



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL SUIT NO. 103 OF 2011.

DAMARIS KURGAT :::::::::::::::::::::::::::::: PLAINTIFF.

VERSUS

KENYA COMMERCIAL BANK ::::::::::::::: DEFENDANT.

J U D G M E N T.

This claim is for a declaration that the plaintiff, **Damaris Kurgat**, is entitled to compensation from the defendant, **Kenya Commercial Bank**, for loss of business and damages for unlawful and/or wrongful confinement.

The plaintiff seeks general damages as well as special damages in the sum of Ksh. 350,000/=.

In the plaint dated 22nd November, 2011, it is averred that the plaintiff was a holder of account No. [particulars withheld] at the defendant's Kitale branch and that on the 21st October, 2011, she was invited to the said branch to discuss some anomalies allegedly discovered on her account. On arrival she was informed that she was in loan arrears in the total sum of Ksh. 262,000/= and had defaulted in repayment of the same. In her attempt to exonerate herself, she produced a letter written by the defendant confirming that she had fully cleared the debt.

However, an official of the defendant bank confiscated the letter and demanded from the plaintiff, a written acknowledgement of the alleged debt, a loan repayment undertaking and the immediate payment of Ksh. 100,000/= the bank manager then ordered for her detention until the demands were met. As a result, the plaintiff failed to honour a business engagement thereby losing a business opportunity worth Ksh. 350,000/= other than suffering loss and damage. She therefore prays for judgment against the defendant.

The defendant filed its statement of defence dated 12th January, 2012, and averred that the plaintiff operated account No. [particulars withheld] which reflected a debit balance of Ksh. 261,965/53cts having borrowed an unsecured personal loan of Ksh. 300,000/= which was to be paid by way of check off from teachers service commission. The debt was partly repaid by the plaintiff leaving an outstanding balance of Ksh. 261,965/53cts which accrued interest.

The defendant denied that the debt had been cleared by the plaintiff and that it issued any letters which it allegedly confiscated. Further, the defendant denied that the plaintiff was detained at its branch and contends that her claim is untenable in law and indeed frivolous.

The foregoing averments in the plaint and the defence were more or less reiterated by the plaintiff and the defendant at the trial in which the plaintiff called a total of four (4) witnesses while the defendant called one (1) witness.

In her testimony, the plaintiff stated that she proceeded to the bank on the material date and denied the alleged indebtedness since she had already fully repaid the loan. While at the bank she was directed to a lady called Linda who referred her to one Mr. Kipkosgey, who informed her that she had to deposit a sum of Ksh. 100,000/= before being attended to. She had no money. She requested for time to fetch money elsewhere. The request was turned down by the said Kipkosgey. She therefore committed herself in writing to repay the alleged outstanding amount. She called her relatives on phone but they could not assist and was thus detained at the bank premises from 9.00 a.m. to 3.30 p.m. prior to being rescued by her relative **Vivian Chepkoech (PW5)**, and an advocate, **Harrison Njoroge Gatune (PW4)**.

The plaintiff further stated that she had a business appointment at 11.00 a.m. on the material date. She was to meet a prospective land buyer at Iroko Hotel within Kitale town but the appointment was not honoured by herself due to her detention at the defendant's bank. She therefore suffered a loss of Ksh. 350,000/= being 10% commission for land selling at Ksh. 3.5 million.

The prospective buyer, **Simon Muiruri (PW2)**, indicated that he travelled to Kitale from Subukia to meet the plaintiff on the material date but could not trace her. After several attempts to trace her, he finally called off the deal at 3.00 p.m. He said that the plaintiff contacted him on the following day but having lost confidence in her, he was no longer interested in buying the land.

The owner and vendor of the land, **Charles Muchiri Matande (PW3)**, indicated that the plaintiff was his agent in respect of the sale transaction and that she informed him that a potential buyer was ready to pay Ksh. 3.5 million for the land. He (PW3) travelled to Kitale town on the material date with the intention of meeting the plaintiff and the potential buyer. He failed to trace the plaintiff and returned home after losing hope.

