



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**

**Civil Case 5040 of 1993**

**PAN AFRICAN BANK LTD..... PLAINTIFF**

**VERSUS**

**HORATIUS DA GAMA ROSE.....DEFENDANT**

**JUDGMENT**

The plaintiff is currently under liquidation by the Deposit Protection Fund. The present suit was prosecuted by the Liquidation Agent appointed by the Deposit Protection Fund. The plaintiff's claim against the defendant is for the sum of Kshs.52,457,085.75 being the amount allegedly lend and advanced by the plaintiff to the defendant and others for monies paid by the plaintiff for and on behalf of and for the use of the defendant at the defendant's own request from 1984 to 1992 together with the accrued interest calculated up to 31<sup>st</sup> August 1993 at the rate of 32% per annum until payment in full. The plaintiff prayed to be awarded costs of the suit.

In the defendant's defence, which was amended and then re-amended, the defendant denied that it owed the plaintiff the said sum of Kshs.52,457,085.75 or any greater or lesser sum as alleged in the plaint. The defendant admitted having borrowed some amounts from the plaintiff but averred that he repaid in full the entire debt. The defendant further averred that part of the debt together with the accrued interest was set off against the defendant's claim against the plaintiff. The defendant averred that contrary to what was agreed with the plaintiff's then managing director, instead of the amount owed by the plaintiff to the defendant being set off with the loan account, the records of the plaintiff did not reflect this fact. The defendant set out the particulars of the amounts that were allegedly set off in a bid to establish that he owed nothing to the plaintiff. The defendant averred that the plaintiff was estopped and further precluded from demanding the said amount in view of the fact that the said debt had been set off and settled in full. The defendant further pleaded that the plaintiff's claim was time barred pursuant to the provisions of **Section 4** of the **Limitation of Actions Act** having been filed after the expiry of six (6) years. The defendant further stated that a meeting was held between the plaintiff and the defendant on 13<sup>th</sup> June 1991 which resulted in the settlement and set off being confirmed in writing. The defendant pleaded that the plaintiff was estopped and precluded from denying that the defendant had fully discharged the said debt. The defendant, without prejudice to the above, and in the alternative, pleaded that the said debt was assigned to the estate of Mohamed Aslam (*deceased*) the former managing director of the plaintiff as a consequence of which the defendant was fully discharged and relieved from any

obligations to the plaintiff under the said debt. The defendant prayed that the plaintiff's suit be dismissed with costs.

Prior to the hearing of the case, the parties prepared and filed bundles of agreed documents which were respectively produced as plaintiff's exhibit No.1 and defendant's exhibit No. 1. The plaintiff produced a further document as plaintiff's exhibit No.2. Similarly, the defendant produced another document as defendant's exhibit No.2. At the hearing of the suit, the plaintiff called two witnesses, namely, PW1 Makenzi Mweu, a document examiner and PW2 Hannington Taabu, the liquidation agent of the plaintiff. The defendant testified as DW1. From the oral evidence adduced in court, and further from documentary evidence adduced by both parties to these proceedings, the following are the facts of the case as I was able to comprehend it: the defendant is an advocate of the High Court of Kenya and a businessman. He told the court that at the material time he had stopped practicing law and instead concentrated in various business ventures under various companies managed by a holding company referred to as Da Gama Rose Group of Companies. The defendant told the court that he was one of the incorporators and original shareholders of the plaintiff. I accepted this evidence as a fact since it was not controverted by the plaintiff.

