



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1676 of 1991**

ROYAL CREDIT LIMITED,.....

**PLAINTIFF
VERSUS**

CITY FINANCE LIMITED.....DEFENDANT

Civil practice and procedure - Evidence Law - acknowledgement of having two deposits for respective certificates - Issue of two deposit certificates - Production of documents of support claim via evidence - Mistake and duplication claimed - Possibility envisaged- Contention and Appeal struck out.

JUDGMENT

The Plaintiff Royal Credit Limited filed this suit against the City Finance Limited claiming the sum of Kshs. 3, 000, 000/- (three million) interest thereon from 29th March 1990 to 26th September 1990 at 15.5% per annum and interest thereon from 26 September 1990 until full payment at 19% per annum and costs of the suit.

At all material times, the Defendant was a duly registered and licensed financial institution under the Banking Act and was carrying on business as a financial institution in terms of the Banking Act and was mainly based in Nairobi.

The Plaintiff Company called two witnesses, Mr. Samuel Kamau Macharia, its Chairman who stated in brief that he was the owner and main shareholder and Chief Executive of Madhu Paper International Ltd. The assets of Madhu Paper International Limited were sold to Mutune Investments Limited whose owners and Directors were a group of individuals and companies such as Trust Bank, City Finance Bank. Some of the individuals were Ketan Somaia, Ajay Shah and Isaac Githuthu.

Ketan Somaia, Ajay Shah and Githuthu told Mr. Macharia that they had been directed to buy shares from Madhu International and so Mr. Macharia says the sale of the assets of Madhu Paper International was forced sale. The sale was effected and the acquisition was made in the name of Mutune Investments Limited. Buyer paid some amount directly to Barclays Bank PLC in the United Kingdom, some to Royal Credit. Then the parties met to compare final accounts to see who owed who any money out of the same sale; so as to enable each party to close its books. All these meetings to reconcile the accounts were held between Mr. Macharia on behalf of Madhu Paper International, and Mr. Ajay Shah and Isaac Githuthu at all times with Mr. Ketan Somaia attending such meetings occasionally. Mr. Macharia also represented Royal Credit in such meetings, while Mr. Githuthu, Shah and Somaia represented the interests of City Finance (The Defendant), Trust Bank and Mutune Investments. After all these meetings, the amount to enable each party to close its books was arrived at and it was Kshs. 11, 655, 623/40 and after this amount had been adjusted Kshs. 3, 197, 242/40 was found to be owing and this was rounded up to Kshs. 3,000,000/- and Mr. Macharia confirms that he was paid this amount by issuance of a fixed deposit certificate by City Finance to Royal Credit Limited as City Finance was to act on the instructions of the buyer i.e. Mutune Investments Limited. He was then issued with two fixed deposit certificates. Certificate No. 90/B/0838 was issued as part of settlement of Kshs. 11,000,000/- referred to earlier, and certificate

No. 90/B/0836 was issued as final last payment of settlement of the same Kshs. 11, 000,000/-. These certificates were supposed to mature six months later.

Mr. Macharia then made a demand on behalf of the Plaintiff. Payment was only received in respect of certificate No. 0838 and not in respect of 0836. He wrote again on 29/10/1990, this time demanding the payment in respect of certificate 0836 but on 9th November 1990, the Defendant's Chief Accountant said there was a duplication of one certificate into two certificates. He explained to the Defendant how the two certificates had arisen but the Defendant could not give Mr. Macharia any satisfactory explanation. He contacted Mr. Githuthu but Mr. Githuthu also did not give him any explanation and never solved his problem. Ajay Shah called him for another meeting to further negotiate the matter but he did not attend. The certificate in question was signed by Ajay Shah and Githuthu.

In cross-examination, Mr. Macharia stated that City Finance was conduit through which payment was made to the Royal Credit Limited. Part of the other payments had been made through Trust Bank and was made through Barclays Bank PLC in the United Kingdom. The amount made through Barclays Bank PLC in the United Kingdom was Kshs. 110,000,000/- leaving Kshs. 140,000,000/- which was made to Royal Credit in various forms including the amount now in question. He asserted that these payments were made and two certificates were issued. He was sure that whoever was to pay the Royal Credit Limited took the money to City Finance (the Defendant) but he confirmed that he did not verify with the people as to whether they paid the money.

Shah and Githuthu signed one certificate and the other certificate was signed by Ajay Shah and another person Mr. Macharia did not know. He agreed he did not have a letter confirming the payment in respect of certificate 0836.

