



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 117 OF 2008

THE CO-OPERATIVE BANK OF KENYA. APPELLANT

VERSUS

LUCAS KIBEGWA OKALA. RESPONDENT

(Being an appeal from the judgment and decree of the CMCC at Milimani Commercial Courts, Nairobi by Hon. Mr. Maxwell Kiema in CMCC 12102 of 2003 on 11th February, 2008.)

J U D G M E N T

The Plaintiff who is the Appellant in this appeal filed a plaint dated 21st November, 2003 which was later amended on 7th September, 2005 against the Defendant/Respondent claiming a sum of Kshs.119,636.60cts plus interest on that amount at the rate of 8% per month from 16th February, 2000 until payment in full. It also claimed the costs of the suit.

In the aforesaid plaint, it is pleaded that by an application dated 13th October, 1995, the Defendant/Respondent sought to be issued with a card which entitled him to obtain goods and services on credit at specified establishments. The Plaintiff/Appellant accepted the application and issued him with a card No. 440782000005290. The use of the said card was governed by express and/or implied terms and conditions which are set out in paragraph 6 of the Plaint. In breach of the terms and conditions, the Defendant/Respondent failed to make payments of the amounts due in respect of the card on due dates and as at the 16th February, 2000 he was indebted to the Plaintiff/Appellant in the sum of Ksh.119,636.60cts which it claims from the Defendant/Respondent together with interest from 16th February, 2003 at the rate of 8% per month and late payment penalty/until payment in full.

The Defendant/Respondent filed a statement of defence on 12th February, 2004 in which he denied having applied for the card. He further denied that he had entered into any agreement with the Appellant/Plaintiff as alleged in paragraph 5 of the Plaint.

Further and without prejudice, the Defendant/Respondent pleaded that the letter dated 23rd October, 1995 only constituted an invitation to treat, that the Plaintiff/Appellant did not give any offer and acceptance of the same was never communicated to the Defendant by the Plaintiff. As a result, the Defendant avers that the alleged contract is void and/or voidable at its instance.

The Defendant further averred that the express and/or implied terms of the alleged contract were unilaterally crafted and/or formulated by the Plaintiff in exclusion of the Defendant which gave the Plaintiff undue advantage over the Defendant and therefore, the alleged contract is null and void ab initio. According to the Defendant, the parties did not agree on any credit limit or at all and if any limit was set,

it was solely done by the Plaintiff and the Defendant was never informed of the same.

The Defendant further stated that the monthly statements alleged by the Plaintiff have never been supplied to him though he had made numerous requests for the provision of the same to no avail. It was his case, in the lower court, that parties did not agree on any interest rate or at all to be charged on the principal amount, he denied being in breach of any terms (the same having not been agreed upon) or at all. He denied owing any monies to the plaintiff.

The Defendant pleaded that sometimes in the month of January, 1996, he stopped using the card and this in effect terminated any contract with the plaintiff (if any or at all). He prayed for the suit to be dismissed.

The Plaintiff filed a reply to defence on 19th February, 2004 denying the contents of the defence and maintained that it had a cause of action.

The matter was heard by Hon. M K Kiema (Resident Magistrate) and on the 11th day of February, 2008, he dismissed the Plaintiff's case who got dissatisfied with the said judgment and filed the appeal herein on the 10th day of March, 2008 wherein, it has listed the following grounds of appeal: -

- 1) *That the learned magistrate erred in law and in fact in dismissing the suit with costs.*
- 2) *That the learned magistrate erred in law and in fact in finding that no evidence had been tendered to prove that the Defendant had agreed to the interest and penalties as shown in the terms and conditions of usage of the credit card.*
- 3) *That the learned magistrate erred in law and in fact in failing to appreciate the monthly statements and other documentary evidence that were tendered in court by the plaintiff in support of the claim and which were not disputed by the defendant.*
- 4) *That the learned magistrate erred in law and in fact in failing to appreciate that the defendant never produced any evidence to prove that he had stopped using the credit card in February, 1998 and this effectively terminated the contract between the parties.*
- 5) *That the learned magistrate erred in law and in fact in failing to appreciate that the Defendant did not tender any documentary evidence that he had paid the outstanding sum due to the credit card in full and therefore did not owe any amount to the Plaintiff.*

The Appellant has asked this court to allow the appeal, set aside the judgment and the decree issued by the learned magistrate and substitute it with judgment in its favour.

