



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL & ADMIRALITY DIVISION)

CIVIL CASE NO. 163 OF 2003

KENYA COMMERCIAL BANK LIMITEDPLAINTIFF

VERSUS

OSMAN MOHAMED HUSSEIN..... DEFENDANT

JUDGEMENT

By a plaint dated 8th April 1997 and filed in this court the same day the Plaintiff herein seeks judgement against the Defendant in the sum of Kshs 1,156,331.10 together with interest at the rate of 47.5% per annum from 31st December 1996 until payment in full together with costs. The cause of action according to the plaint arises from a loan or financial facility advanced or granted to the defendant by the plaintiff on the security of Land Reference No. 13673/35 Grant No. IR No. 4957 whose repayment the defendant defaulted while the plaintiff has been unable to realise the said security.

In his re-amended defence dated 26th January 2009 though date-stamped 12th January 2009 the defendant denies the plaintiff's claim as contained in the plaint and specifically denies the sum claimed and avers that the same has been serviced in full. Similarly the rate of interest claimed is denied similarly the fact of attempts to realise the property is similarly denied. According to the defendant no demand was given to him. In the defendant's view, the plaint is defective in law and ought to be struck out due to non-disclosure the period the debt became due and the basis of the interest charged. In the counterclaim the defendant contends that the loan advanced to him in the sum of Kshs 195,000.00 has been paid in full together with interest yet the plaintiff has refused to discharge the property known as LR No. 13139/516 Mandera offered as security. It is the defendant's view that the plaintiff has no justification to continue holding the titles to the said property hence the court ought to declare the loan fully paid and direct the plaintiff to discharge the said property as well as make an order that the costs of the suit and the counterclaim be paid by the plaintiff.

On 18th May 2005 a reply to the amended defence was filed in which the plaintiff reiterated the contents of the plaint and averred that the plaint is materially sound and is not defective.

The hearing of this case commenced before **Hon Lady Justice Mugo** on 25th October 2010 when **PW1 Anthony Nzioka Kyalo**, a banker employed by the plaintiff at its University Way Branch testified. According to him he was employed in 2007 and was tasked with credit analysis dealing with lending and administration of related activities wherein the matter before the court falls. Although the case was filed before he joined the Bank, from the records he found that a Customer by the name **Osman Mohamed Hussein** applied for enhancement of an existing overdraft facility of Kshs 80,000.00 on 22nd March 1993 by a further Kshs 200,000.00 to Kshs 280,000.00. This facility was secured by plot No. 13139/516.

However the facility was approved in the sum of Kshs 275,500.00 comprising of the existing facility of Kshs 80,000.00 and a charge for Kshs 195,000.00. As security the customer was to avail property No. 1367/35 in respect of Kshs 80,000.00 and LR No. 13139/516 Grant IR 4957 in respect of Kshs 195,000.00. To the best of PW1's knowledge this offer was accepted by a signature and a charge dated 8th April 1993 was registered in respect of property no. 13139/516 at the interest rate of 19.5% on the overdraft limit and 22.55 over the limit. That charge according to the witness was duly executed by the customer. However, although the customer enjoyed the facility the same was not serviced. On demand the customer made repayment proposals which were, however, not honoured. This led to attempt by the plaintiff to realise the securities which attempts were unsuccessful and the debt remains un-serviced to date and as at 20th February 2001 the same stood at Kshs 1,565,871.45 yet the maximum that could be fetched from the two properties was Kshs 360,000.00. As at 30th January 2010 the sum outstanding was Kshs 409,406.21 which according to the witness was the sum the plaintiff seeks to recover from the defendant. In his view the requisitions for cheques appearing in the bundle of documents are not evidence of payment of the debt. At the time of writing down the loan the outstanding sum was Kshs 1,565,871.45 accruing interest at the rate of 47.5%. According to him writing down is a requirement of the Central Bank of Kenya Regulations at 100% of the outstanding debt. At the conclusion of his evidence the agreed bundle was admitted as Exhibit 1.

