



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 1224 of 2000

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

-VS-

BETH NGONYO NGENGI..... 1st DEFENDANT

BLUE SHIELD INSURANCE

COMPANY LIMITED..... 2ND DEFENDANT

JUDGMENT

The Plaintiff filed the Complaint herein on the 7th December 2000 and subsequently filed an Amended Complaint on the 23rd February 2001. The Plaintiff seeks a liquidated sum of Kshs. 1,039,445 with interest at 23% per annum from 1st May, 2000 until payment in full. The Plaintiff also seeks costs and interest on the costs at court rate.

The Defendants jointly entered appearance through the firm of M/s Lillian Njuguna & Company and filed a joint Statement of Defence. The Defendants admitted that the Plaintiff had issued a credit to the First Defendant and the Second Defendant agreed to be a guarantor to the first Defendant. The Defendants also admit that a card was issued to the 1st Defendant through a Charge Account Number 4544 9000 2004 1477 on the 27th June 1996.

The Defendants however deny that a sum of Kshs. 1,039,445/- with interest was due and owing. Of particular relevance, the Defendants in paragraph 5 of their Defence state that the card got lost in February 1997 and the 1st Defendant reported that to the Plaintiff. They blame the Plaintiff for neglecting to cancel the said card, leading to the unlawful use by a person or persons unknown to the Defendants.

The parties filed an Agreed Set of Issues for determination on the 2nd July 2001.

The matter was set for hearing and on the 22nd May 2003, Waki J (as he then was) proceeded with the hearing of the Plaintiff's case and that of the 1st Defendant.

The matter was subsequently listed before Njagi J. who gave directions that the proceedings be typed and the case proceed from where Justice Waki had stopped. Eventually the matter came before me and I took the evidence of the 2nd Defendant. Parties subsequently filed their respective written submissions and made oral highlights of the same before I retired to make my judgment.

One Rose Ayieko testified for the Plaintiff. She was then a Security Manager with the Plaintiff. She testified that the 2nd Defendant applied for a corporate credit card for the 1st Defendant. The same was approved and issued on the 27th June 1995. She produced the Application form as Plaintiff's Exhibit 1.

She testified that the interest rate agreed upon was 7% per month which was reduced to 3.5% per month in April 1999 and subsequently to 23% per annum in November 1999.

She said that on the 5th February 1997, the Defendants wrote and advised them that the credit card was lost. They stopped the use of the card and the outstanding amount was Kshs. 127,786.19/= at the end of February 1997. At the end of January the outstanding amount was only Kshs. 48,449.40/=.

She continued testifying that the Bank continued to recover bills even after the loss report. The Plaintiff continued to recover bills although the card was reported stolen. There were 7 bills amounting to Kshs. 12,193/= and after reversing the bills from the account a balance of Kshs. 140,571.97/= remained outstanding as at 30th April 1997. She testified that the amount kept increasing. From April 1997 a minimum payment of Kshs. 119,933.19/= was to be paid by 20th May 1997. Interest was calculated at Kshs. 8,434.38/= and the remaining balance would have attracted interest at Kshs. 1,492.87/=. The total due as at 30th May 1997 was 150,499/=.

The June minimum payment was also not made thus attracted interest of Kshs. 8,723.77/=. The balance bore interest of Kshs. 1,039,445/= as at May 2000. The statements were produced as exhibit 2.

The Plaintiff through Exhibit 3 (a) and 3(b) demanded payments on 15th November 1997 for Kshs. 208,773.87/= and on 31st March 2000 for Kshs. 1,055,130.95/= respectively.

She discounted the averment that there should have been no charges after the card was reported lost. The interest charge was contractual and continued until payment was made in full.

On Cross-examination by Mr. Mbigi, Advocate for the 1st Defendant, she admitted that there was no time before February 1997 that the Defendants paid the minimum amount so as to carry over the money for the succeeding month. They paid in full whenever they paid" She added, "when they stopped paying in January 1997 they did not say they exercised the option to pay a minimum. Minimum payment attracts a penalty of 7% per month. It is the figure reflected estimation and labeled "overdraft". The card holder did not exercise the option to pay the minimum when the card was stolen on 6th February 1997."

The Plaintiff's witness readily accepted that the card holder was not responsible for bills or interest accruing after the card was reported stolen (i.e. 6th February 1997).

On being showed MFID3 and MFID4, she confirmed that those were letters from the Defendant to the Plaintiff. The 1st Defendant complained that the card was still in use despite her report and disclaimed responsibility. This was on 11th March 1997. In the subsequent letter of 14th April 1997 she made a request for the bills as per the earlier letter to investigate the matter. The witness admitted that the request was not complied with by the Plaintiff.

