REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 205 of 1995

NATIONAL BANK OF KENYA LTD ..... PLAINTIFF

VERSUS

ISAAC A OGETTAH ..... DEFENDANT

JUDGMENT

The National Bank of Kenya Ltd claims from the defendant Isaac A Ogettah, a sum of shs1,559,294.50, which it says it lent "for and on behalf of and to the use of the defendant at therequest for the defendant at Kisumu Branch" of the bank, which sum is said to carry interest at therate of 30% p. a. until payment in full. It said that demand and notice of intention to sue has beengiven without eliciting any payment from the defendant. The defendant denies any indebtness tothe plaintiff. So, the plaintiff set out to adduce evidence to prove the claim.

This effort was made through a witness by the name Emanuel Otondi Otieno whodescribed himself only as a section head attached to a loans and recoveries department in theplaintiff bank at its Kisumu branch, but did not tell the court what his duties and responsibilitieswere at the material time, and whether (and if so how) he ever had anything to do with the allegedloan to the defendant, or whether he has merely stumbled upon some papers which happen tocome near to what the plaintiff is claiming in this suit. He stated clearly in answer to a question putto him during cross-examination, that he "did not handle any of the two transactions of the twocheques" said to have been through which the defendant received the loan monies.

This witness said in his evidence, and the defendant agreed with him, so that it is anadmitted fact which I so find on admission, that the defendant was a customer of the plaintiffbank, having become so in the year 1991 (the precise commencement date is not disclosed); that inJune and July of that year he applied by two letters for "bank facilities of shs 1,500,000," and "aloan of shs 800,000", respectively; that the plaintiff bank, in reply to the letter of request of July(asking for shs 800,000 loan), "agreed to grant" to the defendant a term loan of shs 500,000, andnot what the defendant had asked for; that the plaintiff bank made an offer to the defendant of thesum of shs 500,000, and on clearly set out written *terms and conditions, inter alia:*(a) that the term loan was to be repaid by installments of shs 13,890 per month plusinterest commencing 30 days after first drawdown, and in the event of default inany monthly repayment the bank reserved the right to demand the outstanding debtat its discretion without further notice to the defendant;

(b) that the loan would carry interest at the rate of 17% per annum on monthly restsfor the time being, calculated on daily balances, with the bank reserving the right togive notice thereafter to vary the rate of interest charged;

(c) that the plaintiff *bank would hold a land charge over the defendant's plot, NoUyoma/Katwenga/2949, as a security for the sum of shs 500,000;* and

(d) that as a *"special condition "* the plaintiff bank's offer *"shall remain valid foracceptance by signing and returning " to the bank "the duplicate of this letterwithin 30 days from the date" of the offer,* i.e. 30th July, 1991, *"failing which ouroffer of facilities will lapse and be withdrawn."* (Emphasis supplied).

It is also an agreed fact which I find on common ground between the parties, that this offerwas received by the defendant; and that upon receipt of the conditional offer, the defendant didnot fulfil any of the terms and conditions. In particular, he did not accept the offer; he did notcharge his plot of land to secure the offered loan; he did not sign or return to the bank theduplicate of the letter of offer within the stipulated 30 days or at all. According to the letter ofoffer itself, upon the defendant failing to sign and return to the bank the duplicate of the said letterwithin the specified time, the offer of the loan would lapse and be withdrawn. The witness calledby the bank to give evidence confirmed these things in his evidence in-chief and in his answers toquestions put to him in the course of his cross-examination. In his own words, this is how thebank's witness spoke while on the witness-stand:

"On receiving the bank's letter of offer, the defendant did not return to us the portion ofthe letter of offer which was required to be returned signed by him, as per the lastparagraph of special conditions. He also did not perfect the securities as required in thatletter. As a result of these defaults on the defendant's part the loan was not released."It appears that this witness realised that he was damaging the plaintiff's case by asserting that noloan was released because the defendant had neither accepted the offer nor executed the requisitedocuments to charge his

land to provide security for the offered term loan. So, he quickly turnedround and said:

"I am sorry, my lord; I wish to put it this way: On the same day the defendant had madethe request by his second letter (8.7.1991), the bank paid him shs 200,000. But this wasnot paid on the strength of the said letter of request he had made; it was on the basis of theconfidence and trust the bank had in him."Whilst it is obvious that this last quoted passage from the plaintiff bank's own witness evidencestressed that the sum of shs 200,000 which he said was paid to the defendant was not paid underany loan agreement between the bank and the defendant, the bank's own same witness confirmedin his further evidence when he was being asked questions during his cross-examination, that hisearlier version of things was uppermost in his mind, and appears to be what he wanted to putacross to the court, namely, that the defendant having failed to comply with the terms andconditions on which the offer of the term loan was given to him, the bank did not grant any loanto the defendant. For, after reading loudly to the court the special conditions of the letter of offer,the witness said to the court:

"the bank would revoke the offer after 30 days from the date of offer. The date of offerwas 30.7.1991. Thirty days elapsed before the offer was accepted. So no loan was givento the defendant. No money was released, as the letter of offer was not acknowledged."At the same time the same witness told the court that one officer in the bank, NicholasRotich, in the recoveries department of the plaintiff bank had sworn an affidavit in support of aprevious application in this suit for summary judgment, and had stated that the money claimed inthis suit was lent on the basis of the said letter of offer. If I understand the position rightly, itseems that despite the defendant's refusal of the offer and despite the offer having lapsed after thethirty days, the bank allegedly lent out the money to the defendant.

The defendant's position is that while it is true that he approached the plaintiff with arequest that the plaintiff would provide him with a loan facility, namely a loan of shs 800,000, henever received any money from the plaintiff. According to his own evidence, the plaintiff made anoffer to him, of shs 500,000 instead of shs 800,000 requested; and that when the defendant sawthat the sum offered would not meet his needs, he declined the offer and refused to accept it. Hesaid that he declined that offer also because he was not prepared to satisfy the special conditionsset out in the letter of offer. In his own words:

"I got an offer of shs 500,000 through a letter dated 30.7.1991 (Exhibit P2). The letterwas self-explanatory, with special conditions on the last page of the same letter. Because of those conditions and because the sum of shs 500,000 was not what I applied for, I refused the offer and did not execute a loan agreement."And, according to the defendant, since he had enough money on his own account he drew outsome of it. Funds were on his account sufficient to pay his cheques. Accordingly, he drew acheque for shs 200,000, and also withdrew shs 140, 000. He never saw any official of the plaintiffbank to make any arrangement for these withdrawals since he was not borrowing. So when helater saw writings by the bank on one of his cheques, that shs 140,000 was in respect of a loan ofshs 500,000, he said he was surprised, because he had not borrowed any money whether by directlending or by way of overdraft, and he had enough money on his account to draw out.

He said that he opened his account with the plaintiff bank on June 13, 1991, with shs1,000, and then deposited sums on that account later, and barely a month later he made theafore mentioned withdrawals. He did not say how much he deposited on the account, but he saidthat he being a wholesaler and retail trader he banked with the plaintiff bank all his sales proceedson a daily basis.

Neither the plaintiff nor the defendant produced to the court any banking records relatingto the defendant's account. No evidence was adduced to show the state of that account at any onestage of the relationship between the bank and this defendant customer. There is no evidence ofthe defendant's track record or performance with the bank. Such evidence was very important forthe plaintiff bank in more than one way.

The bank must dispel the defendant's assertion that his account was healthy, at least to theextent that it could and did in fact hold sufficient funds to enable the defendant to draw on itwithout overdrawing it. It is the bank saying that the defendant borrowed its money; and since thedefendant says that after he refused the offer of shs 500,000 he fell back on his own money on hisaccount, it fell upon the bank to discredit this explanation, by showing that the account had no orno sufficient funds. It is not for a bank to merely say that a customer borrowed its money andthen thereby shift the burden to the customer to prove that he had money of his own which hewithdrew. It is for the bank to show that the customer did not have the money on his accountsufficient to pay the cheques in question, and that the money which he got on those cheques waslent to him by the bank, or that his account was overdrawn by the customer since there were no orno sufficient funds on his account at the time as the exhibited state of his account at the timeshows.