In its submissions in the appeal, the Appellant has argued that it accepted the Respondent's application for the card which it issued to the Respondent and this constituted an agreement between the parties. That the Respondent knew very well that the card was governed by the terms and conditions since he signed the application form which contained a declaration to that effect. That by failing to make the payments of the amounts due in respect to the use of the card on the due dates, that constituted a breach of contract entered into between the parties.

The Appellant submitted that by signing the cardholder's application, the Respondent accepted the conditions of use which were that he would be charged interest at 5% per month and/or rate payment interest at 3% which terms were pre-existing at the time he signed the application form thus constituting a contract. The Appellant relied on the case of **National Bank of Kenya Ltd Vs Plastic Samkolit (K) Limited** (as quoted in **Allied Cards Limited Vs Jaswinder Singh Enterprises & Another (2008) eKLR**) where it was held: -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

The Appellant submitted that no such allegations were made by the Respondent and therefore, he is bound by the terms.

On the part of the Respondent, it is submitted that he never signed any contractual document and there was no agreement between the parties and that the letter dated 23rd October, 1995 only constituted an invitation to treat. That the Respondent did not give any offer and acceptance of the same and it was never communicated to the Respondent by the Appellant hence the contract was void at the instance of the Respondent. The Respondent argued that he was never given any document that indicated the terms and conditions though he was told that there were some terms and conditions.

It was further submitted that the application for the card was an invitation to treat and that the same did not constitute an offer. He relied on the case of **Ladopharma Company Ltd Vs National Hospital Insurance Fund [2005] eKLR**. The court in this matter held: -

“that an invitation to treat is distinguishable from an offer on the ground that it is not made with the intention that it shall become binding as soon as the person it is addressed to simply communicates his assent to its terms. A statement is clearly not an offer if it either expressly provides that the person who makes it is not to be bound merely by the other party’s notification of assent but when he myself has signed the document in which the statement is contained or that statement sets out the terms under which the parties are to be bound.”

The Respondent also relied on the case of **George Ngatiri T/a Naivasha Millers (1987) Vs Naphatali J. M. Mureithi & Another [2005] eKLR** where Hon. Judge Musinga held that a document that was not signed by the Plaintiff could not be described as a valid contract, because the same lacked the essential and basic ingredients of a valid contract. That the terms of a contract must be agreed on by the parties or as is said there must be a meeting of the minds.

The Respondent averred that the terms and conditions of the usage of the card were contained in the brochure that was neither provided to him nor agreed upon by the parties. To support his contention, he relied on the case of **Givan Okallo Ingari & another Vs Housing Finance Co. (K) Ltd [2007] 2 KLR 232** wherein Warsame J expressed himself as follows: -

“ In my view, any rate of interest to be charged on a loan account must be provided by the contractual document and must be in accordance with the parties’ agreement... in my view if the Defendant applied default charges on the Plaintiff’s account but which was not permitted or provided by the charge document then that is prima facie uncontractual or illegal.”

In the alternative and without prejudice to the foregoing submissions, the Respondent submitted that, if there existed a contract, the amount of Ksh.119,636.60cts claimed by the Appellant was not proved. The claim is for special damages which have to be specifically pleaded and strictly proved. He relied on the case of **Millicent Atieno Ochuonyo Vs Katalo Richard [2015] eKLR**

“Special damages are particular damages that are alleged to have been sustained in the circumstances of a particular wrong. To be awardable, special damages must be specifically claimed and proved. In this case I am not inclined to grant the damages, since the Plaintiff failed to sufficiently support with evidence, the claim that the employer demands back what was paid as a medical bill settlement.”

This position was upheld by the Court of Appeal in **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros Vs Augustine Munyao Kioko [2006] eKLR** in which the learned Judges of Appeal quoting the case of **Mwangi & another Vs Mwangi [1996] LLR 2859 (CAK)** held thus: -

“In her plaint the Respondent had claimed damages for loss of earnings and loss of earning capacity. Loss of earning is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability. The Plaintiffs cannot just

“throw figures” at the judge and ask him to assess such damages.”

He submitted that the Appellant did proof to the court how he arrived at the figure that it is claiming.

Finally, the Respondent submitted that the claim of interest is against the spirit and letter of Section 39(1) of the Central Bank (Amendment) Act 2000 which provides that ***“... the maximum interest chargeable under this subsection shall not exceed the principal sum loaned or advanced...”***. He urged the court to dismiss the appeal.