The defendant testified that after about a year or so, he divested from the plaintiff bank but continued offering consultancy services to the plaintiff. The defendant testified that he was instrumental in the exponential growth of the plaintiff in that he undertook several assignments on behalf of the plaintiff which resulted in the plaintiff obtaining substantial business. In the defendant's bundle of documents, at pages 244 to 274, the defendant exhibited consultancy work which he alleges to have undertaken on behalf of the plaintiff and for which he was allegedly paid consultancy fees of Kshs.350,000/= per month from 1983 to 1991. The plaintiff strenuously disputed this fact. The plaintiff denied that it had instructed the defendant to undertake any consultancy services on its behalf. The defendant conceded that there was no documentary evidence to back up his claim that the plaintiff had retained him as a consultant. The defendant insisted that such retainer was agreed orally with then managing director of the plaintiff, the late Mr. Mohamed Aslam. The plaintiff testified that there was no evidence in the plaintiff's records that such consultancy agreement had been entered between the plaintiff and the defendant.

Having evaluated the facts of the case on this point, I am inclined to agree with the plaintiff that no such consultancy agreement was entered between the plaintiff and the defendant. Having perused the documents which the defendant relied on to support his claim that he had been so retained to be a consultant of the plaintiff, it was apparent to this court that the defendant may have acted as an intermediary or as a Mr. Fix It for the plaintiff in relation to certain government functionaries at the time. As a person who appeared to have had influence in the corridors of power at the time, the defendant may have aided the plaintiff to secure certain licences and statutory exemptions and further assisted the plaintiff to secure business from government itself in addition to other government agencies. However, this court drew inference from the said evidence that the defendant was paid commission or other accommodation on a case to case basis and not the monthly retainer that the defendant claims he was being paid. As would become apparent later in this judgment, the issue of the monthly retainer allegedly paid to the defendant will prominently feature in a controversial document dated 13<sup>th</sup> June 1991 which was authored by the defendant and allegedly signed by the late Mohamed Aslam on behalf of the plaintiff.

What is clear is that the close relationship between the plaintiff's then, managing director and the defendant resulted in the plaintiff and companies associated with him being advanced several credit facilities. For instance, the defendant applied for and was advanced the sum of Kshs.3.5 million in 1984. The plaintiff charged his property being LR. No. 209/3509 to secure the said debt. Although the defendant claimed that he had paid off this sum, it was clear that before the said loan was fully paid, the defendant again borrowed another sum of Kshs.3.5 million from the plaintiff in 1986. The defendant executed personal guarantees at both instances when he was advanced the said sums. It is instructive that in the subsequent loan advanced in the year 1986, the defendant requested the plaintiff to continue holding the security that he had offered to secure the amount that he was earlier advanced in 1984. The plaintiff further adduced evidence which established that the defendant irregularly operated his current account by overdrawing funds with the acquiescence of the plaintiff. For instance, on 16<sup>th</sup> July 1986, the

defendant deposited with the plaintiff a cheque of Kshs.4 million with a view to apparently reducing his overdraft which by then was overdrawn by Kshs.3,601,108.20. Upon the deposit of the said cheque, the account reflected a positive balance of Kshs.398,891.80. On 23<sup>rd</sup> July 1986, as indicated in the defendant's letter of 16<sup>th</sup> July 1986, the amount of Kshs.4 million reflected as offsetting the defendant's overdraft facility was reversed on 22<sup>nd</sup> July 1986.

Meanwhile, in the intervening period, apparently, on the strength of the said cheque which was later reversed, the defendant withdrew the sum of Kshs.105,100/=. At the end of the entire process, the defendant owed the plaintiff an amount that was higher than before the defendant deposited the said dud cheque of Kshs.4 million. This conduct by the defendant, apparently in collusion or connivance with the plaintiff's former managing director was further evident on 21<sup>st</sup> December 1990 when the defendant deposited a cheque of Kshs.10 million apparently to reduce his debt which had by then accumulated to Kshs.28,352,244.75. On the said date, the defendant's account reflected a negative balance of Kshs.18,352,244.75. On 31<sup>st</sup> December 1990, the entry of Kshs.10 million was again reversed to reflect the original amount of Kshs.28,352,244.75. This court drew an inference that the defendant was requested by the then managing director of the plaintiff to deposit the said cheques in the accounts so as to conceal from whoever who was looking into or inspecting the said account, temporarily at least, the true state of the said account.