He agreed he signed a document Exh. D1 - a memo dated 29th March 1990 from Madhu Paper International to nobody. It was headed Mutune Madhu Paper Reconciliation statement and it stated that the amount due was Kshs. 3, 367, 246/00. It had a note on it saying Kshs. 3,000,000/- agreed by Macharia and he agreed that on 29th March 1990 the amount due to him was Kshs. 3,367,246/- and he said the same payments were made within four days.

In re-examination, Mr. Macharia said that when he signed Exh. D1 it was not that the entire figure of Kshs. 3,000,000/- was the entire debt. He stated that that figure represented interest on Kshs. 55,000,000/- which was fixed deposit which was due from Mutune Investments Limited. The total interest was Kshs. 4, 000,000 but Mutune deducted what was due to them.

The second witness for the Plaintiff was Mr. Gerald Munene who was at one time, the Finance Manager with Madhu Paper International and after that he was the Finance manager with the Royal credit Limited and was involved in the sale of Madhu Paper International to Mutune Investments. He was together with Mr. Macharia representing the Royal Credit Limited whereas Githuthu and Ajay Shah represented Mutune Investments during the negotiations for the same sale. He received the two fixed deposit receipts from Ajay Shah's office and had custody of the same receipts. He admitted that he signed Exh. D1 which stated that the agreed figure was Kshs. 3,000,000/- but stated that that figure was only related to interest on the minor adjustments on the money held by the Defendant Bank of Kshs. 55, 000,000. He further stated that deposit receipt No. 0838 had in it payments of stocks, staff benefits and other payments. He wrote a letter included in exhibit 1 dated 19th January 1991 explaining fully how the two payments came to be and his facts were never disputed by those who participated at the various meetings in which the alleged settlements were negotiated.

On cross-examination, Mr. Munene stated that he attended a meeting with Ajay Shah and the two produced a reconciliation statement and then he was issued with a certificate for Kshs. 3,000,000/- and on 30 March, they held another reconciliation meeting in respect of stocks, staff salaries, loans but he did not have that reconciliation statement for which the second certificate was issued. He confirmed that the transaction involved Kshs. 250,000,000/- payment covered 270 days, and he could not remember a date when payment was made without a document being issued. He was then shown Exh. D1 and he confirmed that the same were letters setting out how each payment was made. He however, said it was possible to

pay him fixed deposit certificate without any documents and again confirmed that he had no reconciliation statement for the stock and staff salaries. He admitted that the certificates were not given to him by Ajay Shah and then he confirmed that he could not remember the person who gave him the certificates. He maintained in evidence that on 29/3/1990 the amount was Kshs. 3, 000,000/-. The question of second certificate was not mentioned because they were to meet the following day and that Exh. D1 was related to debtors only, Stock and staff benefits had different letters.

In re-examination, he stated that the meetings that decided on settlement amounts were not formal meetings and no minutes were kept of the same meetings as they were informal bargaining meetings. On 30th March, 1990 the amount was more than Kshs. 3,000,000/- but because of good relationship it was rounded to Kshs. 3,000,000/-. The Plaintiff also produced several exhibits in support of their case.

The Defendant called one witness who told the Court that the Defendant got instructions from Mutune Investments to issue a deposit certificate for Kshs. 3, 000,000/- in the name of Royal Credit Limited. The procedure before the issue of the Deposit certificate is that the customer deposits either cash or a cheque or if he has money in his account then he requests for the deposit receipt to be issued either to himself or to a person of his choice. The Bank will first verify that there is money in the account or that cash or cheque has been deposited into the account and then issue deposit receipt.

In this case, Mr. Peter Kamau Kabi, the Defendant witness stated that the Defendant got instructions from Ajay Shah on 29/3/1990. The same instructions were oral and although it was not proper to act on oral instructions, but Ajay Shah was the Defendant's one of the Directors and so the Defendant acted and issued the certificate. He maintains that only one instruction was issued and only one certificate was supposed to have been issued. The witness was the one receiving instructions and he only received one instruction from Mr. Ajay Shah. Once the certificate is issued and signed a covering letter would be issued and the certificate would be sent through a letter. The signatories would be any of Bank Officer of the rank of a Manager. There would be about 100 (one hundred) receipts per day and mistakes did happen and there were cases where two certificates would be issued instead of one certificate. From the records there was no deposit to support the second certificate and he never deposited Mutune's account twice and the bank did not have two deposits. There were thus two deposit receipts against one deposit. He confirmed that the Defendant got Exh. D1 from Ajay Shah and that only one letter was written forwarding deposit certificate. When the claim was made for the payment of the second deposit certificate, the Defendant sought details as how the funds were placed with the Defendant, but that letter seeking the same information was not replied to. He was referred to Exh. D3 which were bundles of papers handed over to the Bank by Ajay Shah showing how much money was owed to the various parties from various documents and none of them concerned this particular alleged debt. He ended his evidence in chief by saying that the Defendant is not under any obligation to make any payment on a certificate which has an error on the face of it.