Such evidence must be produced by the bank, especially when, as in this case, thecustomer says that he is a businessman and that he banked his sales proceeds daily, and the bankoffers no contrary evidence. Here we are not having the defendant claiming; he is defending. Hecan only be called upon to show that he in fact banked as he said, after the plaintiff bankestablishes a *prima facie* case, using the records at the bank for the relevant period, showing nopayments-in by the customer. Upon such records produced, it becomes incumbent upon thecustomer, if he is to escape liability, to lay before the court such banking records as may be in hispossession, and if what he produces raises questions about what the bank had initially placedbefore the court, then the final burden of proof reverts to the plaintiff bank.

Another, and very important reason why it was necessary for evidence to be producedregarding the state of the defendant's account with the plaintiff bank at the relevant period, is thefact that the bank, in its evidence to the court said that although the defendant did not signaccepting the offer made to him by the bank, the bank nevertheless gave him the loan or allowedhim to overdraw the sums in question, because it said, the bank trusted the defendant and in goodfaith; or, as the plaintiff bank's witness put it, he was given this money "on the basis of theconfidence and trust the bank had in him". The bank witness emphasized this reason for allegedlygiving the money to the defendant, and repeated it during his being re-examined by the lawyer forthe bank. Said he, "The cheques were paid based on the confidence and trust the bank had in thedefendant, and on the fact that the bank was meditating to release a term loan of shs 500,000,upon the perfection of securities by the defendant."

Without a customer performance track record and roll of honour of obligations, how can itbe believed that the public depositors' money entrusted to the bank was just given to a very newcustomer at the mere asking of a person who had been a customer for hardly one month, allegedlyon the basis of the confidence and trust in the customer whose state of account before the allegedlending has not been placed before the court and is not said and shown to have ever existed? Onthis consideration alone the court is unable to believe that any lending manager could and did lendany money to this customer whose account had been in existence barely a month since its beingopened, and there is no evidence that this customer had otherwise been a customer known towhoever allegedly dealt with him at this branch of the bank.

The strongest evidence the bank could offer of any alleged payment by it to the defendant,and which the plaintiff bank said was proof that a loan was given to the defendant was a "cash" cheque for shs 140,000 drawn by the defendant on his own account at the plaintiff bank. Thischeque was produced as an exhibit. The cheque was paid. On it there are handwritten words inred, "Loan - shs 500,000". The bank witness in these proceedings said that he is not the one whowrote those words and figure. Someone else wrote them. The witness said that the matter waswritten by one of the bank officials. Whoever wrote them was not called to testify in this case.And yet, this witness told the court that what those words meant was that the amount of shs140,000 on the cheque was being paid by the bank to the defendant against his cheque as a part ofa loan of shs 500,000 either to be advanced or already advanced to the defendant. Surely, wheredoes one get this interpretation from? There is no evidence of any loan or overdraft approval.There is no record that any sum had been posted to the defendant's account to facilitate hisdrawing on it. There is no date of loan approval and crediting of the defendant's account with asum of shs 500,000 or any at all. There is no acknowledgement of receipt of any money by thedefendant from the plaintiff bank. There is virtually no documentation of any loan or overdraftfacility arrangement between the bank and the defendant. There are no internal communicationinstructions from anyone to anyone for any money to be put on the account of the defendant forloan or overdraft purposes. One simply sees writings on a cheque "Loan- shs 500,000", out of theblues and whose authorship is not disclosed. Who, in the bank, if at all, wrote that line? Whatwas the source of that matter? No one is telling the court. There is no reason offered to the courtas to why the authorship of that line remains anonymous, and the said writing unauthenticated.The date of that writing is not stated. The name and position in the bank of the writer are notgiven. This bank witness testifying before the court in these proceedings was not the author, andhe was not present and did not witness at the writing. The court must be on its guard againstdeception or danger of a thing like this bare statement on a cheque written by a person who hasnot testified and whose non-availability to testify has not been explained to the court, and when thewriting lacks any evident context. These misgivings are serious and lead this court to be wary ofthe writing in question and to its rejection of that superimposition on the cheque as evidence of anyloan or overdraft advanced or actually availed to the defendant.

