



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 585 OF 2012

BETWEEN

ECOBANK KENYA LIMITED.....PLAINTIFF

AND

LIBERTY GRAPHICS KENYA LIMITED.....1ST DEFENDANT

WILFRED KASHONGA SARONI.....2ND DEFENDANT

WILLIAM KAROMO MUNGAI.....3RD DEFENDANT

NJERU KARUANA.....4TH DEFENDANT

JUDGMENT

Introduction and Background

1. By the Plaint dated 3rd September 2021, the Plaintiff (“the Bank”) sued the Defendants for money advanced to the 1st Defendant (“the Company”) under the Letters of Offer dated 13th August 2009 and 16th December 2009 and an Overdraft facility granted to the Company through its current account.

2. Under the Letter of Offer dated 16th December 2009, the Bank granted a facility of KES. 3,600,000.00 to the Company secured, inter alia, by the personal guarantees of its directors. Under the Letter of Offer dated 13th August 2009, the Bank granted a Project Loan Facility of KES. 1,600,000.00 to the Company secured by, inter alia, the personal guarantees of its directors. Further, the Company requested and the Bank granted it Overdraft Facilities through its current account number CA 01-xxxxxxx (001xxxxxxxxxxxxx).

3. The Bank states that the Company defaulted in servicing the aforesaid facilities whereupon it commenced recovery of the outstanding amounts by issuing the requisite demands and notices to the Defendants which, it contends, they did not honour. It pleads that the Company is indebted and continues to be indebted until payment in full as follows:

a. CA 01-xxxxxxx (001xxxxxxxxxxxxx): KES 1,650,627.40 outstanding as at 15th October 2009 accruing interest at 35% p.a;

b. CL 01-xxxxxxx (001xxxxxxxxxxxxx): KES 6,023,977.34 outstanding as at 26th March 2012 accruing interest at the rate of 28% p.a plus an additional 5% p.a on amounts on the arrears;

c. CA 01- xxxxxxx (001xxxxxxxxxxxxx): KES 12,603,884.99 outstanding as at 29th February 2012 plus interest at the rate of 35% p.a.

4. The Company and 2nd Defendants responded to the suit by filing a Statement of Defence dated 9th January 2013. I struck it out on 24th February 2020 after they repeatedly failed to comply with directions of this court or attend court. The suit against the 3rd Defendant was

withdrawn by the Bank on 21st March 2014.

5. The 4th Defendant filed a Statement of Defence dated 8th November 2012. He denied knowledge of the facilities advanced to the Company. He however admitted that he signed a letter of guarantee and indemnity supplied by the Company but denies that he is liable under it in the circumstances of the case.

6. The matter was set down for formal proof of the Bank's case against the 1st and 2nd Defendants and for hearing of the case against the 4th Defendant. The Bank called one witness, Sammy Miringu (PW 1), its Remedial Officer while the 4th Defendant (DW 1) testified on his own behalf.

The Testimony and Evidence

7. In support of the case I have outlined above, PW 1 produced the documents in support of the facilities granted to the Company and a statement of account proving the Defendants' indebtedness.

8. Apart from the Statement of Defence, DW 1's position was that in as much as he signed the Letter of Guarantee and Indemnity dated 11th December 2009 ('the Guarantee'), the one supplied to him by the Bank lacked particulars of the principal sum and the amount guaranteed. He recalled that he did have any intention to create a guarantee in favour of the Bank but it was never finalized and that he did not enter into any agreement of guarantee and if he did, then the same was void and not binding upon him for want of consideration. He further stated that the Bank did not have any cause of action against him and/or that no cause of action has accrued against him in favour of the Bank.

9. DW 1 stated that the Bank was to supply him details of his alleged liability but the Bank did not do so and that he never heard from it or the 1st and 2nd Defendants. He denied receiving any demand from the Bank and was surprised to be served with summons in this suit. He states that the address used by the Bank to send the demand is unknown to him and that he never supplied the address to the Bank. He also denied receiving a hand delivered demand on 25th May 2011 and another demand letter dated 17th April 2012.

Analysis and Determination

10. At the conclusion of the hearing, the parties filed written submissions which I have considered alongside the pleadings, testimony and evidence. The facilities advanced by the Bank to the Company are not in dispute and at any rate, the Plaintiff has produced all the documents supporting the facilities. The Company is the principal debtor while the claim against the other Defendants is secondary as it arises out of guarantees issued by them to the Bank in respect of the two loan facilities.