In his evidence, PW2, the liquidation agent of the plaintiff testified that the defendant truly owed the plaintiff the said sum of Kshs. 52,457,085.75 as at 31<sup>st</sup> August 1993 and therefore should be compelled to pay the said sum together with the accrued interest at the rate of 32% per annum until payment in full. He testified that the documentary evidence produced by the plaintiff established to the required standard of proof on a balance of probabilities that indeed the defendant owed the said amount. PW2 particularly relied on the defendant's bank statements of accounts which were maintained by the plaintiff. On his part, the defendant vehemently and vigorously denied that he owed the plaintiff the said amount. The defendant offered several explanations in a bid to persuade the court that he did not owe the said amount. The first explanation that he gave was that he had fully paid the loan that was advanced to him by the plaintiff in 1984. He testified that this fact had been confirmed in writing by the plaintiff. A copy of the said letter is in the bundle of documents produced by the defendant as defence exhibit No. 1. As stated earlier in this judgment, that may well be the position. However, there is no evidence to suggest that the plaintiff paid off the subsequent sum of Kshs. 3.5 million which he borrowed in 1986 on the strength of the same security that he had used to borrow a similar amount in 1984.

The defendant offered a further explanation in a bid to exonerate himself from the debt. He testified that the plaintiff's former managing director had irregularly, unprocedurally and illegally debited amounts into the said account with a view to concealing irregular dealings in the bank. I would have been persuaded by the defendant's story were it not for the fact that it was apparent that the defendant participated in the alleged scam. The defendant did not give a cogent reason why in the two instances pointed out by this court earlier in this judgment, the defendant issued two cheques of Kshs.4 million and Kshs.10 million respectively with a view to aiding the plaintiff conceal the true state of the defendant's loan account. If the defendant had not issued the said cheques (*which apparently were rubber cheques which were meant to bounce*), may be, just may be, this court may have been swayed into believing the defendant's story that indeed his said account had been irregularly operated and maintained.

Another explanation which the defendant came up with to disclaim liability of the said amount claimed by the plaintiff was that the debt had been compromised by an agreement that he had reached with the plaintiff's then managing director. As stated earlier in this judgment, the letter dated 13<sup>th</sup> June 1991, is controversial to say the least. The court sought to peruse the original copy of the letter but the defendant, despite being given an opportunity to avail the same, did not ultimately produce it. Instead the defendant produced a photocopy of the said letter. The said letter which was produced as defendant's exhibit No.2 is also contained at page 48 of the plaintiff's exhibit No.1. It was the defendant's testimony that this document compromised the entire debt then owed by the defendant to the plaintiff. It is the defendant's case that the plaintiff's then managing director, as the holder of a power of attorney on behalf of the bank (*the power of attorney which was produced in evidence by the defendant*), the said managing

director had the authority of the plaintiff to compromise the debt.

I have perused the said document. It is written on the letterhead of the Da Gama Rose Group of Companies, a company associated with the defendant. The defendant admitted that he authored the said letter after a discussion that he had prior to that date held with the said managing director. What is of interest is that in the said letter, the defendant admits owing to the plaintiff the sum of Kshs.31,878,931.90 as at 31<sup>st</sup> May 1991. I perused the bank statements in respect of the defendant's loan account produced at pages 53 to 60 of the plaintiff's exhibit No.1. The said statement reflects the position stated by the defendant in the said letter. The amount owed by the defendant to the plaintiff as at 31<sup>st</sup> May 1991 was Ksh.31,878,930.90. It was clear that the defendant was at the time up to date on information regarding the status of his loan. In paragraph (d) of the said letter, the defendant proposes to settle said outstanding amount by offsetting it with the consultancy fees which was allegedly owed to him from 1<sup>st</sup> October 1983 to 30<sup>th</sup> June 1991. The issue of consultancy fees has been addressed by this court. This court is of the firm view that there was no such agreement between the plaintiff and the defendant to the effect that the defendant be paid consultancy fees at the rate of Kshs.350,000/= net per month. As stated earlier in this judgment, the issue of consultancy fees allegedly owed by the plaintiff to the defendant appears only in this letter dated 13<sup>th</sup> June 1991 and no other document of the bank.

