



**I & M Bank Limited v Shani Active Limited & 2 others (Civil Case 401 of 2018)  
[2022] KEHC 11962 (KLR) (Commercial and Tax) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11962 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 401 OF 2018  
WA OKWANY, J  
JULY 28, 2022**

**BETWEEN**

**I & M BANK LIMITED ..... PLAINTIFF**

**AND**

**SHANI ACTIVE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**RASIKLAL VIRPAL SHAH ..... 2<sup>ND</sup> DEFENDANT**

**NEER RASIKLAL SHAH ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein, I & M Bank, a limited liability company incorporated in the Republic of Kenya and licensed under the [Banking Act](#), instituted this suit seeking judgement against the defendant for:-
  - a. Judgement against the 1<sup>st</sup> defendant for a sum of Kshs 17,126,517.70 as at 1<sup>st</sup> October 2018 with interest at the rate of 13.5 pa until payment in full.
  - b. Judgement against the 3<sup>rd</sup> defendant for the sum of Kshs 41,100,000.00 together with interest at the rate of 13.5% per annum till payment in full.
  - c. Judgement against the 2<sup>nd</sup> defendant for the sum of Kshs 5,238,000.00 together with interest at the rate of 13.5% per annum till payment in full.
  - d. Costs of the suit on an advocate client basis and interest thereon at 14% per annum from the date of filing suit until payment in full.



### **The Plaintiffs case**

2. The plaintiff's case is that the parties herein entered into various contracts in which the plaintiff lent money to the 1<sup>st</sup> defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants guaranteed the said loan transactions. The plaintiff's case is that the guarantors were, under the contract, obligated to pay to the bank, on demand, all money and discharge all obligations and liabilities, whether actual or contingent due owing or incurred by the bank. The plaintiff further states that it was an express term of the guarantee that the amount recoverable from the guarantors was limited to the principal sum and that the guarantee would be a continuing security.
3. It was the plaintiff's claim that the 1<sup>st</sup> defendant's assets and properties, secured by a debenture, were distressed and proclaimed for distress of rent arrears of Kshs 4,734,065.98. The plaintiff objected to the proclamation and 1<sup>st</sup> defendant filed a case seeking to restrain the landlord from selling the assets but the court dismissed the plaintiff's objection hereby leaving the plaintiff at a great risk of being exposed without tangible security.

### **The Defendants case**

4. The 1<sup>st</sup> defendant is a limited Liability Company incorporated in the republic of Kenya while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are adults of sound mind residing and working for gain in the Republic of Kenya.
5. The defendants filed a joint statement of defence dated January 16, 2019 wherein they deny the plaintiffs claim. They contend that the overdraft facility of Kshs 29,100,0000 was advanced on May 23, 2014 when it was mutually agreed between the 1<sup>st</sup> defendant's shareholders Messrs Kishor Shah, Prashant Shah, Sandeep Hansaraj, Ravindu Dhirajlal, Ariff Mahamood and the 3<sup>rd</sup> defendant that the debt would be paid off prior to securing the credit facilities.
6. The 3<sup>rd</sup> defendant averred that his portion of the debt was 18% and that he borrowed the sum of Kshs 5,238,000 from the plaintiff to enable him pay off his share of liability. He states that the plaintiff however caused a deed of guarantee and indemnity dated July 2, 2018 in the sum of kshs 5,238,000 to be executed by the 2<sup>nd</sup> defendant guaranteeing the 1<sup>st</sup> defendant in lieu of the 3<sup>rd</sup> defendant.
7. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants admitted that they agreed to guarantee and indemnify the 1<sup>st</sup> defendant's obligation to the sum of Kshs 5,238,000 and Kshs 4,100,000. The 2<sup>nd</sup> defendant however denied that he executed a deed of indemnity guaranteeing and indemnifying the 1<sup>st</sup> defendant's obligations and liabilities under a fixed floating debenture for a principal sum of Kshs 12,000,000. The 2<sup>nd</sup> defendant contended that by a letter dated July 3, 2014 he issued a cessation notice in accordance with clause 5 of his Deed of Indemnity which authorized the plaintiff to liquidate his fixed deposit receipts held by the plaintiff in the sum of Kshs 4,100,000 towards the settlement of the 1<sup>st</sup> defendant's liabilities.
8. The defendants contend that the plaintiff liquidated the 2<sup>nd</sup> defendants Fixed Deposit Receipts (FDR) in the sum of 4,100,000 with a view to offsetting the said amounts but did not credit the defendants account. The 2<sup>nd</sup> defendant states that he honored his obligations under the Deed of Guarantee and indemnity dated July 2, 2014.
9. The 1<sup>st</sup> defendant denied its alleged indebtedness to the plaintiff to the tune of Kshs 17,126,517.70 and contended that it had paid the principle sums under the first overdraft facility of Kshs 29,100,000. The 1<sup>st</sup> defendant faulted the plaintiff for failing to regularly supply it with monthly statements of accounts and claimed that the plaintiff had tampered with the statements of accounts. The 1<sup>st</sup> defendant stated that the 3<sup>rd</sup> defendant, transferred a sum of Kshs. 5,238,000 from his personal account



to the 1<sup>st</sup> defendants account but that the same was not credited to the said account. The 1<sup>st</sup> defendant further claimed that it paid Kshs 899,260 by way of real time gross settlement with a view to settle its obligations but that it was not given credit for the said settlement.