There were further request on the 11th July 1997, 8th January 1998 and 16th October 1998 all of which the Defendants demanded that the entries be reversed after the card was reported stolen and sought vouchers and statement in order to settle the matter once and for all. All the requests by the Defendant from February 1997 to October 1998 were never responded to by the Plaintiff.

She reiterated the same in Cross-examination by Mrs. Kiarie Advocate for the 2nd Defendant. The Plaintiff's witness maintained that when a card got lost the interest remained the same at 7% per month. This was provided in Section 5(a) and (b) and not 7 of the Contract (exhibit 1). It is necessary to reproduce this in part:-

“5. PAYMENT

(a)All charges are due for payment in full immediately on receipt of your statement. You may however as a credit card holder exercise an option to pay the minimum payment shown on your statement and revolve the balance to the next month. A service charge referred to as revolving credit interest and equal to 7% of the balance so revolved will be adduced on your statement for the subsequent month. National Bank of Kenya Limited reserves the right to revise this rate from time to time and you will be advised one month in advance of such revision.

(b)A late payment fee of 7% will be levied on the minimum amount if such amount is not received by the due date shown on your statement. National Bank of Kenya Ltd. reserves the right to revise this rate from time to time and you will be advised one month in advance of such revision.

7. LOST CARDS

(a)You must tell us immediately if the card is lost, stolen, mutilated or not received when due. You must also tell us if you suspect that a supplementary card is being used without your authorization.

(b)You are liable for any authorized use of the card issued to you t o the extent permitted by law.

(c)”

The Plaintiff’s witness concluded the cross examination by stating that Sec 5 (a) and (b) of the above contract above do not specifically refer to where cards are lost but refer to all cards. After the card is lost it is the responsibility of the Bank. The card holder is not charged anything. On her re-examination she maintained that the Plaintiff sent the statement of revised entries in April 1997.

The 1st Defendant testified as DW1. She stated that she misplaced her card in January 1997. She had been paying all her bills promptly before then and she had not opted to pay the minimum instead of the whole bill. She produced as Exhibit D1 her letter dated 5th February 1997 to the Plaintiff informing it that the card was misplaced on 21st January 1997 and usage should be stopped. Exhibit D2 is a letter of 6th February 1997 again from her to the Plaintiff repeating the above and asking for all bills thereafter to enable her with the help of the police try to establish the beneficiaries of the said transactions. She produced Exhibit D3 being a letter from her to the Plaintiff dated 11th March 1997. She referred to her previous letters and regretted that despite her report the subject card was still in use from the statement sent to her. She was categorical that she would not take responsibility for the expenses incurred after notification of the loss of the card. She concluded the letter by asking for her bills to enable her with the help of the police establish the beneficiaries.

She produced further letters from the 2nd Defendant to the Plaintiff dated 14th April 1997, 11th July 1997, 8th January 1998 and 16th October 1998. In summary the Defendant maintained that she was not responsible for expenses incurred after reporting and requested for a statement as at 6th February to enable her clear their indebtedness with the Plaintiff. In the said letters the Defendants stated that their balance when the card was reported lost was Kshs. 61,456/= and they sought a statement reversing all other entries to enable them pay. She concluded by lamenting on the Plaintiff’s failure to reverse the entries and give her a statement free from all entries/expenses after 6th February 1997.

Having calculated the outstanding at the time of reporting the loss of card at Kshs. 61,456/=, she eventually paid the said sum to the Plaintiff even without their confirmation.

On cross-examination by the Plaintiff’s Advocate, reiterated that she never received a statement of the reversals she had been demanding. There were reversals for 30th April 1997 but the statement still included entries after the card was lost. Though she lost her card in 21st January 1997, she calculated all the entries upto 6th February 1997 when she reported the loss at Kshs. 61,456/=. The 2nd Defendants

worked out the interest payable in this summation and they paid in full on in May 2001. She said that she did not pay earlier as the Plaintiff had refused to send the figures to them.

In her re-examination she maintained the statements sent to her were all wrong and that had they responded to her demand, she would have paid.

The second Defendant's witness was one Njoroge Kiguongo who was the 2nd Defendant's Financial Controller. He reiterated the 1st Defendant's evidence. He added that there were 45 entries which had been reported. He also challenged the charging of interest on interest and the application of compound interest as against simple interest. He argued that it was for National Bank of Kenya to supply copies of the bills before any payment is made. Authentication was necessary and the mere production of statements could not help.

On cross examination he testified that there were 50 transactions between February – April and they disputed 45 and admitted only 5 for the reasons already advanced herein. He gave the exact date of payment of the undisputed Kshs. 61,456/= being on the 7th May 2001. The figure of Kshs. 61,456/= was reconciled by the 2nd Defendant after the Bank declined to.