The plaintiff strenuously disputed the validity of the document. The plaintiff was of the view that the signature of Mohamed Aslam, the late managing director of the plaintiff had been forged in the said document. It was further the plaintiff's case that the said document could not possibly be considered to be a valid and binding document in view of the fact that the bank had not passed any board resolution writing off the debt owed by the defendant to the bank. In this regard, the plaintiff called PW1, a document examiner, who adduced evidence to the effect that the signature on the said document was dissimilar to the known signatures of Mohamed Aslam and was therefore a forgery.

The defendant on his part sent a photocopy of the document to be examined by a scientific handwriting expert in England. The name of the expert is Frits Cohen. His report was produced in evidence by the defendant and is contained between pages 100 and 111 of the defendant's exhibit No.1. In his report, the said expert formed the opinion that it was probable that Mohamed Aslam had signed the said letter. The expert noted that there was a substantial degree of resemblance or similarity in differences between the said signature and the known signature of Mohamed Aslam. The expert wrote his opinion on the basis of a copy of the subject letter. It is therefore apparent that the two handwriting experts gave diametrically opposed opinions in regard to the authenticity of the signature of Mahamed Aslam. In **Dhalay v Republic [1995 – 1998] 1EA 29**, the Court of Appeal held that while courts were obliged to give proper respect to the opinions of experts, such opinions are not binding on the courts. An expert's evidence has to be considered alongside with all other available evidence, and where there was a proper and cogent basis for rejecting an expert opinion, a court was perfectly entitled to do so. A trial court has a duty of deciding whether or not to believe the expert and is required to give reasons for its decision. In **Asira vs Republic [1986] KLR 227**, the Court of Appeal held at page 228 that:

*“6. The most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by particular person or that the writings are so similar as to be undistinguishable.*

*7. It is the duty of a court to make an examination and satisfy itself whether the handwriting expert's opinion can be accepted and the court cannot blindly accept such an opinion. The failure to demonstrate to the court the features of the so-called disguised handwriting meant that the court did not itself decide the issue.”*

In the present suit, it is clear that conflicting evidence was adduced by the two expert witnesses. In determining which expert evidence to accept as constituting the credible evidence in regard to the signature of Mohamed Aslam, this court, of necessity will have to consider the events that allegedly transpired before the said document was allegedly executed. This court took into consideration the fact that the two experts' opinion was constrained by the fact that they were not availed the original document upon which to render their opinion. The said two experts wrote their opinion on the basis of a copy of the

said document. It was the defendant's case that his debt to the bank was compromised by the said letter. This court was not persuaded by the evidence adduced by the defendant that the document in question was as a result of negotiation between himself and Mohamed Aslam. This court found it to be too convenient that the defendant's liability to the bank was settled in a document where the bank got no valuable consideration.

Further, it was highly unlikely that the bank would have written off the then outstanding sum of Kshs.31,878,931.90 without some resolution having been passed by the directors of the bank. It was improbable that Mohamed Aslam, as the managing director of the bank, would have executed a document prepared by the defendant which was to the detriment of the bank. If indeed such an agreement had been reached, the decision thereto would have been reflected in the defendant's bank statements. As it were, there is no single document, or even entry, made in the books kept by the bank that puts in effect what the defendant alleges to be an agreement between himself and the bank. Taking into consideration the entire circumstances of the events that are alleged to have taken place at the material time, it is clear to this court that it was neigh impossible that Mohamed Aslam could have executed the said document. It is unfortunate that Mohamed Aslam is dead. May be he would have shed light on what really transpired on that day. As it were, dead men tell no tales.