For these reasons the court does not find any facts from which it can legitimately hold thatthe plaintiff bank lent any money to the defendant. The court has not closed its eyes to the factthat the defendant had recently opened an account with the plaintiff bank, with an initial small sumof shs 1,000. His evidence that he was a wholesale businessman was not challenged, and no questions were put to him to extract from him the turn-over of his business. He said that he hadbuilt up his account by daily deposits on that account; and although he did not produce paying-inbank deposit slips to show the state of his account, he was confronted with this difficulty onlyduring a question in his being cross-examined by counsel for the plaintiff. But it should not beoverlooked, that the plaintiff had not utilised the pre-trial process of discovery, inspection, or evenattempted to sent a notice to produce. In other words, the defendant was simply being caught bysurprise. It was not his case, so he needed not come to the court to prove the state of his account.It was for the plaintiff to prove the state of the defendant's account in order to prove its claimagainst the defendant. To do so, if the bank had any difficulty about it, it should have begun byseeking discovery by way of interrogatories, inspection, notice to produce, and all the machineryavailable in our Rules of Court to assist it. The plaintiff chose to ignore all these proceduraldevices to help him tie down the defendant, and waited to put a couple of casual questions whichreceived answers in cross-examination, and were not pressed further.

As a result, there is nothing to justify refusing to accept the defendant's position that out ofhis business he had, within a period of about one month, since opening the account with shs 1,000,deposited sums on that account, daily, enough to meet the cheques he subsequently drew on thebank. After all, if the bank was prepared to give him a loan of shs 500,000 within such a shortperiod, there must have been something on that account which showed a rapidly built account, anaccount which was growing very fast per day. That the account was getting big at a phenomenalrate on each passing day was probably one reason which gave the bank the confidence and trust inthe defendant. And when the bank does not inquire into what business the defendant was doing togenerate so much per day, it is not for the court to pursue the matter on behalf of the plaintiff. Inour adversary self-interest system of justice it is for the plaintiff to prove its unadmitted claim, andit is for the plaintiff to destroy, discredit or contradict the adverse position taken by the defendant.In this case the plaintiff did not do that, and it is not for the defendant to prove that he did notreceive the loan, or that he had funds enough on the account. For he could have had enoughfunds as he says. Where is evidence to the contrary? There is none. That is why the courtbelieves him on his evidence that the cheques he drew were against his own funds on the account,and not by way of utilizing any loan facility. He could even have simply kept quiet without sayinganything after denying the claim, and it would still be up to the plaintiff to prove its claim clearly denied by the defendant. The plaintiff has failed to discharge its burden of proof to the requisitebalance of probability.

But supposing I am wrong on my finding that the giving of the loan or overdraft facilityand its receipt or use have not been proved upto the required standard of proof, I have consideredthis matter from the point of view of principle and public good generally, and in the interests ofthese parties in particular. If the plaintiff lent any money to the defendant in the circumstances ofthis case, then the lending was done against and in complete violation of every known canon oflending which every prudent and experienced lending bank manager with a basic common-senseapproach to lending problems and marketing opportunities in his work, can only ignore to the ruinof the bank and to his own perdition. In at least one sense bank lending is not a science, in thesense that it cannot be broken down into a fool proof mathematical formula of natural immutablelaws standing constant in every situation which presents itself. Nevertheless, one does not have tohave been at an institute of bankers or to be erudite in financial studies, money marketing andfinancial services, to know *and apply* the obvious basic principles which underlie every lendingproposition. If the printed loan or overdraft application forms commonly filled by applicants forloans and overdraft arrangements at most major banks or finance houses or building societies, or,the kind of questions lending managers at such major banks and financiers ask at interviews withwould-be borrowers, can be recalled by any person who has had either of these experiences (andthey are things only too notorious to require particular citation and specific instance illustrativeparticularization), one sees clearly that the following are some of the leading canons of lending,distilled from commonsense prudence to safeguard public depositors' funds and to promote soundbusiness sense:

1. *Sizing up the would-be borrower.* The lending manager must (1) assess the character and basic integrity of the customer who wishes to borrow the money he asks for. This assessment must be based on:

(a) The manager's knowledge of the customer (would-be borrower),

(b) The track record and honour of obligations (if any) of the would-be borrower,and

(c) The ability of the applicant to articulate on financial aspects of his business orline of interest on which he intends to employ the funds; (2) in addition, assess the ability and experience of the would-be borrower in his field of work, his will, enthusiasm and capacity to work hard to achieve his objective, and wherethey are pertinent, also his managerial skills and financial acumen; (3) develop apersonal knowledge

of the customer's business activities, and personally observehis efficiency, organizational ability, staff relations and the product of hisexertions, and make a general assessment on these matters even though you, as abank manager you may not be an expert on the particular enterprise of yourencounter; (4) have a clear knowledge of the local reputation of the peoplegenerally as well as the type of business or project to be financed from therequested borrowing. Clearly, therefore, a lending manager entrusted with publicfunds for responsible safe-keeping and careful trading with depositors' money,before he lends out that money must be absolutely satisfied on the borrower'sindividual integrity, capacity for productive work, and financial acumen; and hemust know the local environment pretty well.