I have gone through the evidence and all the documents produced by the parties in great extent as my answer to the dispute is explained therein.

Though there are numerous issues agreed upon for determination by the parties, in my mind I respectfully think the only contention is the effect of entries and charges after the loss of the card.

I wish to first determine the issues raised by the 2nd Defendant challenging application of interest on interest and use of compound interest as against simple interest.

Clause 5 (a) and (b) and very clear on how the service charge interest and penalty interest will be applied. These are terms that were brought to the Defendants' attention before execution of the contract. I am guided by the findings of Kwach JJA (as he then was) in the decision of **MRAO LTD. V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 125**

“I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligation under the documents to which he appends his signature or seal.”

The 2nd Defendant freely executed the contract binding himself to these terms. It is not for the court to rewrite the terms of a contract.

The Defendants have also challenged application of penalty interest. I have my own doubts on application of penalty interest for breach of commercial contracts. However I am aware that it is a known trade usages and custom within the banking industry to charge penalty when a borrower defaults. In this case I need not rely on the implied terms as it was expressly provided for. In my understanding whether or not a charge applied is a 'penalty' in a Commercial Contract is a determination of the court notwithstanding the fact that the charge applied is styled penalty interest. I would not fault a genuine pre-estimate of interest/charge applied by the bank to mitigate against its loss caused by a defaulter, whatever the interest/charge is styled. The Defendants have not sufficiently challenged the penalty interest charged to the above standard or even proved that it was unconscionable.

In my reading of the terms of the Contract, I do not find in favour of the Defendant's argument that interest ceased on the balance outstanding after a card is lost. However, this case is different as the outstanding amount includes disputed charges as I shall analyse shortly.

As stated earlier, the crux of this case lies in the charges/entries after 5th February 1997 when the

card was reported as lost.

I find great importance in the testimony of the Plaintiff's witness when cross examined thus,

“The credit adjusted was April 1997. It was made on 30th April 1999, 9 bills for Kshs. 12,193/=. Bills recorded from 4.2.97 – 30.4.97 were 45. The other 36 were not adjusted.”

It is beyond pre-adventure that the loss of the subject credit card was reported by the letter dated 5th February 1997. I am clear in my mind that the Defendants cannot be liable for any bills subsequent to this.

From the evidence before me, the amount outstanding as at end of February 1997 was Kshs. 127,786.19/=. This amount includes several bills that were incurred after the loss of card was reported to the Plaintiff. This amount attracts the service interest and penalty interest at the end of every month bringing it to Kshs. 1,039,445/= as at May 2000. With respect to the application of interest at 7% per month, I find that right from when the card was reported lost, the Plaintiff have breached their duty to maintain a true statement of account. Unless reversals were made from the 6th of February 1997, illegal bills/charges, service interest and/or penalty interest were levied on the statement of account and a further 7% penalty interest, clearly every cent counts a lot.

I am persuaded that the Defendants were diligent and did all they could to have the situation remedied. Going through the statement, they paid in full all outstanding sums in time until the card was reported lost. If it counts for anything, I believe they were prepared to pay the outstanding undisputed sum. The Plaintiff has completely failed to explain why they neglected to reverse the unauthorized entries in time. They have breached their contractual obligation.

The Plaintiff's cause of action is founded on the agreement that it has itself breached. Can it be allowed to do so? I do not think so. The Plaintiff cannot seek damages arising from the contract it has failed to honour.

Despite several attempts by the Defendants, the Plaintiff completely failed to reverse the unauthorized entries and additional charges arising therefrom after the report on the loss of the card.

The Defendants on the other hand, calculated the outstanding amount as at 6th February 1997 to be Kshs. 61,456/=. The Plaintiff has never challenged this or offered to calculate what was outstanding as at 6th February 1997. On a balance of probability I find in favour of the Defendants that the outstanding balance as at 6th February 1997 was Kshs. 61,456/=. However I am not satisfied with the Defendant's explanation as to why they did not pay money until the 7th May 2001. They have since 1997 admitted that this amount was due. That means a sum of

The upshot of the foregoing is that the Plaintiff is entitled to only interest on the sum of Kshs. 61,456/= as from February 1997 to 7th May 2001 at court rates. The same shall be calculated by the Deputy Registrar of this court. I also grant costs of the suit to the Plaintiff against the Defendants to be taxed on the basis of the Decretal sum. The other claims are disallowed.

Dated and SIGNED at Nairobi on this 22ND day of AUGUST 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Nairobi on this 2ND day of OCTOBER 2012.

W. KORIR
Judge

In the presence of