In cross-examination, he accepted that there was no requirement that all fixed deposit certificates must have funds, and that Ajay Shah did not issue the certificates but that he signed both certificates. The Defendant notified the Plaintiff about the mistake which was detected when the Plaintiff demanded payment on maturity. He maintained that the Defendant was only instructed to pay only one certificate but not the second one as there was no money to back up the second payment.

In re-examination, he stated that when he was instructed to issue the deposit certificate, he debited Mutune account and credited Royal Credit account and he maintained that the second deposit certificate was issued in error.

These were the evidence adduced by both sides to this case. Exhibits were also produced by both sides.

I have carefully perused the evidence by these witnesses, the exhibits and the submissions by the learned counsels for both sides. I want to state at the very start that when the evidence was closed on 27th April 1999, the counsels were to make their verbal submissions on 4th June 1999, the Plaintiff counsel sent a written submission and Mr. Majanja for Mr. Muigai for the Plaintiff made verbal submissions as well. I feel that as the written submissions was not agreed upon and in Law is not proper, I would not consider

the same. I will therefore, consider only the submissions by Mr. Majanja for the Plaintiff and Mr. Malowe for the Defence.

In Law, the fact that the Plaintiff had been issued with the two deposit certificates is prima facie evidence that the Defendant had acknowledged having two deposits from him one in respect of each certificate. In this case, it shows that the Defendant had his deposit in respect of certificate No. 0836 and in respect of 0838. As each certificate was for Kshs. 3,000,000/-, it goes without saying that it means the Defendant had his deposits amounting in total to Kshs. 6,000,000/-. The Defendant, however says that this is not so and that only one deposit for Kshs. 3,000,000/- is valid and that in respect of another alleged deposit, the certificate issued was issued by mistake. This means that the presumption that the Defendant held two deposits in favour of the Plaintiff must be re-examined against the existing evidence to see if the presumption is rebutted satisfactorily. Plaintiff's exhibit 1 contains a letter dated 19th January 1991 which was referred to by Mr. Munene in his evidence in chief. That letter states at page 2 that the fixed deposit certificate No. 0836 was issued to cover their letter of 29th March 1990 whereas the fixed deposit certificate No. 0838 was to cover their letter of 14th September 1990 plus all other letters referred to in the analysis in his letter. This in my humble opinion was the nearest the Plaintiff went into explaining these two certificates. PW1 Mr. Macharia states clearly that the payments were both negotiated on 29th March 1990 and were issued one on 29th March 1990 i.e. certificate or fixed deposit receipt No. 90/B/0836 and another one was issued on 30th March 1990, i.e. certificate or fixed deposit No. 90/B/0838. If the two certificates were issued on 29th March 1990 and on 30th March 1990 respectively, then how can the certificate No. 0838 be issued to cover a letter of 14th September 1990. That certificates 0838 was in fact to mature on 30th September 1990.

Mr. Munene stated in his evidence that that letter (dated 19th January 1991) he wrote to the Defendant covered everything in this matter. As it stands, that letter seems to me from the part I have referred to, to be confirming that at least one fixed deposit certificate was not valid. In this case fixed deposit 0838 had been accepted as valid and was paid.

Further, Mr. Macharia in his evidence during cross-examination admitted that on 29th March 1990 he signed a reconciliation statement between Mutune and Madhu Paper dated 29th March 1990 agreeing to the amount of Kshs. 3, 000,000/- as around figure for Kshs. 3, 367,246.00. He stated in cross-examination:

"I now see this letter marked for identification as MFI DI. This letter is dated 29/3/1990 from Madhu Paper International to nobody. I signed it. It is a memo. Heading is Mutune Madhu Paper reconciliation statement. The amount due is Kshs. 3, 367, 246.00. I signed it. I see a note saying Kshs. 3,000,000 agreed by Mr. Macharia. On 29/3/1990, the amount due to me was Kshs. 3, 367,246/-. These payments were made within 4 days and none was made in cash."

