REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 113 OF 2012

KARACHIWALA NAIROBI LTD.....PLAINTIFF

VERSUS

SANJIVAN MUKHERJEE.....DEFENDANT

J U D G E M E N T

1. The Plaintiff filed the instant suit on 24th February, 2012. In the Plaint dated 22nd January, 2012 the Plaintiff claimed against the Defendant for the sum of Kshs. 10,600,000/-. The claimed amount was a loan advanced to the Defendant, and the same was disbursed through two cheques dated 14th November, 2006 and 6th December, 2006. The Plaintiff further alleges that the Defendant issued, as part re-payment, a cheque for Kshs. 3,500,000/- dated 27th December, 2006 which cheque was returned unpaid upon presentation. The Defendant issued a further cheque of Kshs. 5,000,000/- drawn by M/S Owino & Associates which was not presented at the request of the Defendant. It was alleged by the Plaintiff that despite its demand letter dated 20th June, 2010, the Defendant has failed and/ or neglected to repay the loan advanced to him. The Plaintiff claimed interest at 24% per annum on the claimed amount i.e. Kshs. 10,600,000/- accruing from 27th December, 2006 being the date that the first cheque was issued, until payment in full. It further prayed for costs of the suit together with interest at 14% per annum.

2. The Plaintiff filed its witness statement dated 24th March, 2014 on 25th March, 2014. Therein, the Plaintiff witness, Sanjay Chimanbhai Dayabhai Patel, stated that the Defendant had refunded Kshs. 7,000,000/- towards the settlement of the debt but that there was an outstanding balance of Kshs. 3,600,000/-.

3. In his Defence, the Defendant in his Statement of Defence dated 29th March, 2012 filed on 30th March, 2012, denied the allegations that he owed the Plaintiff the claimed amount of Kshs. 10,600,000/-. He stated that the claim by the Plaintiff was aimed at defrauding the Defendant and unjustly enriching itself at his expense. Further, he stated that he was a stranger to the allegation of the Kshs, 5,000,000/- purportedly drawn by M/s Owino & Associates on his instructions. He refuted and contended that the same was drawn in an arrangement between the Plaintiff and the said M/s Owino & Associates of which he had no knowledge. It was further detailed that the Plaintiff had not specified the true nature of the claimed transaction that resulted in the instant suit and, as such, is not entitled to the reliefs as sought

under paragraph 9 of the Plaint, or at all. It was further stated that the allegations by the Plaintiff are untrue and unknown by the Defendant.

4. In the Defendant's witness statement dated 29th March, 2012 filed on 30th March, 2012, it was contended that the Plaintiff Company and the Defendant used to be business partners in a company known as Machine Technologies (2006) Ltd in which the Defendant was a Director. It was contended that sometime in 2006, the Plaintiff made an order for the supply of IT equipment from Machine Technologies, which it later cancelled and was refunded Kshs. 7,000,000/- which they had paid for the said order. Further, it was contended that subsequently, with the cancellation of the order and the refund of Kshs. 7,000,000/-, there was no agreement or any outstanding claim between these parties.

5. In the submissions dated 25th June, 2014 filed on behalf of the Plaintiff, it was submitted that the loan agreement and the order made to Machine Technologies were two distinct entities, with the former advanced personally to the Defendant whilst the latter was a business agreement between the Plaintiff and Machine Technologies (2006) Ltd. It was also submitted that the refund of Kshs. 7,000,000/- as reiterated by the Defendant in his witness statement and Statement of Defence was pertaining to the business transaction between the two entities and was unrelated to the loan of Kshs. 10,600,000/- advanced to the Defendant in his personal capacity. Further, it was submitted that the Defendant lacked any defence to the claim against him, and had tried to cast aspersion by making reference to a Sharjah Project, which in any event is not a subject matter in the present suit, and as such, he should have judgment entered against him.

