



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 341 OF 2004

**CO-OPERATIVE BANK OF KENYA
LTD.....PLAINTIFF**

VERSUS

**HARUN KOMEN TUITOEK.....
DEFENDANT**

JUDGMENT

Under a Plaint dated 24th June 2004, and filed in this court on 28th June 2004, the Plaintiff sued the Defendant claiming the following reliefs:-

- (a) Judgment in the sum of Kshs. 3,375,827.65 together with interest thereon at the rate of 19% per annum from 16th June 2003, until payment in full**
- (b) Costs of the suit with interest thereon at court rates**
- (c) Such other and/or further relief as the court may deem fit and just to grant.**

As stated in the Plaint the debt claimed is in respect of a loan of Kshs. 700,000/= advanced to the Defendant, at his request, pursuant to a letter of offer dated 4th February, 1997 and interest accrued

thereon as computed at the prevailing contractual rate of 29% per annum upto 25th June 2003. Interest thereafter is claimed at the rate of 19% per annum. The loan was secured by a charge over the Defendants immovable property known as L.R No. 9038/93/1. Following the Defendant's default in repaying the loan, the Plaintiff attempted to sell the said property in exercise of the chargee's Statutory Power of Sale, without success, hence the filing of this suit.

Upon being served with the Plaint and Summons to enter appearance in the suit, the Defendant filed a defence dated 6th August 2004 in which he denies the existence of any loan agreement between himself and the Plaintiff Bank, and the terms of such agreement, and putting the Plaintiff to the strict proof of the same. He also denied having given his property as security for the loan as alleged. Alternatively the Defendant pleads in the said defence that, if at all the plaintiff had granted him a loan facility as claimed, then the same had been liquidated in full.

The Defendant did not attend at the hearing of the suit despite being served with a hearing notice. The Plaintiff called one witness to testify on its behalf. The said witness, Sarah Moraa Oira, a Business Development Officer with the Plaintiff (PW1) attested to the facts of the case as set out in the Plaint which are that:

1. The loan in respect of which the Plaintiff's claim arises was granted to the defendant on or about 7th February 1997, vide a letter of offer dated 4th February, 1997 which she produced as an exhibit marked "P Exhibit 1-1".
2. The loan was secured under a charge executed by the Defendant and which was duly registered on 26th March 1997 [Exhibit 1: (2-20)].
3. The rate of interest as stated at page 3 of the charge document was 29% per annum compounded monthly, and the Defendant was to repay the loan by monthly instalments.
4. The Defendant made no attempt at all to repay the loan, causing the Plaintiff to issue him with a 3 months statutory notice dated 22/7/98 which was sent by registered post to the Defendant's Post Office Mail Box No. 41 Kabarnet as was provided in the letter of offer and the Charge Document. A copy of the letter of 22nd July 1998 was produced as an exhibit and marked "exhibit 1-21".
5. After the receipt of the notice the Defendant wrote to the Plaintiff, first on 7th July 2001, requesting that he be allowed to sell some property of his in Langata and apply the proceeds towards the repayment of the Plaintiff's loan; and again on 25th July, 2001, offering to give the Plaintiff some plots of his in Eastleigh which he said the Plaintiff could sell to recover its debt. The two letters were produced as exhibits as part of the Plaintiff's bundle of documents together with a letter of allotment over the Eastleigh plot.
6. The Defendant's proposals were not acceptable to the Plaintiff who then proceeded to instruct auctioneers (Muga Auctioneers) to auction the charged property.
7. After failing in their attempt to auction the property citing unwillingness and aversion on the part of the Defendant's neighbours in regards to purchasing another person's residential home, (particularly since the Defendant had been an area councilor), the auctioneers wrote to the Plaintiff on 15th March 2003, communicating their frustration. The auctioneer's letter and the respective Notification of Sale (2 in number) were produced as exhibits.
8. The loan account balance of Kshs. 3,375,827.65 as at 31st May 2003 is reflected in the Defendant's account at the Plaintiff's Nakuru Branch as per the Statements (dated 30.11.2000 – 31.12.2005) appearing at pages 34 to 81 of the Plaintiff's bundle of documents.

9. The contractual rate of interest was lowered to 19% in the course of the term, hence the claim for interest on the outstandings at this rate.

Written submissions were filed on behalf of the Plaintiff to the effect that the Plaintiff, through its witness had proved that there existed a valid contractual relationship which gave rise to the Plaintiff's claim, particularly since the same is supported by documentary evidence which is not challenged at all. Learned counsel for the Plaintiff, Mr. Kimondo submitted also that the Defendant had admitted his default in repaying the debt as demonstrated by the correspondence he sent the Plaintiff, seeking indulgence in the matter and renegotiating the mode of payment. He submitted further that although the loan has been secured by a charge over the Defendant's property, the security proved worthless when attempts to sell the same by way of a public auction proved futile and the only recourse left open to the Plaintiff was to move the court by way of the present recovery action. Finally, counsel submitted that the defence filed herein was a sham and ought to be, in any event, deemed as abandoned, since no evidence was tendered before the court to support it.

I have considered both the oral and documentary evidence adduced by the Plaintiff herein, as well as the submissions by learned counsel for the Plaintiff. Taking everything in totality, I am satisfied that the Plaintiff has proved its case on a balance of probabilities. The Plaintiff has proved that it lent money to the Defendant and that the Defendant defaulted in repaying the same. The securities given by the Defendant to the Plaintiff are worthless and the Defendant's empty promises to remedy the situation have remained just that. The terms of the loan and the outstandings have been proved by unrebutted documentary evidence.

In the premises I find that the suit succeeds. Accordingly I hereby enter judgment for the Plaintiff as prayed in paragraphs (a) and (b) of the Plaint dated 24th June, 2004.

DATED SIGNED and DELIVERED at NAIROBI this 4TH day of MARCH, 2011.

M. G. MUGO

JUDGE

In the presence of:

Ms. Kahoro holding brief for Mr. Kimondo For the Applicant

No appearance For the Respondent