This court has carefully considered the pleadings, the memorandum of appeal and the submissions by the respective parties. In my view, the following are issues for determination: -

1) Did the Defendant agree to the interest and penalties as shown in the terms and conditions of usage of the credit card?

2) Did the Plaintiff adduce sufficient evidence before the court to prove its case on a balance of probability?

On the first issue, it is not in dispute that the Respondent applied for and was issued with a credit card by the Appellant. The Respondent knew very well that the use of the card was governed by the express and/or implied terms and conditions, since he signed the application form which contained a declaration to that effect. By signing the declaration, the Respondent agreed to be bound by the terms and conditions upon which the card was to be issued. Among those terms were that he would be charged an interest rate of 5% per month and/or late payment interest of 3%.

Though the Respondent has argued that the application form amounted to an invitation to treat, this court is not persuaded by that argument. In my view, the offer was contained in the application form and the Respondent accepted it by signing the same and that is why the application contained a declaration which the Respondent was required to sign and which he did. If the application was an invitation to treat as argued by the Respondent, then the Respondent would not have been called upon to sign the declaration. At the point when he signed the declaration and returned the signed copy to the Appellant, the Appellant accepted the offer and it needed not communicate to the Respondent of acceptance in any other way and/or form.

The Respondent has argued that his intention was not to be bound as soon as the card was issued to him, but looking at his conduct, it is clear to this court that he intended to be bound because he went ahead and used the card only for him to turn round and aver that his intention was not to be bound when he signed the application form and the accompanying declaration.

In the **Law of contract by Sweet and Maxwell, Third Edition**, the writer defines a contract as an agreement giving rise to obligations which are enforced or recognized by the law. He goes further to say, that, even though it is true that the existence of an agreement is in the vast majority of cases a condition for the existence of a contract, not contained in a deed, this statement ought to be treated with caution. First, the existence of an agreement is not an issue merely of fact to be found by a psychological investigation of the parties at the time of its alleged origin. English law takes an objective rather than a ***“subjective”*** view of the existence of an agreement and so its manifestation of mutual assent by two or more persons to one another.

The conduct by the parties herein could not be construed otherwise than that of parties who had a mutual assent to enter into a contractual relationship and which they indeed entered into. If the Respondent did not intend to be bound by the terms, he was not under any obligation to accept the card and more so make use of it. Having signed a declaration that he would be bound by the terms and conditions on the use of the card, he was under an obligation to make an enquiry of what the terms and the conditions were, before he could use the card, if the same were not provided to him as alleged.

On the second issue, the Appellant produced a bank statement for the Respondent showing the balance as

at the time the Respondent stopped using the card. The balance stood at Kshs.119,636.60cts which is the amount claimed in the plaint. The Respondent did not produce any document and/or evidence to the contrary yet he denied that the money was owing to the Appellant. He did not even produce any evidence to show when he stopped using the card and to this extent, it's my considered view that the appellant proved its case on a balance of probability.

However, the Respondent has raised a fundamental legal issue on the provisions of Section 39(1) of the Central Bank of Kenya (Amendment) Act 2000 which provides that:-

“..... the maximum interest chargeable under this subsection shall not exceed the principal sum loaned or advanced....”

The amendment came into force before the transaction herein was entered into and therefore the Respondent can enjoy its protection. The principal sum claimed by the appellant is Kshs.119,636.60cts. Though the Respondent in his submissions claimed that he left the account at Kshs.51,000/- the last time he used the card, he did not tender any evidence to that effect. From the evidence on record and the documents which were availed to court, this court is persuaded that the Respondent owes the Appellant the claimed sum with interest at the rate of 8% per month from 16th February, 2000. Such interest should, however, be calculated to conform with the provisions of Section 39 (1) of the Central Bank of Kenya (Amendment) Act Cap 2000.

In the result, this court makes the following orders: -

- 1) The Judgment delivered by Hon. Mr. Maxwell Kiema on 11th February, 2008 is hereby set aside.***
- 2) Judgment is hereby entered for the Appellant against the Respondent at Ksh.119,636.60cts with interest at the rate of 8% p.a.***
- 3) Calculation of the interest to conform with the provisions of Section 39 (1) of the Central Bank of Kenya (Amendment) Act of 2000.***
- 4) Costs of the Appeal and that of the lower court is awarded to the Appellant.***

Dated, signed and delivered at Nairobi this 6th day of October, 2016.

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L NJUGUNA

JUDGE

In the presence

..... ***for the Appellant***

..... ***For the Respondent***