2. *Purpose of the requested advance.* On being requested for a loan or overdraft facilityfor a business or other project, uppermost in the lending manager's mind must be thequestion whether the venture will succeed. If the proposition is speculative the risk ishigh, especially in speculative property transactions, speculative purchase of shares orprecious metals. The risk element carried in such ventures call for great care, and alending manager must seriously address these aspects. Transactions outside the scopeof a customer's normal business, and for which he requires a loan, must be carefullyinvestigated. It is incumbent upon the manager to clearly establish the purpose forwhich the loan is applied, for the more speculative the proposition, the greater the carerequired; and he must ensure that the loan money is in fact used for the purpose used.

3. *Amount of the loan.* There are very crucial considerations regarding the amount ofmoney sought and to be advanced. The manager must find out the adequacy of the requested funds, and to make sure that those funds if advanced, will indeed beadequate for all eventualities, and he will have to advance only a realistic amount. Theconcern of the manager should not be confined to whether the sum asked for iscovered by the security; in addition, he must be sure that such amounts as he lendswill, in fact be enough to complete the project to generate funds to repay the loan, orso that the borrower does not employ his own funds which he should have used to repay the loan, and divert it to topping up the advance which leaves a shortfall. Theamount should adequately fund the project so that repayment is made. Another aspectof the amount to be advanced is this. The lending manager must properly relate theproportion of the amount to be borrowed, to the borrower's own stake in the business (usually his capital and accumulated profits) to provide fixed assets, leaving areasonable amount for working capital. Sometimes referred to as "gearing" or"leverage", the percentage of capital employed represented by borrowings is animportant consideration by a lending manager, because normally it is inappropriate fora bank or financier to put more of its money at the risk than the borrower is putting hisown. Moreover, if the enterprise or project or purpose is heavily borrowed in relationto its capital, chances are that it might not meet the cost of borrowing the new funds,and loan repayment prospects are proportionately diminished.

4. *Source of funds the would-be borrower has already provided.* If the intendingborrower intends to have a partial funding, then the amount either to be provided oralready provided by himself and its sourcing is an important factor in the elements to be considered. It is to his credit if the applicant is drawing on what he has been saving. Ifhe has resorted to private borrowings before approaching the bank for further funding,it may bring him out as over reliant on borrowed money; and such a view of theapplicant does not normally inure to his benefit; it is generally a minus point.

5. *Period of the loan.* The period of the advance sought is important in considering anapplication. Although bank loans are traditionally repayable on demand and arerelatively on short terms, modern trends are leaving this aspect to the sound discretionof individual banks. It is important to be clear on this aspect, because different considerations determine a host of matters, such as the fixation of interest and interestrates which are governed by whether it is a short-term, medium-term, or long-term,advance. The facility letter may carry safeguard (sometimes called "trigger") clauses inlong-term and not in smaller-term lending. In short, details in a facity document maycorrespondingly differ.

6. *Source of repayment.* There must be information to satisfy the lending manager thatthe would-be borrower will achieve his promises to repay, and that repayment isfeasible. If the applicant is a businessman, like the defendant in the instant case says he is, the lending manager will extract facts on this aspect from, among other things, anassessment of the general past and current cash flow as depicted by properly audited andlive accounts, depreciation, retained profit, forward budgets and cash flow forecasts. Inthe light of proper information the bank must ensure that the repayment proposals areclear and well thought-out. It is important to find out whether that on which the moneyto be borrowed is to be applied is going to be self-liquidating, in the sense that theproject or item to be funded generates sufficient funds to repay within a reasonableperiod, or there are alternative sources of repayment such as salaries, profits orpayments for sugar-case or coffee.

7. *Profitability.* A bank is, of course, in business, and it will want to make a profit on itslending to enable the business grow and provide the bank owners with adequate returnon their capital. For this reason the lending manager must keep this element in viewwhen considering a loan proposal.

