant. There is no documentary evidence produced by the Plaintiff that sets out the terms and conditions of the loan. The Defendant admits the indebtedness but not the quantum (see Defence and Witness Statement). The terms and interest rates alleged are therefore bare assertions.

17. The Defendant has produced firstly, an extract from its Board Minutes dated 11th June 1991 authorising the Plaintiff to make an Advance of Kshs.17,250,000. Secondly, there is the Letter of 13th June 1991 addressed to the Manager of the Plaintiff. It states clearly that repayments will be made from the proceeds of the contract for works on the Bank's Kisumu Branch. Authority is given for the Bank to remit sums as per that agreement. The Defendant's third document is the facility letter dated 18th June 1991. That letter provided for and offered the Defendant a bridging loan. The Amount was Kshs.10,000,000 (ten million Shillings). The period was 4 months. Interest was to be paid at a rate of 17% per annum on monthly rests. Penalty interest was to be changeable at 2% above that rate.

18. Particularly relevant to these proceedings are the repayment terms. The first page of the offer sets out repayment thus:

"The debt will be gradually expunged from the proceeds of payment under Architectural certificates issued in respect of construction of the Bank's Kisumu Branch premises awarded under tender".

On the second page (page 3 of Letter) security is defined as follows:

"we shall hold the following security:

(a) A letter of set-off of funds of the Company in respect of Architectural certificates issued.

(b) The personal guarantees of the Directors of Lab Construction Company Limited.

It also provides for set-off thus:

"The Bank Reserves the right to set-off all or any account of the borrower and to consolidate all securities held on any account to be made inter available for liabilities which may be guaranteed by the borrower".

19. The offer was accepted albeit outside the 30 day period set out. As the advance was made it is fair to assume there was an extension to that deadline.

20. The construction under the contract was completed and the site handed over on 20th February 1992. Further works were carried out during the defects period. On 4th May 1993 the total certified sum due and payable to the contractor was Kshs.18,786,121.20. Both Parties have included in their Bundles letters from the Architect informing the Contractor to claim the sum stated. The Architect is the client's agent (in this case the Bank). Nowhere in the correspondence that is contemporaneous to the works and the certificates is there any mention of payments being made to the sub-contractors directly, either during the

works or after. The letter of 12th October 1993 is the first mention and it comes a significant period later. The Architect has not attached to his letter, nor has the Plaintiff exhibited, any statements or demands from which figures were used for making payments. Nor are there any receipts acknowledging payment. The Architects letter is a self serving document and therefore of questionable evidential value. In 1993 the Plaintiff became insolvent. The Letter dated 12th October 1993 is, in fact, addressed to the Receiver.

21. The defects period ended on 20th August 1992. The Final Certificate is dated 4th May 1993 and the Architect's letter is dated 12th October 1993. That is more than 12 months after the works were finally completed under the contract. There is no explanation why at that late stage it was decided not to pay according to the contract or facility letter but to adopt a different method, to the detriment of the contractor. That amounts to a variation of the Agreement between the Parties. Again there is no evidence that there was any consensus or consideration relating to that variation in the contract. The Plaintiff's Witness relies on the fact that the Defendant did not respond to the Architect's Letter disputing those payments. The Plaintiff produces an authority; Halsbury's Law 4th Edition Vol. 4 (2) paragraph 346 states there is no privity between the Client and the sub-contractors. A position also argued by the Defendant.

22. Moving on to the rate of interest to be applied. The Defendant pleads 17% is the applicable rate but then surprisingly, argues for 30% in its written submissions.

23. As stated, the Court heard oral evidence from two witnesses. The Plaintiff's Witness JANE WANGARI KAMITA told the Court that she worked at the Deposit Protection Board Fund which was set up by the Central Bank of Kenya with the Kenya Deposit Insurance Corporation. The connection between the Plaintiff and the Board is that the Board has been appointed to liquidate the Plaintiff which became insolvent in 1993. In 2012 she was the liquidator agent. The Witness said she had the account records but the same not well kept so there are limitations. She adopted her statement dated 12th June 2012 as her evidence in Chief and confirmed the figures claimed. She explained that when an institution collapses, the Central Bank appoints the Deposit Protection Fund as liquidator of the failed institution and the management of the failed institution provides files to the Deposit Protection Fund. She said that even though the Offer Letter does not quote an interest rate of 30% the Bank reserves the right to charge 30%. At page 6 it reads Bank reserves the right to vary notice. She could not tell the Court if a notice to vary had been served.