The witness was then stood down and on 29th November 2010 cross-examination of PW1 resumed before the learned Judge. In cross-examination by **Mr Musyoka**, learned counsel for the defendant, the witness reiterated that he had worked for the Bank since 2007. He however confirmed that the facility was given by Kenyatta Avenue Branch which has since been closed though he was unaware of the date of closure since the same occurred before he joined the Bank and the account was transferred to University Way Branch. In his evidence the facility had no expiry date and existed up to 31st March 1994 at which time the account was overdrawn to the tune of Kshs 346,780.00. This was contained in a letter since the statements relating to the account from 1994 and hence the only statements available are from 2001. Although the suit was filed on 8th April 1997 the witness testified that he did not have the statements for the period 1997 although he believed there must have been statements evidencing the debt as at the time of filing. According to him the claim for Kshs 1,156,331.10 is reflected in the statement dated 20th July 2002 and the case is built on correspondence. Referred to page 59 of the bundle the witness confirmed that there was a miscellaneous payment of Kshs 1,205,871.00 which left a debit balance of Kshs 360,000.45. However there is an entry on 19th July 2003 which shows cleared cheques for Kshs 360,000.45 leaving zero balance. Referred to the interest of Kshs 500.00 charged on 30th August 2008, he admitted that the same was charged 5 years after the credit. He however said that the interest charged was in respect of overdrawing of Kshs 362,505.85 during the period after 19th July 2008. On further cross-examination the witness conceded that he had said that the facility expired in 1994 and was not available thereafter and that the customer was not allowed to withdraw. And there was no transaction with the customer after he was sued. While admitting that the second page of the letter of offer was missing he confirmed that the letter was addressed to **Osman Mohamed Hussein** while the property charged belonged to **Sheikh Osman Mohamed** who according to the witness is the defendant. Referred to the special condition he testified that it referred to LR No. 4957/1 although the stroke was left out. Again the Registrar's stamp at page 21 of the bundle refers to IR No. 4957/2. He however confirmed that they were holding Grant No. 4957 while the one registered at the Lands as per the charge is IR 4957/2 which means that what they hold is not what was charged. The letter of offer at page 4 refers to Kshs 280,000.00 and property No. 1367/35 as security which property the witness had no records of though in his belief the Bank had records thereof which were however not part of the Court records. Although the suit was filed after failure to realise security No. 4957 there was no confirmation as to whether attempts were made to sell 1367/35. The witness could not, however, confirm whether the same property was sold and the balance cleared. Although he confirmed that the security indicated in the plaint is No. 13673/35 the witness confirmed that it has no similarity with 1367/35 and that the two titles are different and could not tell what happened to LR No. 13673/35. He also confirmed that the charge document exhibited does not show execution by the bank or even the person who drew it. He conceded that the charge did not authorise the Bank to increase the interest rate from the 19.5% and 22.5% in the charge to 45.5% claimed in the plaint. Further the signatories are not shown anywhere in the charge. While conceding that notices were not sent in respect of the attempts at the recovery he admitted that in his evidence in chief he stated

that the amount owing from the defendant was Kshs 409,406.21 although according to him the claim remains as per the plaint. He admitted that if it turns out that **Sheikh Osman** of Mandera is different from the defendant there would be no reason to retain the title to IR No. 4957. Referred to page 26 the witness stated that the statutory notice issued to **Sheikh Osman Mohamed** on 25th August 2005 refers to IR No. 13139/516 Mandera.

The plaintiff's case was closed after PW1's evidence and the hearing was adjourned.

On 25th October 2011 directions were given that the matter proceeds from where **Mugo, J** had left and on 5th March 2012, the defence hearing commenced when the defendant, **Osman Mohamed Hussein** testified as **DW-1**. According to him, he knew a **Mr Wainaina** who was in charge of loans in North Eastern Province although was based at the Head Office of the plaintiff. According to him he went to see **Mr Wainaina** and informed him that he was unable to agree with the Area Manager at Eastleigh. He was then referred to the Area Manager at Kenyatta Avenue Branch whom he informed that he normally receives cheques from East African Industries and that in the event that the same are received they should not be passed without question. He opened an account at Kenyatta Avenue in the years 1972/1973 but the Branch was eventually closed. According to him, he was granted any overdraft facility and that what used to happen was the encashment of the cheques received from East African Industries. He however admitted that he gave the Bank his titles but they were for the purposes of approving his cheques. He admitted signing the charge in respect of the property which is in Mandera and which the Bank is still holding. Whereas he was allowed to overdraw the account by between Kshs 100,000.00 and Kshs 200,000.00 his evidence was that he never overdrew the account. Though he was unable to remember the account number which account was closed down. According to him he was neither transferred to another branch and was not informed of the same. The first time he became aware of the closure was when he was served with the court papers. He was likewise not furnished with statements of account even after the institution of this suit. In his evidence he does not owe the Bank any amount and wants his title released to him as well as the costs of the suit.

