



**Gesa Building and Civil Engineering Limited & another v Equity Bank Limited (Civil Case 791 of 2010) [2022] KEHC 476 (KLR) (Commercial and Tax) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 476 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 791 OF 2010  
DAS MAJANJA, J  
MAY 31, 2022**

**BETWEEN**

**GESA BUILDING AND CIVIL ENGINEERING LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**GEORGE NGURE CHIRA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**EQUITY BANK LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The 1<sup>st</sup> Plaintiff is a company that engages in the business of construction. It operates a Business Current Account No. 001\*\*\*\*484 (“the current account”) with the Defendant (“the Bank”). Due to the nature of the 1<sup>st</sup> Plaintiff’s business, the Bank has over time extended various facilities to it, which facilities were secured by, inter alia, motor vehicles KBB 3--D (Toyota Premio), KAL 4--S (Mitsubishi Pajero Station Wagon) and KAZ 3--S (Toyota Station Wagon) (“the motor vehicles”) and immovable properties Githunguri/Ikinu/2527 and Githunguri/Ikinu/2525 (“the properties”) owned by the 2<sup>nd</sup> Plaintiff and who is also a director of the 1<sup>st</sup> Plaintiff. In accordance with the Bank’s policy, a loan account No. 001\*\*\*\*\*695 (“the loan account”) was also opened so as to run concurrently with the current account above so that whenever monies were deposited in the current account, the same was debited in the loan account and used to repay the loan.
2. Over time, the loan account fell into arrears prompting the Bank to commence recovery action against the Plaintiffs. On 22<sup>nd</sup> November 2010, the Plaintiffs filed this suit by the Plaint dated 19<sup>th</sup> November 2010 against the Bank claiming that they did not owe the sums demanded by the Bank. They accused the Bank of committing commercial fraud by purporting to the attach the motor vehicles without notice, attempting to recover an amount that is not actually owed, failing to go by the agreement



- between them and the Bank on the time and terms of settlement of the facility and seeking to realize a guarantee in the properties without following due process.
3. Together with the Plaintiff, the Plaintiffs filed a Chamber Summons application dated November 19, 2010 seeking to, inter alia, restrain the Bank from exercising its statutory power of sale over the motor vehicles and the properties pending hearing and determination of the suit. On 30<sup>th</sup> July 2012, the court dismissed the Plaintiffs' application which paved way for the Bank to proceed with the sale of the properties to a third party.
  4. The Plaintiffs now seek an order for accounts to be taken and that a declaration be made that the contract of guarantee is invalid, null and void.
  5. The Defendant responded to the suit by filing a defence dated March 1, 2011 that was amended on July 7, 2019 and further amended on September 25, 2019 together with a counterclaim. It states that it had the right to recover money owed to it which right includes the exercise of its statutory power of sale. It states that the Plaintiffs are free to obtain statements of accounts from the Bank on request and on payment of the requisite statement fee. The Bank further denies the existence of an unsigned guarantee agreement as claimed by the Plaintiffs.
  6. The Bank claims that by a letter of offer dated 28<sup>th</sup> November 2008, the Bank advanced the 1<sup>st</sup> Plaintiff a business loan of KES 7 million that was to be repaid in twelve monthly instalments of KES 641,760.00 until the loan is paid in full. Further, that sometime in the year 2013, the 1<sup>st</sup> Plaintiff requested that it be advanced a business loan which was for the purpose of purchasing Safaricom shares which the Bank was selling in conjunction with Safaricom. The Bank avers that after the loan was disbursed to the 1<sup>st</sup> Plaintiff through the loan account, the same fell into arrears and stood at KES 3,232,140.38 as of 17<sup>th</sup> July 2019 and remains unpaid to date. The Bank avers that having defaulted in payment of the loan, it proceeded to sell one of the motor vehicles registration number KBB 3\*\*D belonging to the 1<sup>st</sup> Plaintiff which proceeds were utilized to repay the loan arrears but that the Bank has been unable to locate the other motor vehicles and as such, unable to exercise its right over them.
  7. The Bank's position is that it was agreed between the parties that the Bank would make available funds out of which the 1<sup>st</sup> Plaintiff could overdraw the current account owing to the fact that the 1<sup>st</sup> Plaintiff's business venture required substantial investment which the Plaintiffs did not have at the time. That owing to the fact that the Plaintiffs had failed to repay the earlier loan advanced to them, the Bank was left with no choice but to deposit money from the overdraft account to offset the various loan accounts which the Plaintiffs had defaulted payments. It is upon the amount being overdrawn to offset the loan accounts that the current account has since incurred interest among other charges and now stands at KES 11,148,851.00.
  8. It is on this basis that the Bank now seeks judgment on the counterclaims for KES 3,232,140.38 and KES 11,148,851.00 together with the interest thereupon at the prevailing commercial rates of interest. It urges the court to dismiss the Plaintiffs' suit against it with costs.
  9. The Plaintiffs replied to the further amended defence and counterclaim by reiterating their averments in the Plaintiff and denying the averments in the defence and counterclaim.
  10. The matter was set down for hearing with the 2<sup>nd</sup> Plaintiff testifying on behalf of the Plaintiffs as PW 1. The Bank called its Credit Manager, Mary Katoni as its witness (DW 1). At the conclusion of the hearing, the parties were directed to file written submissions which are now on record. The parties' testimonies were along the lines set out in the pleadings as I have outlined above hence I shall not rehash the testimony but refer to it to resolve a disputed issue.