24. The Defence Witness was, Lalji Karsan Rabadia. He told the Court he was a businessman. He was one of the directors of the Defendant company. He signed the witness statement on 21st June 201 He was therefore aware of the facts. He adopted his Witness Statement and the Defendant's Bundle of Documents as his Evidence in Chief. Under cross-examination he said that the Company was not wound up but in 1994 the Company stopped operating He was the person in charge. He confirmed that the borrowing facility granted was for Kshs.10,000,000/= (ten million shillings). When asked if he had engaged the sub-contractors, he said he had not, they had been nominated.

Decision

25. Moving onto the prayers in the Plaintiff and the List of Issues. The Court will depart from the list of Issues as filed because that document contains such errors that make it illogical. For example, Issue 2 is; "Does the Plaintiff owe the Defendant the sum of Kshs 9,371,338..... as claimed in the Plaintiff". That sum is claimed in the Counterclaim. The same mistake appears at Issue 5.

26. The Plaintiff prays for Judgment in the sum of Kshs7,410,565.70. The Defendant has admitted that indebtedness in the Defence at Paragraph 5. Later statements attempt to deny that but the admission as to indebtedness is clear and unequivocal even though the quantum may not be. That prayer is allowed and granted.

27. In relation to the Counterclaim, the Defendant claims it has not been paid the balance on the Final Certificate. That amounts to:

Final Certificate

Kshs 18,786,121.20

Payments made and rec'd Kshs. 9,414,782.90

9,371,388.30

That counterclaim is disputed, but as stated above, there is not cogent or compelling evidence before the Court showing that it was paid to the Defendant, or to the Defendant as alleged or provided in the Contract. Any side payments made to the sub-contractors, if made, were outwith the Contract and the facility and therefore amount to a private arrangement. There is no evidence of any receipts for payment. In the circumstances, the Counterclaim succeeds. That amount was owing and due when the demand was made.

28. As set-off the Defendant also claims it had a deposit of Kshs1,000,000/=. That deposit although not directly admitted in the Reply and Defence to the Counterclaim it is admitted by the Plaintiff's witness. Therefore the set-off claimed in the Counterclaim is allowed.

29. Both Parties have asserted and denied that a rate of interest at 30% should be applied to the sums due to it. The Plaintiff also claims that it should be compounded. The Defendant approbates and reprobates. The only evidence before the Court is the rate of 17% on the facility. In the absence of agreement, the Court has discretion. In exercising that discretion, the Court can consider, inter alia, whether that rate claimed is excessive or punitive in the circumstances. There is no evidence adduced as to the prevailing rate during 1993/94. In the circumstances, the claim to interest as pleaded and argued in the submissions is dismissed.

30. Therefore the Plaintiff is ordered to pay to the Defendant the sum of Kshs.2,960,883.30 made up as follows:

| |
|--------------------------|
| 9,371,388.30 |
| 1,000,000.00 |
| Less <u>7,410,505.00</u> |
| 2,960,883.30 |

31. In addition the Plaintiff shall pay to the Defendant any interest due on the sum of Kshs.1,000,000/= between the dates of the deposit prior to 1993 and the admission on 21st June 1994 at the contractual rate and thereafter at judgment rate. The claim for interest at 30% pa is dismissed. The Plaintiff shall also provide to the Defendant an account of how those sums are calculated.

32. As to costs, the Plaintiff to pay 50% of the Defendants costs. That Order is justified taking into account the delay and the preparation of this matter for trial.

Dated: 15th July 2016

Order accordingly,

Farah S. M. Amin

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS DAY 15TH DAY OF JULY 2016

In the Presence of:

Mr Otieno C/Clerk

Mr Okoth For Plaintiff

Mr Otieno HB

for Mr Onyango For Defendant