The defendant has been left in the unenviable position of relying on expert evidence to support his assertion that indeed Mohamed Aslam executed the said document and thus discharged him from the said debt. The facts of the case do not however support his evidence. Having evaluated the facts of this case in that regard, I hold that it was most unlikely that Mohamed Aslam executed the letter dated 13<sup>th</sup> June 1991. I further hold that even if the said Mohamed Aslam executed the said letter, he did not have the authority of the bank to discharge the defendant from his debt. The money held by the bank did not belong to the bank. It belonged to members of the public who deposited their money with the bank. The fact that the discharge was not reflected in the defendant's loan account is more the reason why this court was not persuaded that indeed such a compromise was reached.

The other reason, in the alternative, that the defendant foisted in a bid to escape liability from being held accountable to pay the amount demanded by the plaintiff is a letter written by Mutula Kilonzo Advocate dated 12<sup>th</sup> March 1993 which purports to have assigned the debt then owed by the defendant to the estate of Muhamed Aslam. Muhamed Aslam had already died at the time. The letters exchanged between the said advocate and the governor of the Central Bank of Kenya, among others, is between pages 6 and 50 of the defendant's exhibit No.1. The defendant testified that he obtained the said documents when they were produced by Central Bank of Kenya during the Goldenberg Commission of Inquiry. I perused the said documents. I was unable to comprehend the argument advanced by the defendant: is the defendant saying that the estate of Mohamed Aslam – deceased should be held liable to settle the said debt? I do not think so. If indeed that is what the defendant wanted the court to believe, then the right forum for the defendant to agitate such a claim is before a succession court where the defendant would be called upon to establish such assignment to enable the court recognize him as a creditor to the said estate. The defendant cannot purport to prove said assignment of his debt in the absence of the administrators of the estate of Mohamed Aslam being enjoined to this suit. I therefore hold that the defendant was unable to establish the alleged assignment to the required standard of proof on a balance of probabilities.

As regard the claim by the defendant that the suit was time barred in accordance with the provisions of **Section 4** of the **Limitation of Actions Act**, I hold that the transactions in the defendant's loan account were such that the suit is not barred by limitation. It was clear that that loan account was current and was being operated by the defendant prior to June 1991 when the defendant made the claim that the suit had been compromised. I further hold that the admission by the defendant that he owed the bank the exact outstanding amount as at 31<sup>st</sup> May 1991 constituted the time upon which the cause of action accrued.

Several issues were framed by the parties to this suit for determination by the court. The said issues can be summarized into essentially two issues: has the plaintiff established to the required standard of proof on a balance of probabilities that it is owed the sum of Kshs.52,457,085.75 as at 1<sup>st</sup> September 1993? From the evidence adduced and the analysis of the facts of the case by the court, the answer is yes.

The plaintiff established that the defendant borrowed certain sums of money, and in some instances, overdrew his current account, and failed to repay the same. As at 1<sup>st</sup> September 1993, the amount had escalated to the sum claimed in the plaint on account of the interest charged. The second issue for determination is whether the defendant established his claim that the debt had either been compromised or set off or assigned on sums allegedly owed to the defendant by the plaintiff on account of consultancy work undertaken on behalf of the plaintiff. Having evaluated the evidence adduced, both oral and documentary, it is clear that the defendant failed to prove to the required standard of proof on a balance of probabilities, that the said debt was either compromised, set off or assigned as alleged by the defendant. The court did not believe the defences advanced by the defendant. This court formed the firm view that the defendant took the opportunity availed to him by the death of Mohamed Aslam to attempt to have the said debt waived. He has miserably failed in his attempt.

The upshot of the above reason is that judgment is entered in favour of the plaintiff as against the defendant for the sum of Kshs.52,457,085.75 as at 1<sup>st</sup> September 1993. Interest shall be paid on the said amount at the prevailing average bank rates of 19% per annum until payment in full. The plaintiff shall be paid the costs of the suit. It is so ordered.

**DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER 2009.**

**L. KIMARU**

**JUDGE**