On being cross-examined by **Mr Masinde**, he testified that although the signature appearing in the bundle was his, he did not know how to speak or write English and could not remember who assisted him to write the letters and could not remember making repayment proposals. He was unable to recall visiting the Bank to discuss the loan at all.

At the close of the defence case the plaintiff orally applied to amend paragraph 4 of the plaint to read LR No. 13139/516 instead of LR No. 13673/35 which application not being objected to was allowed.

At the close of the case the parties filed written submissions.

According to the plaintiff, the fact of advance of the loan was admitted in paragraph 6(a) of the re-amended defence and counterclaim as well as in the letter of offer. In his letter dated 18th February 1998 at page 28 of the agreed bundle reference is made to the overdraft facility of Kshs 275,000.00 and a proposal made with respect to servicing the account from other sources. It is therefore submitted that there is no dispute that the Defendant enjoyed facility of Kshs 275,000.00 from the plaintiff. A reading of the said letter clearly shows that the defendant was seeking indulgence and according to his statement the debit balance was Kshs 1,565,871.45 hence the defendant has not serviced the loan in full. With respect to the rate of interest, it is submitted that since the minimum in the charge document is indicated as 19.5% and the maximum as 22.5% per annum, the plaintiff is entitled to claim interest on the outstanding balance of Kshs 1,565,871.45 up to a maximum of 22.5%. With respect to the security, it is submitted that pursuant to paragraph 6(b) of the re-amended defence and counterclaim as well as the charge at page 19 the property offered was LR No. 13139/516. From the record, it is submitted that there is evidence that the plaintiff made attempts to realise the security. On the declaration sought by the defendant, it is submitted that the defendant did not put any evidence before the court to show that he fully serviced the loan but there was evidence to the contrary that he was seeking indulgence from the plaintiff to be given more time to service the loan hence his counterclaim is unmerited. It is therefore submitted that judgement should be entered for the plaintiff for the sum of Kshs 1,565,871.45 with interest at the rate of 22.5% per annum with costs while the counterclaim ought to be dismissed and the injunction granted

herein discharged.

On behalf of the defendant it is submitted that the plaintiff has failed to prove its case on a balance of probabilities. According to him, PW1's evidence was conflicting and unreliable and whereas the defendant admitted having signed a charge for overdraft facilities, he denied enjoying any such facilities and the mere existence of a charge does not amount to indebtedness. According to the plaintiff although the statement relied upon is dated 20th January 2001, there is no evidence how this figure is arrived at since there are no entries from 1993. In the plaintiff's view, it is not right for the plaintiff to ask for judgement simply because there is no evidence of payment and the logical conclusion should be that the defendant did not pay because there was no debt to be paid. Since it is admitted that the rate of interest was not 47.5% the sum claimed which was based on the said rate was erroneous and the plaintiff has not given a re-calculated figure based on the correct rate hence the figures are cooked and baseless. It is not for the Court to do calculations and determine the debt owing and any case no figure has been given as the principle sum advanced. Since it is admitted that the defendant ceased operations in 1995, there is no basis for payments made on 19th July 2003 hence the statements and figures are unreliable. It is the defendant's evidence that from the evidence on record the amount owed was repaid since the deposit slips were not challenged. Since the overdraft was never drawn, the issue of servicing of the loan does not arise hence the suit should be dismissed and the counterclaim allowed.

Having considered the foregoing, the following are according to me the issues that fall for determination.