## **Analysis and Determination**

11. Since the parties did not file a list of agreed issues and based on the pleadings, evidence and submissions, I find that the following are what the court is being called upon to ultimately determine:
  - a. Whether the Bank advanced the 1<sup>st</sup> Plaintiff KES 7 million.
  - b. Whether the Plaintiffs have overpaid the Bank.
  - c. Whether the Plaintiffs are indebted to the Bank for the sum of KES 14,380,991.00.
  - d. Whether the Bank should be ordered to provide a reconciliation of the Plaintiffs' loan accounts.
  - e. Whether there is in fact a contract of guarantee and whether it should be declared null and void.

### **Whether the Bank advanced the 1<sup>st</sup> Plaintiff KES 7 million**

12. Whereas the Plaintiffs did not dispute that they took out certain facilities with the Bank, the Plaintiffs in their evidence, deny ever taking out a facility of KES 7 Million, stating that the same was never applied for and was erroneously and/or mysteriously deposited into the 2<sup>nd</sup> Plaintiff's wife's account. On its part, the Bank averred that the Plaintiffs indeed applied for and were granted the facility as a business loan, which loan amount was deposited in the 1<sup>st</sup> Plaintiff's current account as evidenced by the letter of offer dated November 28, 2008 and the 1<sup>st</sup> Plaintiff's statement of account.
13. Going through the pleadings and applications on record, more so the Plaintiffs' Chamber Summons application dated November 19, 2010, I note that the Plaintiffs stated in one of the grounds in support of the application that, "The 1<sup>st</sup> Plaintiff obtained a bank overdraft facility from the defendant in the sum of Kenya Shillings Seven Million." The validity of the Letter of Offer dated November 28, 2008, though not executed by the Plaintiffs was not contested and challenged by the Plaintiffs and indicates that upon an application, the 1<sup>st</sup> Plaintiff was being offered a credit facility of KES 7 million according to the terms and conditions set out in the letter. The 1<sup>st</sup> Plaintiff's statement of account of the current account which is found in the Plaintiffs' documents indicates that on the same date, 28<sup>th</sup> November 2008, a disbursement credit of KES 7 million was made.
14. The Bank produced the statement of account for the 1<sup>st</sup> Plaintiff's loan account which indicates a loan disbursement of KES 7 million on November 28, 2008. Section 176 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) creates a presumption in favour of the Bank on the terms that "A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded." These statements of account were produced without objection, meaning the court ought to admit them as true and accurate entries unless demonstrated otherwise. As stated, the Plaintiffs never objected to their production nor claimed that any entries in the statements have been omitted or are erroneous. The Plaintiffs also never led any evidence that the KES 7 million loan was deposited in the 2<sup>nd</sup> Plaintiff's wife's account. This, coupled with the Plaintiffs' own admission in their pleadings can only lead me to conclude on a balance of probabilities that the 1<sup>st</sup> Plaintiff indeed applied for and was granted a loan facility of KES 7 million, which loan amount was disbursed to the 1<sup>st</sup> Plaintiff's account.

### **Whether the Plaintiffs overpaid the Bank**

15. The Plaintiffs claim that they have overpaid the Bank as they had paid an aggregate sum of KES 8.9 million at least against the overdraft facility of KES 2.5 million. This was rebuffed by the Bank, who stated that in as much as the Plaintiffs had paid the sum of KES 9.9 million for the facilities, the



Plaintiffs remain indebted to them for the sum of KES 14,380,991.00 as can be seen through the statements of accounts.