8. *Security for the loan.* It may be possible, although it is not a common occurrence inthis country, to lend money of the public on the strength of the borrower's personalintegrity or customer's balance sheet. Generally, however, lending may have to becovered by some security, depending on its type, value, chargor and reliability; or ifthe applicant does not have assets to charge, he may be backed up by a guarantor whoundertakes to repay the loan in the event of the borrower's failure. Normally, however,the proposition should be viable on its own merits, and the security taken only as asafeguard in the event of unforeseen circumstance. At any rate, the security offeredmust be something which has stability in value and easily realizable in case of need.This aspect must always be an important part of a banker's assessment of a loanproposition. In this connection the manager must consider whether security isnecessary at all; and, for this purpose his appraisal of the overall financial strength ofthe applicant, will influence his decision to lend or to decline an advance. That is oneother reason why a detailed assessment of audited accounts is essential. If security isrequired, then he must establish what security is available and its adequacy as a cover.

All these basic principles are really commonsensical. Experience in the practice of banking willshow the wisdom. For a judge, experience in the Commercial Division of the High Court teachesthese things. Books by experts on banking are full of them. But one also learns that the lending manager retains discretion, different managers have different discretionary powers, depending ontheir responsibility and seniority, size of the bank branch and the business complexity. Themanager's discretion notwithstanding, the aforesaid canons of lending are so basic andfundamental, that they normally call for strict compliance with them, and a lending manager CANONLY IGNORE THEM AT HIS PERIL.

Nearby each of these considerations is imperatively crucial. For example, the intendingborrower's integrity, status, competence, and how

well he puts across important information andpresents his request for assistance, are cardinal considerations; and there can be no honesty andgood faith in lending depositors' money to anyone when danger signs are clear enough, as theywere in this case when the defendant refused or failed to accept a loan of less than what he hadasked for, and offered on special terms and conditions he said he would, or could, not be able tofulfil or otherwise accept. The purpose for which the money asked for is going to be put isimportant, for two things must always be considered by the bank, from at least two standpoints:first, the purpose must be legal; and secondly, the intended use of the loan money must bereasonably likely to produce the desired profitable result; so that for the second consideration, itmay often be wise to avoid purely speculative propositions. The duration of the risk is important,often avoiding long term loans not repayable quickly if need arose, and also bearing in mind thatpossible effects of changing economic and political circumstances may radically alter the chancesof repayment.

So, despite the manager's discretion, there are certain things which are at the core oflending. There must be contractual terms of lending backed up by a legally binding agreementbetween the lender and the borrower. The loan agreement must cover essential matters, amongthem a clause governing the various conditions which must be fulfilled before any advance ismade, e.g. formal matters as to the execution of any necessary guarantees and securitydocumentations, clauses on default events, remedies and so on.

Therefore, a loans portfolio assigned a lending manager carries with it heavyresponsibilities, a general duty of care. Above all, I propose that a bank is under a duty not toimpose a loan on a customer who does not want to borrow at all or on terms and conditions whichhe is not willing, able, and ready to accept or fulfil. This duty must be fulfilled through the bank'slending manager. The manager in his turn owes this duty to his bank and to the customer. Nocustomer shall be saddled with an encumbrance of a loan which has been offered to him on terms and conditions which he does not accept and has declined to accept. No bank customer shall havea sum of money he does not want, thrust down his throat merely because he had put in anapplication for a loan, especially when the sum forced on him is less than what he had asked for.When a customer receives an offer of a loan from his bank following his application, and the offercontains stipulated terms and conditions which the customer must accept as a part of theconsideration for the loan offered, he is free to consider those terms and conditions, and if they aretoo onerous for him, he may decline to accept the conditional offer; if he considers them alrightand he feels he is ready, able and willing to meet and satisfy them, he may accept the offer andindicate or otherwise communicate his acceptance in either the usual manner if no mode ofindication is specified, or, if any particular way of communicating acceptance is stipulated in theoffer (as was specified in the instant case), then he must accept and communicate the acceptance tothe bank as the bank stipulated in its offer. To hold that any offer made by the bank to a would-beborrower who has applied for a loan must be accepted or deemed accepted would be utterlyabsurd, contrary to the order of reason and a total opposite of the law. In our system of law abank does not have a right to compel an applicant to take a sum determined by the bank eventhough the sum and amount is inadequate and the conditions for lending are unacceptable to theapplicant. In our system a bank cannot be allowed to tell an applicant for a loan. "Although youapplied for shs 1,500,000 and also shs 800,000, we have approved a loan to you of shs 500,000,which *we* and *not you*, think is good for you, and since you had applied for loans you must acceptour offer, and here is the amount of our choice take it". If it is said that the plaintiff in this casegave any loan of the amount claimed, then the loan was forced on the plaintiff in a way similar towhat I have just described.