1. **Whether the defendant is aware of the particulars of the plaintiff's claim.**
2. **Whether the defendant is indebted to the plaintiff and in what sum.**
3. **Whether the defendant has serviced the said facility.**
4. **What was the agreed rate of interest.**
5. **Whether the defendant was aware that the property was put up for sale and that the same did not attract any bids.**
6. **Whether demand was given.**
7. **Whether the plaint is defective.**
8. **Whether the plaintiff should discharge LR No. 13139/516.**
9. **Who should bear the costs of the suit?**

On the first issue whether or not the defendant is aware of the plaintiff's claim, the defendant concedes at paragraph 6(a) of the re-amended defence and counterclaim that the loan advanced to him was Kshs 195,000.00. In his evidence DW1 did not give evidence in respect of this particular aspect. He maintained that he was not given any overdraft and avoided dealing with this facility though he admitted in his pleading that it was advanced to him but he repaid. Having admitted that he was advanced the said sum, the allegation whether or not the same was advanced is not an issue. The issue in my view is the actual facility that the defendant enjoyed and not whether or not the facility was availed to him.

That leads me to the second issue whether the defendant is indebted to the plaintiff and in what sum. The plaintiff's claim is that the defendant is indebted to it in the sum of 1,565,871.45. However, in his evidence there was a conflict as to whether this is the sum owed since at one point PW1 testified that the actual sum due from the defendant to the plaintiff was Kshs. Kshs 409,406.21. There was no concrete evidence adduced as to how the figure claimed in the plaint was arrived at more so when it is taken into account that there is evidence emanating from the plaintiff that some documents were burnt. Further as it is conceded that the rate of interest of 47.5% is erroneous, one cannot state with certainty whether or not the said sum of Kshs 1,565,871.45 has not factored in the said erroneous rate of interest. It is therefore clear that from the evidence on record, the Court is unable to determine the actual sum due to the plaintiff. On the part of the defendant, the Court is urged to find that the loan has been fully serviced. However, this finding would be contrary to the evidence adduced by the defendant in which he stated on oath that he never took any overdraft facility. This evidence is, however, contradicted by the correspondence in the agreed bundle as well as by the pleadings. From the pleadings and the evidence adduced it is not possible for this court to make a positive finding that the defendant has in fact serviced the loan which he himself denies having been advanced.

This determination effectively disposes of issue number 3.

On the issue number 4 on what the rate of interest was, it is conceded that the rate of interest was between 19.5% and 22.5% per annum hence there was no justification to claim interest at a rate higher than that.

The next issue is whether the defendant was aware that the property was put up for sale and that the same did not attract any bids. There is no evidence that the defendant was made aware of the intention to realise the property. PW1 was unable to produce any evidence to prove this fact. In **Maria Ciabaitaru M'mairanyi & Others vs. Blue Shield Insurance Company Limited Civil Appeal No. 101 of 2000 [2005] 1 EA** the Court of Appeal held that whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. Section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence. Since it is the plaintiff who wishes the court to believe that the notice was duly served, it was upon it to adduce sufficient evidence to prove so. It is not enough for the Plaintiff to simply state that it believes the notices were sent and advertisement done. Accordingly, the Court has no evidence upon which it can find that the defendant was made aware of the process of the realisation of the security.

That determination also settles the 6th issue.

With respect to whether the plaint is defective, nothing turns on that since the same was not pursued.

That leads me to the issue whether this Court should discharge LR No. 13139/516. Having found that on the pleadings and the evidence on record, that the defendant enjoyed some facility from the plaintiff, without any evidence that the said facility was fully settled, the declaration sought by the defendant which would have the effect of releasing the defendant from his obligations cannot be made. I am unable to find on the balance of probability that the defendant has in fact serviced the loan which loan he in the first instance denies having been advanced to him. It follows that the declaration sought in the counterclaim cannot be granted.

What then should be the order that ought to be made with respect to the costs? As both parties have failed to prove their cases the order that commends itself to me is that both the suit and the counterclaim be and are hereby dismissed with no order as to costs. However, the injunction that was granted herein is no longer useful and the same is hereby vacated.

Dated and Delivered at Nairobi this 4th day of February 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mutua for the Plaintiff

Miss Ongaki for B M Musyoki for the Defendant