The advocate, (PW4), stated that he was informed by his secretary (PW5) that the plaintiff who was her aunt had been detained at the defendant's bank over alleged loan arrears. He assured the secretary that the matter would be resolved by the bank. However, at about 3.00 p.m., the secretary informed him that the plaintiff was still being detained at the bank. He proceeded to the bank accompanied by the secretary and found the plaintiff at a back/rear office. She (plaintiff) explained to him what had happened and told him that she could not be released by the bank until an undertaking was given by her to re-pay the loan arrears and a deposit of Ksh. 100,000/= was made. He saw the bank manager who was unco-operative and arrogant and insisted that the undertaking be given. The manager later released the plaintiff at 4.00 p.m. the secretary (PW5), confirmed that the plaintiff was released at about 4.00 p.m. She said that she was first called by the plaintiff at 10.00 a.m. and was informed that she (plaintiff) had been held at the bank over a loan repayment. She (PW5) later accompanied the advocate to the bank.

The defendant through its Kitale branch credit manager, **Joseph Barngetuny (DW1)**, testified that the plaintiff was the bank's client and debtor and that she obtained a loan in the year 2006 which was to be repaid by the check-off system availed to her employer i.e. the teachers service commission (TSC). The repayment went on upto the year 2008, when it stopped with an accumulated outstanding balance of Ksh. 245,176/85cts. Which attracted interest and charges. Several demand letters were forwarded to the plaintiff. The last such demand was made on 26th April, 2011 and after establishing that the plaintiff had since left her employment, the bank contacted her through her husband. She came to the bank on the material 21st October, 2011, with regard to the repayment of the loan arrears standing at Ksh. 261,721/59cts as at the month of April, 2011. She intimated to the credit manager (DW12) that her son by the name Kipchumba was to sent to her some money through the M-Pesa system. She decided to wait for the money at the bank and was shown a place to sit and wait. She was during the time visited by relatives and voluntarily remained at the bank upto 3.00 p.m. when she left and agreed to return later to give an undertaking. This was after the advocate (PW4) came to the bank and saw the branch manager while alleging that the plaintiff was being detained.

The defendant contended that this suit is not genuine and indicated that the plaintiff had not settled the loan when she visited the bank.

From all the foregoing evidence, it is apparent that the fact that the plaintiff obtained a loan from the

defendant and that the loan had not fully been repaid as at the time the plaintiff visited the defendant's bank at Kitale was not substantially disputed.

Indeed, the defendant produced the necessary documents confirming the existence of the loan and the last demand made to the plaintiff to repay the outstanding balance (D.Ex.1, 2, 3 & 4).

The loan account statement (D. Exh. 4) indicated that the outstanding balance was Ksh. 261,721/59cts as at the month of April, 2011.

The plaintiff alleged that the loan was fully repaid but offered no tangible evidence to establish the fact. She alleged that a statement from the bank confirming that she had no unpaid arrears was given by her to a bank employee called Linda. This fact was not confirmed and neither was the existence of the alleged statement or letter. The least the plaintiff could have done was to produce a copy of the alleged statement which must have been in her possession if indeed it existed. Her visit to the bank was not coincidental but was at the instance of the bank to discuss the repayment of her outstanding loan balance.

What happened at the bank during the plaintiff's visit seems to have triggered this suit. Although the defendant through its credit manager (DW1) denied any untoward behaviour by the bank against the plaintiff, she indicated otherwise by stating that the bank demanded that she immediately deposit a sum of Ksh. 100,000/= and commit herself in writing to repay the outstanding amount before her case was to be attended to. She was not allowed time to go elsewhere and obtain the money. She contacted her relatives on phone but they could not forward any money to her. She was thus kept waiting and confined in the bank in order to fulfill the demand by the bank. She denied that her stay at the bank from about 9.00 a.m. to about 3.30 p.m. was not voluntary neither was it for the purpose of waiting for money from her relatives including Vivian (PW5). The plaintiff in essence alleged that she was unlawfully detained and/or confined by the bank in its Kitale branch.

The allegation was however, vehemently denied by the defendant's credit manager (DW1) who implied that he was the one who attended the plaintiff and in the process she told him that her son called Kipchumba was to send her some money through M-pesa. She then decided to wait for the money while inside the bank during which time she was visited by her relatives. She was still in the bank by 3.00 p.m. It was at that time when she left.

The Credit Manager (DW1) in denying that the plaintiff was detained at the bank also indicated that the advocate, Mr. Gatune (PW4), came to the bank and complained that the plaintiff had been detained. He (PW4) saw the branch manager but the credit manager (DW1) did not know what transpired in the manager's office.

Mr. Gatune (PW4), indicated that he went to the bank at 3.00 p.m. after being told by his secretary (PW5) that the plaintiff was detained there. He thus relied on what the secretary told him and proceeded to the bank where he found the plaintiff who told him that the bank could not release her until she gave an undertaking to pay the loan arrears and also deposit a sum of Ksh. 100,000/=. He (PW4) saw the bank manager over the matter but was informed that the manager was under pressure from their Nairobi office.