6. In the submissions dated 8th July, 2014 filed on behalf of the Defendant, it was submitted that the Court lacked the jurisdiction to hear and determine the matter. This was alluded to by the fact that the Defendant was served with Summons to Enter Appearance on 28th February, 2012 which provided for ten (10) days within which to enter appearance. It was submitted that the summons to enter appearance was fatally defective and therefor the proceedings were a nullity in law. Further, it was submitted that the Kshs. 7,000,000/- paid to the Plaintiff, which was admitted by the Plaintiff witness in his statement, was towards the settling of the Kshs. 10,600,000/- that had been advanced to him. It was submitted that the Plaintiff's witness had admitted that it had received a cheque of Kshs. 3,500,000/- in the statement dated 24th February, 2012 and that by such admission, there was no more debt outstanding between the parties.

7. For the determination of the Court are two issues: (1) Whether the Court has the jurisdiction to hear and determine the instant matter and (2) Whether the Defendant is indebted to the Plaintiff as alleged in the Plaint filed on 24th February, 2012.

8. As regards the issue of jurisdiction, the Defendant claimed that the Summons to Enter Appearance was fatally defective as it had only provided for ten (10) days within which to enter appearance. It was further alleged that due to the defect, the proceedings were a nullity law. Under **Order 5 Rule 1(4)** of the *Civil Procedure Rules*, the Plaintiff is mandated to serve the summons and allow sufficient time for the Defendant to enter appearance. The afore mentioned rule reads *inter alia:*

"The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear: *Provided that the time for appearance shall not be less than ten days*."

In the Summons to Enter Appearance dated 28th February, 2012 the Defendant was required to enter his appearance within ten (10) days of service of the summons. The Plaintiff therefore acted within the ambit and provisions of **Order 5 Rule 1(4)** and the Defendant could therefore not claim to have entered

appearance in protest. This Court therefore, has the mandate and jurisdiction to hear and determine this suit, in accordance with and pursuant to the provisions of *Article 159(2)* of the *Constitution*, as read together with **Sections 1A and 1B** of the *Civil Procedure Act*.

9. In summary, it was alleged that the Defendant was advanced a loan of Kshs. 10,600,000/- by the Plaintiff. However, the Defendant in admitting that he received two cheques dated 14th November, 2006 and 6th December, 2006, detailed that the same were for business purposes and was not a loan advanced. This was stated by the Defendant in his testimony before the Court on 20th June, 2014. He further testified that it was never a condition that the money was to be paid back as they, the Plaintiff and Machine Technologies (2006) Ltd were in partnership for a project known as the Sharajah Project, and that the money was to be used as working capital for the same. The Defendant reiterated that he had paid back Kshs. 7,000,000/-to the Plaintiff on 6th December, 2006, after the Plaintiff had cancelled a previous order for the supply of IT equipment. As regards the cheque written out in the name of M/s Owino & Associates, the Defendant testified that he had nothing to do with it and it had never been brought to his attention that any third party was making payments on his behalf. He further testified that the discounting facility as perpetrated by the Plaintiff was not beneficial to him, and to which in any case, no claim had been issued against him in that regard. He further testified during cross examination that he did not owe the Plaintiff any money as alleged and further that the discounting facility was never an issue before the Court.

10. The Plaintiff through PW1 alleged that it had lent some Kshs. 10,600,000/- to the Defendant personally, sometime in 2006. On or about 27th December, 2006 the Defendant issued a cheque for Kshs. 3,500,000/- in repayment of the loan which was returned unpaid when the Plaintiff presented it for payment. The repayment of the Kshs. 7,000,000/- PW1 further testified, was for another transaction, which was the discounting facility in which the Plaintiff repaid Kshs. 10,000,000/-. The Defendant, through Machine Technologies (2006) Ltd repaid Kshs. 7,000,000/- on 10th March, 2007 to the Plaintiff, with a balance of Kshs. 3,000,000/- outstanding. It was however testified that the Kshs. 7,000,000/- paid by Machine Technologies (2006) Ltd was a guarantee for the discounting facilities and not the repayment of the loan. PW1 testified during cross examination, that the facility was offered by Prime Bank Ltd in 2007 and the Plaintiff issued four (4) post-dated cheques to the Bank in order to access the facility. The Kshs. 7,000,000/- received by the Plaintiff was used in repaying the discounting facility after Machine Technologies (2006) Ltd requested that the same be used for the repayment of the same. The outstanding balance therefore reverted to Kshs. 10,000,000/- as per the Plaintiff's averments.

