

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO 368 OF 1992

HABIB BANK LIMITED.....PLAINTIFF

VERSUS

MOHAMED SHARIFF HASSAN.....DEFENDANT

RULING

In the suit (as pleaded in the plaint) the plaintiff claims from the defendant a sum of Shs 760,322/65 alleged to be the debit balance of the amount due and owing by the defendant to the plaintiff as at 16th April, 1992. This is alleged to be in respect of the bank loan or an overdraft reflected on the defendant's account with the plaintiff.

In para 3 of the plaint it was alleged that for the past several years the defendant had been running an account with the plaintiff and that as at 16th April, 1992 he had borrowed money from it by means of an overdraft to the tune of the sum claimed from him in this action. An overdraft is a sum lent to the customer by a bank of more money than he has in the Bank. It is not in dispute that such money has to be repaid to the Bank. The customer/bank relationship is of a contractual nature. (See *Halsbury's Laws of England* 4th Edn Vol 3 para 40). A customer would be someone who has an account with a bank. In the present application the supporting affidavits are annexed documents that undeniably show that the defendant Mohammed Shariff Nassar opened this particular account and at the time of opening the account he not only supplied the Bank with his personal details such as profession, postal address, telephone number, specimen signature but he also agreed "to be bound by the Bank's rules of the conduct of such accounts." (See annexure A to the supporting affidavit).

On the overleaf of the same annexure he also put his signature in a provided space to denote thereby that he had understood the stipulated rules and had agreed to be bound by the same.

Annexure B to the affidavit is a bulk of photocopies of cheques which were variously drawn on the account by the defendant. Annexure D are photocopies of the statements of account which were periodically sent to the defendant. It is averred in the plaintiff's affidavit (para 8) that the defendant never questioned any of those statements of account or his liability for the amount shown on the statements. The defendant's defence and replying affidavit present an aspect which is really hard to fathom. It is averred therein that the defendant has never had any business or resources of his own to enable him operate this account and thereby justify to be given such a colossal sum as a loan, that the bank account in question was opened at the instance of and that it was operated for the benefit of one Shariff Hassan Alwi (his father). He admits, however that he drew the cheques but goes on to say that this was done likewise ie for benefit of his father or his (father's) business. The matters deposed to by the defendant may very well be true but in his dealings with the Bank he clearly portrayed himself not as his father's agent or servant but as an independent customer of the Bank. On the other hand if he was convinced that his father and not himself should be liable for the sum claimed in the suit it was open to him to join his father to the suit as a 3rd party. He has not taken such a course. The suit against the defendant is plainly based on his contractual relationship with the Bank.

In *Zola v Ralli Bros Ltd* [1969] EA 691 Sir Charles Newbold P at p 694 said:

"the mere right of a defendant to be indemnified by or to have a claim over against a third party in respect of defendant's liability to the plaintiff or to recover from the plaintiff by way of a counterclaim, a sum of money which does not readily reduce the liability of the defendant to the

plaintiff, does not entitle the defendant prevent the plaintiff from obtaining a summary judgment.”

I do not see how the private arrangements between the defendant in the present case and his father would eliminate or reduce the defendant’s liability to the Bank. Mr Don Amolo, counsel for the defendant also conceded that the pleaded defence was a difficult one when he ultimately said that it is one which is “peculiar, novel and unprecedented.”

On the basis of the foregoing reasons I am satisfied that this is an apt case for the entry of summary judgment. I accordingly enter judgment for the plaintiff as prayed in a 6, c, and d of the plaint. Costs of the application to the applicant.

Dated and delivered at Mombasa this 2nd day of November , 1992

I.C.C WAMBILYANGAH

JUDGE