16. From the Plaintiffs' deposition of November 19, 2010, the 1<sup>st</sup> Plaintiff admits to be indebted to the Bank, only as per the balance as at 16<sup>th</sup> August 2010 subject to further payments as may be made. Indeed, as per the statement of account of the current account annexed by the Plaintiffs for the period January 1, 2009 to August 24, 2010, as at the said date of 16<sup>th</sup> August 2010, the 1<sup>st</sup> Plaintiff was in a debit position with the Bank, the account having been overdrawn by KES 2,729,431.86. By a letter dated 23<sup>rd</sup> August 2008, the Bank informed the 2<sup>nd</sup> Plaintiff that the 1<sup>st</sup> Plaintiff was indebted to the Bank for the sum of KES 6,794,950.00. The 1<sup>st</sup> Plaintiff's loan account also indicates that as at April 25, 2019, the said account had a debit balance of KES 2,887,404.38.
17. I have gone through the record of evidence and pleadings and I regret that I am unable to find any point where the Plaintiffs were ever in a credit position with the Bank as contended by PW1. Thus, I can only conclude that the Plaintiffs never overpaid the Bank as claimed and I find this claim to be baseless.

### **Whether the Plaintiffs are indebted to the Bank**

18. It is the Bank's position that owing to the fact that the Plaintiffs had failed to repay the loan advanced to them, the Bank had no choice other than to deposit money in terms of the overdraft facility granted to the 1<sup>st</sup> Plaintiff by overdrawing the 1<sup>st</sup> Plaintiff's current account to offset the loan accounts which now stood at KES 11,148,851 inclusive of interest. Further, that from the KES 7 million loan advanced to the 1<sup>st</sup> Plaintiff, there is an outstanding amount of KES 3,232,140.38 which means that the Bank claims an aggregate sum of KES 14,380,991.38 from the Plaintiffs.
19. When asked how the Bank arrived at this aggregate figure, DW 1 stated that they applied an interest rate of 18% per annum on a reducing balance as from 2008 to date. The Plaintiffs did not really challenge the rate of interest or how the same was applied meaning that they acquiesced to the Bank's claim that they were indebted to it for the sum of KES 14,380,991.00.
20. I therefore find and hold that the 1<sup>st</sup> Plaintiff is indebted to the Bank to the extent of KES 14,380,991.00

### **Whether the Bank should provide a reconciliation of the Plaintiffs' loan accounts**

21. The Plaintiffs seek for an order for accounts in respect of its facilities. The Bank stated that for this reconciliation to be done, a customer, in this case, the Plaintiffs, ought to make an application in the prescribed form. In any case, DW 1 testified that due to the fact that this case has been ongoing for a while, the Bank has already done its reconciliations and filed them in court.
22. The Bank has furnished to the Plaintiffs and the court all the documents. The Plaintiffs have not pointed out the errors in the statement or stated in what way they are incorrect, erroneous nor have they expressed their dissatisfaction with the ones on record. I do not find any reason to order accounts as the statements of account are already on record.

### **Whether there a contract of guarantee and whether it should be declared null and void**

23. The Plaintiffs seek a declaratory order that the contract of guarantee is invalid, null and void. According to *The Law of Guarantees (2<sup>nd</sup> Ed.)* by Geraldine Andrews & Richard Millet at pg.156, "a contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation.



The surety is therefore under a secondary obligation which is dependant upon the default of the principal and which does not arise until that point.”

24. When PW 1 was probed by the court on whether there was in fact a contract of guarantee on record, he was unable to give a conclusive answer and eventually conceded that none had been filed. While he initially claimws that the said guarantee was annexed in their documents as GNC-5, it turns out that the document was nothing more than a Sale Agreement between the 1<sup>st</sup> Plaintiff and a third party for the sale of a motor vehicle. The Bank further confirmed that the 2<sup>nd</sup> Plaintiff never executed any personal or director’s guarantee, which fortifies the conclusion that there was no contract of guarantee between the 2<sup>nd</sup> Plaintiff and the Bank and none on record.
25. In light of the evidence, I hold that the court cannot issue a declaratory order for a non-existent guarantee.

### **Conclusion and Disposition**

26. In conclusion I find and hold that the Plaintiffs’ claim as set out in its Plaint dated November 19, 2010 fails and it is dismissed. On the other hand, I find that the Defendant’s amended counterclaim dated 25<sup>th</sup> September 2019 succeeds. I therefore make the following dispositive orders:
  - (a) The Plaintiffs’ Plaint dated November 19, 2010 is dismissed with costs to the Defendant.
  - (b) The Defendant’s Amended Counterclaim dated 25<sup>th</sup> September 2019 is allowed on terms that Judgment be and is hereby entered in favour of the Defendant against the 1<sup>st</sup> Plaintiff for KES 14,380,991. with interest thereon at 18% p.a. from the date of filing suit until payment in full.
  - (c) The Plaintiff shall bear the costs of the suit and counterclaim.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY 2022.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango.

Mr Oyuchio instructed by J. M. Njengo and Company Advocates for the Plaintiffs.

Mr Ochieng instructed by Kioko, Muniyithya and Ngugi and Company Advocates for the Defendants.