The said bank manager was not called to testify before this court to admit or deny the allegations made against him. He was herein portrayed by the advocate (PW4) to have been very unco-operative and arrogant on the material date.

Be that as it may, a person who fails to repay a loan obtained from a bank is never detained and/or confined in a bank premises in order to force him or her to pay a deposit of the arrears or give a written undertaking to repay the arrears. Any purported detention and/or confinement of a person by a bank would amount to an unlawful act in as much as it would be an infringement of a person's right to freedom of movement.

The plaintiff contended that she was detained or confined by the defendant but apart from her word and that of the credit manager (DW1) no one could for sure tell whether or not she was actually prevented

from leaving the bank until she paid a sum of Ksh. 100,000/= and or gave a written undertaking to pay the loan arrears.

She dealt with the credit manager (DW1) and perhaps the lady called Linda and a man called Kipkosgei were not called to testify. She (plaintiff) appeared not to have met the branch manager.

The allegation of detention and confinement appeared to have emanated from Vivian (PW5) who said that she was called by the plaintiff at 10.00 a.m. and informed by the plaintiff that she (plaintiff) was being held at the bank over a loan repayment.

Vivian in turn informed her boss (PW4) who decided to come to her assistance by going with her to the bank at about 3.00 p.m.

Ironically, the plaintiff indicated that she did not call Vivian. She said that her plight was brought to the attention of Vivian by her (plaintiff's) son based in Marsabit.

So, while heading to the bank, Vivian (PW5) and her boss (PW4) operated under the impression that the plaintiff could not have been at the bank for such a long time unless she was under detention or confinement and needed to be rescued.

The plaintiff stated that she saw the lady called Linda who referred her to the man Kipkosgey whom she said was the person who actually told her to deposit a sum of Ksh. 100,000/= before she could be attended to. It therefore seems that she (plaintiff) was not actually given a condition to pay the money or give an undertaking to pay the loan arrears before she could be allowed to move freely in and outside the bank. And, even if any condition was imposed on her by the said Kipkosgei, there was no scintilla of evidence that he was acting under instructions from the bank. He may as well have been a stranger in the relationship between the plaintiff and the defendant bank.

Mr. Gatune (PW4) and Vivian (PW5) never mentioned the said Mr. Kipkosgei. He could not have been the branch manager that Mr. Gatune referred to since he (Mr. Gatune) indicated that he could not remember the name of the bank manager.

The fact that the plaintiff was unlawfully detained and/or confined by the defendant was not satisfactorily established even on a balance of probabilities for the reason that the plaintiff's evidence was apparently contradictory and did not clearly show how the alleged detention started and ended.

Mr. Gatune (PW4) relied on what he was informed by Vivian (PW5). He was not certain as to whether the plaintiff was unlawfully detained when he found her at the bank.

Vivian on the other hand was untruthful and merely peddled rumours as she did not receive any call from the plaintiff informing her that she (plaintiff) was detained. The plaintiff called her son in Marsabit who may have passed unsubstantiated information to Vivian thereby causing the unpleasant state of affairs in which the bank was accused of having detained or confined the plaintiff.

Seems to this court, that the allegation against the bank was prompted by the plaintiff's injured ego when the bank offered no apologies. Indeed, she said that her self-esteem was lowered by the defendant's staff. She, would not be entitled to any damages having not proved that she was actually detained and/or confined unlawfully by the defendant. The claim for special damages in the sum of Ksh. 350,000/= was far-fetched and was not established in any manner.

The business transaction alluded to by the plaintiff was not established and was in any event, premature for any financial benefit to accrue to the plaintiff. She could not have lost what she did not have in the first place.

The potential buyer of the alleged land (i.e. PW2) did not produce any written sale agreement to confirm that he actually intended to purchase the land. The alleged vendor (PW3) did not produce any document

to show that he had entered into an agency agreement with the plaintiff for the sale of his land.

The alleged relationship between the potential buyer (PW2), the vendor (PW3) and the plaintiff was doubtful as none of them had anything to show for it.

Suffice to opine that the roping in of the potential buyer and the vendor into the plaintiff's relationship with the bank was an attempt by the plaintiff to unjustly enrich herself with full knowledge that she was justly indebted to the defendant.

This suit is not only frivolous but also scandalous and is hereby dismissed with costs to the defendant.

[Delivered and signed this 1st day of July, 2014.]

J.R. KARANJA.

JUDGE.