### **Counterclaim**

10. The defendants filed a counterclaim seeking the following orders:-
  - a. An order directing the plaintiff to provide properly reconciled accounts hereto and remove all amounts levied illegally to wit usurious interests, penalties, additional interests and watch charges.
  - b. An order directing the plaintiff and the defendant to appoint an auditor to review the accounts of the defendants as held by the plaintiff and makes a report to court.
11. The defendants reiterated the averments made in their joint defence in respect to the various payments that they allegedly made to the plaintiff towards the settlement of the 1<sup>st</sup> defendant's debt obligations which payments the plaintiff did not credit to the 1<sup>st</sup> defendant's account.

### **Hearing**

12. The hearing commenced with the testimony of Musa Dumbuya (PW1), the plaintiff's first witness who adopted his witness statement dated November 18, 2018 as his evidence in chief.
13. On cross examination, he stated that the bank's claim was for Kshs 17,126,517 as at October 1, 2018. He testified that according to the guarantee and indemnity document, the 3<sup>rd</sup> defendant was to pay 41 million. He conceded that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants guaranteed the bank on the same transaction and made payments towards reducing the debt. He further conceded that the bank did not produce a loan statement and added that the 2<sup>nd</sup> defendant remained a guarantor despite the fact that he informed the bank, in writing, of his intention to withdraw as a guarantor.
14. Neer RasiklaL Shah (DW1) similarly adopted his witness statement dated August 2, 2019 as his evidence in chief. On cross examination he stated that he guaranteed Kshs 5.23 million for the facility of 29 million and that even though the same was fully paid, the bank refused to issue the statements. He added that all the guarantors had paid their full share of the guarantee but the bank refused to furnish them with the bank statements.
15. I have carefully considered the pleadings, the oral and documentary evidence presented by the parties together with their submissions. The first issue for determination is whether the 1<sup>st</sup> defendant is indebted to the plaintiff as alleged.
16. It was not disputed that the plaintiff advanced the 1<sup>st</sup> defendant a facility by a letter of offer dated May 23, 2014. The plaintiff's claim was that the said facility was secured by Personal guarantee and indemnity dated July 2, 2014, a letter of set off executed by Ravindu Virpal Shah together with fixed deposit receipt for funds held as lien of Kshs 9,021,000 and a fixed floating debenture of Kshs, 12,000,000 over all the assets of the 1<sup>st</sup> defendants. It was the plaintiff's case that the 1<sup>st</sup> defendant defaulted in the loan re-payment and that by a letter of demand dated January 15, 2018, the plaintiff demanded payment from the 1<sup>st</sup> defendant and that on January 15, 2018 the bank called up the guarantees.



17. In its defence the 1<sup>st</sup> defendant denied being indebted to the plaintiff for a sum of Kshs 17,126,517 as at October 1, 2018 and instead averred that it had paid the principal sums under the 1<sup>st</sup> overdraft facility of Kshs 29,000,000 and the term loan of May 23, 2014 together with interest, commissions and costs.
18. In its bundle of documents the plaintiff produced the statement of accounts for the 1<sup>st</sup> defendant Company account number 00100xxxxx1210. A perusal of the said statement reveals that as at September 30, 2018 the balance stood at 17,126,517.70.
19. During cross examination of PW1 confirmed that the 1<sup>st</sup> defendant was truly indebted to the plaintiff. It is therefore evident that, as at September 30, 2018 the debt had accumulated to the sum of Kshs 17,126,517.70. There is ample and credible evidence to show that the 1st Defendant is indeed indebted to the Plaintiff in the sum claimed herein.

**Whether the plaintiff is entitled to enforce the guarantees issued by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.**

20. The second issue is whether the plaintiff is entitled to enforce the guarantees issued by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The plaintiff's case was that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were liable as sureties for the 1<sup>st</sup> defendant's debt having breached its terms and obligations under the charge and debenture. According to the plaintiff the 2<sup>nd</sup> defendant was liable for the amount guaranteed of Kshs 5,238,000 whereas the 3<sup>rd</sup> defendant was liable for the sum guaranteed of Kshs 41,000,000.
21. I have perused the court record and I note that the terms of the bank guarantee executed by the 2<sup>nd</sup> defendant indicates that the principle sum secured by the guarantee was Kshs 5,238,000/=.
22. The 2<sup>nd</sup> defendant, on his part, contended that he issued a cessation notice, under Clause 5 of the Deed of Indemnity, authorizing the plaintiff to liquidate his Fixed Deposit Receipts in the sum of Kshs 4,100,000 which amount was not credited to the 1<sup>st</sup> defendant's account.
23. Clause 5 of the Deed of Indemnity stipulates as follows regarding notice to determine the guarantee:-