The hearing was then adjourned on 27th April 1999. On 27th April 1999, Mr. Macharia, who admitted that PW2 Mr. Munene also signed the same reconciliation statement on 29/3/1990, now said that when he signed that statement, it was not that the entire figure claimed was Kshs. 3,000,000/-. He stated that that amount represented the amount of interest from Mutune Investment on the fixed deposit of Kshs. 55,000,000/-. Clearly that figure of Kshs. 3,367,246 was the amount that was due to Madhu Paper after taking into account the amount of Kshs. 474, 241 as per letter dated 9th March 1990, interest on 55 million which was actually Kshs. 4, 500,000/- and not Kshs. 3,000,000/- and from the two, the amount due to Mutune was deducted. I therefore, cannot see that the amount of Kshs. 3, 367, 246.00 rounded to Kshs. 3,000,000/- which he accepted was due as per that letter was interest on Kshs. 55,000,000/- and what Mutune felt should be deducted as he alleged. Then, Mr. Munene in his evidence agreed he signed the same paper and in fact wrote the words "agreed Kshs. 3,000,000/-" but according to him that was only in respect of interest and referred only to interest. Mr. Macharia has not produced any reconciliation settlement document. DI came from the Defence.

Mr. Munene (PW2) says that on the next day i.e. 30th March 1990, they held another reconciliation meeting in respect of stocks, staff salaries, loans etc, but he did not have reconciliation statement from which the second certificate was issued. If at the meeting held on 29th March 1990, a reconciliation

statement was issued which showed that Kshs. 3,367,246.00 was due to the Plaintiff why was there no reconciliation statement issued on 30th March 1990 if it also resulted into another valid payment? Mr. Munene also says that the document Exh. D1 which they both signed concerned only debtors and that stock and staff matters had different letters but he never produced the same letters into the Court.

I have gone through the exhibits produced into the Court by the Plaintiff but I find it difficult to see how the amount of Kshs. 6, 000,000/- or thereabouts warranting the issue of the two certificates came about. At least the documents do not seem to be clear on this aspect.

The Defendant maintains that one certificate was issued by mistake and had no funds paid into the Plaintiffs account to back it up. They have not said who actually made the mistake. The only witness the Defence called stated that he had only one instruction on this matter and that was to issue fixed deposit receipt for only one Kshs. 3,000,000/- and not two certificates. He said there was no money for the other certificate. Mr. Ajay Shah signed both certificates. He signed one certificate with Mr. Githuthu and another certificate with the witness. Ajay Shah was representing Mutune Investments during the settlement meetings. His evidence would have been important to the court in this case but he has not come and so one would not be able to know whether the mistake was the result of his work or not. Githuthu's evidence would have also been very important in this matter particularly as Mr. Macharia alleges that he (Githuthu) promised to look into this matter but when he wrote to him no response was forthcoming. These two persons were Directors of Mutune Investments and of the Defendant Bank. That they were not called would affect mainly the Defence case. However, as I have indicated above, I am not convinced that the Plaintiffs witnesses were witnesses of truth and I am not convinced that they have proved that the Plaintiff was entitled to additional payment over and above the Kshs. 3,000,000/- for which one certificate was paid. Under these circumstances, the non-calling of Shah and Githuthu by Defence does not strengthen Plaintiffs case.

I find that although there was at the beginning a presumption arising from the issue of the certificates, that the Defence accepted by those certificates that the Plaintiff had money in its favour with the Defence, that presumption is by the evidence of Plaintiff which is not clear and honest, rebutted as I find that the settlement amount agreed was as admitted by Mr. Macharia Kshs. 3,367,246/- which was rounded up as Kshs. 3,000,000/- and that this was the amount in respect of which one fixed deposit certificate was issued and that payment in respect of that certificate has been made. I find that the other certificate was issued by mistake as the Plaintiff has not produced an agreement for the issuance. I accept the Defence evidence that as there were many certificates to be signed everyday (he said about 100 per day) there could be a mistake and duplication could have resulted. The Plaintiffs case is dismissed with costs to the Defendant.

Delivered this 24th Day of June, 1999.

ONYANGO OTIENO
JUDGE