11. The issue for contention before the Court, is not as to the transactions between the Plaintiff and Machine Technologies (2006) Ltd, but the purported loan advanced to the Defendant in his personal capacity sometime in 2006. No claim has been issued by either of the parties as to these transactions or as to the alleged Sharajah Project which the parties may have been jointly involved. The Court will deliberate and limit its determination in relation to the Plaint, the Defence thereto and the Reply to Defence, as well as the testimonies and submissions of the witnesses in so far as the same relate to the alleged loan advance of Kshs. 10,600,000/-. The Plaintiff demanded the repayment of Kshs. 10,600,000/- in its demand letter dated 21st June, 2011 to the Defendant. On 22nd July, 2011 the advocates for the Plaintiff, duly instructed, issued a further demand notice to the Defendant, who in his response dated 1st August, 2011, countermanded and further demanded Kshs. 14,000,000/- from the Plaintiff. The Plaintiff wrote to the Defendant's advocates on 8th August, 2011, 16th September, 2011 and 30th November, 2011 seeking reply to the demand notices, and it subsequently instituted formal proceedings via the Plaint on 24th February, 2012.

12. In the Plaintiff's Bundle of Documents dated 24th February, 2012 are two cheques drawn in favour of Sanjivan Mukherjee, the Defendant herein. The first cheque, being cheque no. 141220, dated 14th

November, 2011, is for the amount of Kshs. 3,600,000/-. The second cheque, being cheque no. 141271 is dated 6th December, 2011, for Kshs. 7,000,000/-. The Plaintiff alleges that the amount was a loan to the Defendant who failed and/or neglected to repay the same. The Defendant claimed that the same was for business purposes: for the supply of IT equipment, as working capital for a project known as the Sharajah Project or for the discounting facilities purposes. The Court has been unable to establish exactly what it was for. However, in the testimony of the Defendant on 20th June, 2014 during cross examination, he stated that the Plaintiff did not pay Kshs. 7,000,000/- for the supply of IT equipment and that no advance payments were made for the same. Therefore the Kshs. 7,000,000/- alleged to have been repaid by the Defendant could not have been for the order of the IT equipment. Secondly, as regards the Sharajah Project, the Defendant has not produced any documentary evidence, or has proved otherwise to the satisfaction of the Court, that the amount was advanced as working capital to facilitate that project. The Defendant has not shown or produced before the Court any evidence that the monies advanced were not to be repaid and that the same was utilized in a business partnership between the Plaintiff and Machine Technologies (2006) Ltd in which the Defendant was a Director. With regard to the discounting facility, the same is not within the purview of this Court to determine, as no claim has been made by either party as portends the same.

13. It is explicitly evident that the Defendant was lent money in the amount of Kshs. 10,600,000/- through the two aforementioned cheques. It is not for the Court to determine the purpose or use of the monies but only to ascertain that indeed monies were advanced to the Defendant by the Plaintiff on 14th November and 6th December 2006. The Defendant has not shown that he has made good any repayment of the same. In my view, before this Court the Defendant engaged in sideshows in an attempt to deflect the Court from the real issue in contention. DW1 has confusedly stated that the same was for the Sharajah Project, or that the same was repaid after the cancellation of the order for the supply of IT equipment or that the same was a guarantee for the discounting facility. It was not clear to me just which and all point to one decisive conclusion that the Defendant was being liberal with the facts and contorting the same in his perceived favour. I consider that the Plaintiff demonstrated that it had advanced Kshs. 10,600,000/- to the Defendant, and that the same remains outstanding to date. The claim by the Plaintiff for Kshs. 10,600,000/- is therefore valid and sustainable as against the Defendant. As regards the issue of interest on that amount, the Plaintiff has failed to establish that the rate of 24% per annum was the lending rate agreed at the time the loan was advanced. To this end, the Court determines that the rate of interest charged shall be the prevailing Court rate. The same prevails from the date of first demand by the Plaintiff being the letter dated 21st June, 2011 until repayment in full. Costs of the suit shall be borne by the Defendant.

DATED and delivered at Nairobi this 7th day of August, 2014.

J. B. HAVELOCK

JUDGE