

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 191 of 2004

SHEIKH OSMAN MOHAMMED PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.DEFENDANT

JUDGMENT

This suit was filed by the plaintiff against the defendant claiming an order directing the defendant to release to the plaintiff his title documents to properties L.R. No.418/B/J/1 and L.R. 1318/312 and Log Book to motor vehicle registration No. KAA 426 L, damages for determination on mesne profits plus the costs of the suit.

The plaintiff admits that he borrowed money from the defendant bank. The security was vehicle No. KAA 426 L and title to L.R. 418/312 in Mandra Town and L.R. 1318/312. As at 17/8/1996, the exhibit banking slips and statement of the plaintiff's account showed Nil balance.

This was after reconciling the defendant's account which plaintiff stated were erroneous. PW2 was an expert from Interest Rates Advisory Centre who testified that after examination of the plaintiff's account, the plaintiff had overpaid by Kshs.9,598/21. However, the defendant stated that the plaintiff's account was in arrears to the extent of over two million. He did not produce any statement to prove this. He admitted that the plaintiff's exhibit was their statement and according to him the loan had been written off as not paid. However, the documents of the plaintiff have not been discharged and returned to him.

It is clear then the defendant acknowledges that the debt does not exist. Furthermore, the defendant alleges that this suit is res judicata since there was another suit HCC No.888 of 1996 between the same parties. It is clear the issues in that case were not the same. The plaintiff therein was seeking injunction while in this case he wants his documents to be returned to him together with damages.

An application to declare suit res judicata was on 17/01/2005 dismissed by Hon. Justice Waweru, was struck out and dismissed on 13/5/05. No appeal was filed. This court of concurrent jurisdiction cannot therefore sit on an appeal in that matter.

The plaintiff's evidence shows that the value of motor vehicle which the defendant attached and abandoned it leaving it being vandalized was Kshs.4,500,000/=. The plaintiff claims mesne profits which is defined under Section 2 of Civil Procedure Act as:

“Those profits which a person in wrongful possession of such property might with ordinary diligence have received therefrom”

In respect of this case, the defendants have constructively converted the plaintiff's vehicle by taking it away and keeping it forever as the witnesses seem to imply.

The plaintiff is therefore entitled to damages for detinue Examination of the statement of defence shows that it is a mere denial. The parties agreed on issues to be decided by the court. There is no dispute that the plaintiff borrowed the loan from the defendant and gave securities of 2 pieces of land and a log book for his motor vehicle KAA 426 L. There is evidence that the plaintiff did repay the loan and overpaid by Kshs.220,908/21 and despite this the defendant has continued to hold on to securities.

As a result, the plaintiff has failed to carry on his business and has suffered loss and damage. This suit is not res judicata as stated above. The plaintiff's suit is not defective. Therefore, the plaintiff is entitled to reliefs sought.

After perusing the record and the evidence adduced by the parties the court finds that the plaintiff did pay its debt to the defendant. The defendant keeps holding the securities to-date. If the debt was not repaid, the defendant would indeed have made effort to realize the securities.

This court further finds that the defendant has caused damage and loss to the plaintiff by its conduct. The delay to release the securities has caused the plaintiff to cease to carry on his business and he has been deprived of the use of his vehicle and the documents of title. I find that the defendant acted fraudulently not keeping the plaintiff's account in order thus causing the plaintiff to overpay the account in the sum of Kshs.220,909/21.

Therefore the plaintiff is entitled to judgment which I hereby enter as prayed in terms of prayer (a) and prayer (bb) Kshs.220,908/21. Prayer (b) general damages determined and mesne profits for loss of use of the vehicle in the sum of Kshs.4,500,000/=.

The monetary sums shall carry interest at court rates from the date of filing suit.

Orders accordingly.

DATED and DELIVERED this 4th day of May 2009.

JOYCE N. KHAMINWA

JUDGE