A bank owes a public duty to its depositors, not to lend their money to any customer whorefuses neglects or otherwise fails to accept the stipulated bank conditions and terms of its offer ofthe loan sought, and in the absence of any lawful loan agreement or contract. It owes itsdepositors a similar duty to apply the correct principles and follow the proper canons of lendingand safe and accepted practices which ensure or maximize the chances of loan repayments. Alending manager who disregards the proper canons of lending endangers depositors' funds. Thecourts cannot render judgments which assist lending managers who put public funds depositedwith the bank to perilous lending.

A bank owes a duty to its customer, not to lend to a customer a sum which the customerhas found insufficient for his purposes and has declined to accept. A bank owes a duty to itscustomer not to tempt him by actually releasing money to him when he is not ready and willing tocomply with lending terms and conditions stipulated in the letter of offer. A bank has no right topry into the moral uprightness or crookedness of its customer by releasing free money to him whenhe has not complied with the bank's terms and conditions of lending. Concealed crookednesswithout its practical application is harmless ; but he who, without lawful reason and not tricked orotherwise defrauded, ruptures the seal of concealment and falls victim of the spillage shall not beheard to groan under the weight of his own self-inflicted distress.

The stability of banks and their prosperity, and the safety and security of depositors'money in banks do not, and will never, lie in bad lending contrary to basic lending principles andsound customer and would-be borrower assessment, and then desperate spirited pursuits after thebadly assessed defaulting borrowers. No. It all lies in responsible lending in accordance with theage-old, time-tested proper rules for lending - rules on the book and rules of practical experiencein place. Courts are not here to pass judgments in aid and promotion of irresponsibility,carelessness and recklessness in lending bank managers, let alone any person entrusted with apublic duty. It will then be up to the banks themselves to know how to recover lost public moneyfrom their irresponsible or reckless lending managers, or to recruit and properly train the rightpersons to handle the public's money safely - persons who know and practice proper lendingprinciples and rules.

On a matter of elementary principle and to avoid saddling the public with irresponsiblemanagers who have no regard for rules for safe lending, the court holds that in the absence ofpleaded and proved fraud, deceit, trickiness or sharp conduct by a borrower who fails to repaywhen repayment is due, losses shall lie where they fall; that badly lent money if not repaid shall bethe pang of a bad lending manager; that a borrower who has not accepted the terms and conditionsof a loan offer but is nevertheless given a loan may repay it only on his terms and conditions, andif he does not pay back, the bank must bear the loss, but if it accepts the terms and conditionsmade by the borrower, that will be the contractual arrangement under which the bank may recoverthe money; and a court shall not be reduced to a bad debts collector for lending managers whoexceed the permissible narrow margin of folly and lend public money outside the bounds of sense.

In the instant case I have found that on the facts, no loan was ever given to the defendant by the plaintiff. I also find that even if a loan had been given, there is not a single piece of evidence to show that any of the basic principles and canons of lending was ever applied in the matter. Each rule on the book was violated. The court lends no assistance to irresponsibility or recklessness in managers, and will not pass a judgment which will promote an evil on society. A judgment which will encourage lending managers to look solely to courts for loans recovery while they themselves exercise no responsible caution will not be very far from telling such managers that next time take the money yourself, write on any cheque of any customer that the customer took the money as a loan, and if he does not pay, go to the court and the court will say that banks never err and the customer must have borrowed the money and must pay it, even though it is the manager who took the money for himself and wrote on the cheque the untruth. Such a scenario will cause untold harm to society, and will not be allowed by a judgment to protect such evil. For these reasons, this suit is dismissed with costs. It is so ordered.Signed and dated by me this 18th day

of March, 1999, at Nairobi.

R .KULOBA

JUDGE

18.3.1999