“ the guarantor or any more of the persons constituting the guarantor may at any time give to the creditor notice in writing to determine the guarantee at a date(the cessation date not less than three months after the receipt by the creditor of the notice provided that, notwithstanding determination as to one or more of the persons constituting the guarantor, this guarantee shall remain a continuing security as to any other persons comprising the guarantor and such notice shall not diminish or affect the liability of such persons and provided that any guarantor giving notice pursuant to the provisions of this clause shall remain relevant under the guarantee.

  - a. In respect to the obligations of the principal debtor to the creditor outstanding at the cessation date together with interest on such obligations until actual payment at the rate charged by the creditor against the principal debtor to the creditor outstanding at the cessation date together with interests on such obligations until actual payment at the rate charged by the creditor against the principal debtor and.....
24. PW1 testified that the 2<sup>nd</sup> defendant wrote to the bank stating that he was no longer a guarantor but that the bank did not confirm his exit from the guarantee. It however turns out that the bank did not discharge the 2<sup>nd</sup> defendant from the guarantee and the question therefore arises as to whether he still remains bound by the terms of the Deed of Indemnity.



25. From the foregoing analysis of the case, it is clear that the guarantors were under the terms of the guarantee under the obligation to pay the bank, on demand, all the money and discharge all obligations and liabilities incurred by the bank.

26. *The Law of Guarantees* by Geraldine Andrews & Richard Millet 2<sup>nd</sup> Edition, at page 156 states as follows:-

“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.”

27. In the context of the above text, I find that the plaintiff’s claim against the Guarantors is well-founded. The Deed of Guarantee spells out the obligations of the guarantors. While I appreciate the concerns of the guarantors regarding the loan repayments that were allegedly not credited to the 1<sup>st</sup> defendant’s loan account, it did not escape this court’s attention that the said claim was not substantiated by proof of payment. In the circumstances of this case, I find that the 1<sup>st</sup> defendant is indebted to the plaintiff for the amount recoverable from the guarantee.

28. Clause 25 of the letter of guarantee and indemnity dated July 2, 2015 provides that:-

25 Joint and several liability

Where this guarantee is signed as guarantor by more than one person or is signed by one person for himself and on behalf of other persons(whether such person is signing on behalf of a partnership or otherwise), the expression” the Guarantor shall include all such persons and the liability of the guarantor under this guarantee shall be the joint and several liability of such persons and any demand for payment made by the creditor to any one or more of the persons jointly and severally liable shall be deemed to be a demand to all persons. The creditor may realize or discharge any one or more of such persons from this guarantee or compound with or otherwise vary or agree to vary the liability of or to grant time or indulgence to or make other arrangements with any one or more such persons without prejudicing or affecting the rights and remedies of the creditor against any other such persons.

29. I find the liability of the guarantors was jointly and severally which means that the plaintiff is at liberty to elect to recover the whole amount from any of the defendants. The same position stated in the case of *Republic vs PS in Charge of Internal Security exparte Joshua Paul* [2013] eKLR. where it was held as follows:-

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.” (Emphasis supplied)



30. The guarantee was signed by the parties who are expected to have understood its contents and details before appending their signatures. It is trite that parties are bound by their signatures. In *Mrao Ltd vs First American Bank of Kenya Limited & 2 Others* [2003] eKLR Kwach, JA (as he then was) held that:-

“...it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters...”

31. I find that there is sufficient evidence to show that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are liable to the plaintiff on the basis of the letters of guarantee and indemnity but such liability is limited to the extent of the actual outstanding debt. I further find that in the event that the guaranteed amount exceeds the debt, justice would dictate that the plaintiff is only paid the amount due. This is to say that should the court find that part of the debt was paid after the filing of the suit, then the plaintiff will only be entitled to the actual amount due.

32. In the circumstances of this case, I find that awarding prayers as sought by the plaintiff would amount to unjust enrichment as the debt may have been substantially settled. It is therefore necessary for the plaintiff to give current statements of the principal debtor's loan account after the payment by the guarantors in order to establish the 1<sup>st</sup> defendant's indebtedness.

33. The statements in respect to the loan account should therefore be availed before this court before final determination of the matter. In this regard, I direct that the said statements be filed and served within 30 days from the date of this judgement.

34. Mention on November, 2 to confirm the filing of the bank statements.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

Ms Leah Muhia for Wawire for Plaintiff.

Ms Kkwamboka for Mutea for Defendants.

Court Assistant- Sylvia