11. Although the parties framed several issues for trial, only two issues call for resolution; first, whether the Company is indebted to Bank and if so to what extent and second, whether the guarantors, including the 4th Defendant are liable and if so, to what extent.

The Company's Indebtedness

12. I have set out the substance of the Bank's claim against the Company at para. 3 above. It is clear that the Bank pleaded its case on the basis of three facilities. In support of its claim, the Bank produced a Statement of Account in respect of account number CA 01-10200126 (0010025008704201) together with demand letters addressed to the Defendants. In addition, in his witness statement, PW 1, in respect of the amount owed, stated as follows:

[12] THAT the Plaintiff on diverse dates advanced Overdraft Facilities through the 1st Defendant's current account Number CA 01-xxxxxxx (001xxxxxxxxxxxx) and the 1st Defendant was indebted to the Plaintiff to the tune of KShs. 12,939,977.98 as at 30th September 2010. (I produce as evidence the 1st Defendant's statement of Account CA 01-xxxxxxx and which is numbered page 35 to page 39).

13. Entries in a Banker's books represented by statements of account are prima facie evidence of the matters, transactions and accounts recorded therein. In this case, the statement was produced without objection thus **section 176** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** creates a presumption in favour of the Bank as follows:

176. 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.

14. As the Defendant's did not produce any other statements of accounts to counter those of the Bank or fault any entries in the statement, I find that the statement for account for account number CA 01-xxxxxxx for the period between 1st September 2009 and 30th September 2010 is a true reflection of the Company's indebtedness. The statement supports that the Banks pleading in the plaint that the Company was indebted to it for the sum of KES. 1,650,627.40 as at 15th October 2009.

15. The Bank has prayed for interest of 35% p.a. The Company did not produce any documents showing the terms upon which the Overdraft facility was granted. It is however, not in dispute that Company overdrawn its current account as evidenced by the debit entries in the statement of account. In my view, the Bank did not provide a basis for this rate of interest or explain how it arose; whether it was contractual or imposed by trade custom or usage.

16. The Court of Appeal in **Highway Furniture Mart Limited v Permanent Secretary, Office of the President and Another NYR CA Civil Appeal No. 52 of 2005 [2006] eKLR** held that the award of interest prior to the filing of the suit is a matter of substantive law.

Consequently, the basis and rate of the interest claimed must be pleaded with particularity to enable the other party understand the claim and defend it. In the absence of any further proof, the default position is that interest shall apply at court rates from the date of filing suit.

17. As stated, the only statement of account produced by the Bank was in respect of Overdraft facilities granted to the Company in respect of account number CA 01-10200126. It was not in respect of the debt in CL 01-xxxxxxx (001xxxxxxxxxxxx) and CA 01- xxxxxxx (001xxxxxxxxxxxx) whose statements the Bank did not produce nor demonstrate any relationship of that account with the other accounts. I therefore find and hold that the Bank has failed to prove the debt due on those accounts.

18. In conclusion therefore find and hold that the Bank only proved to that the Company owed it KES. 1,650,727.40 as at 15th October 2009. This sum shall attract interest at 12% p.a. from the date of filing suit, that is 4th September 2012, until payment in full.

Liability under the Deed of Guarantee and Indemnity

19. A guarantor's liability is secondary to that of the principal debtor (see **Lalji Karsan Rabadia and 2 Others v Commercial Bank of Africa NRB CA Civil Appeal No. 63 of 2021 [2015] eKLR**). I have found that the Bank failed to prove that the Company was indebted to it in respect of the two facilities supported by the Letters of Offer dated 13th August 2009 and 13th August 2009 as it did not provide any statements of account. The guarantees and indemnities securing the two facilities and produced by the Bank were by the 2nd, 3rd and 4th Defendants hence no liability accrues to the guarantors in respect of the overdraft granted to the Company on its current account.

20. Notwithstanding the finding I have reached, I will deal with the issue of the 4th Defendant's liability for sake of completeness. He did not dispute that he executed the Guarantee but assails it on the ground that it lacked particulars and was void for want of consideration. His contention is supported by the fact that the Guarantee filed in the initial bundle of documents was signed by DW 1 but did not have particulars. In the subsequent bundle of documents marked as Exhibit P1 and P2, the same Guarantee had details of the Company as the Principal Debtor and amount guaranteed.

21. PW 1 denied DW 1's assertion that the Bank surreptitiously filled the details of the Guarantee after seeing his Defence. PW 1, upon being questioned by the court, conceded that there were two different documents; one without details and the other with details. Thus the question for consideration is which Guarantee document is valid and binding on the 4th Defendant?

22. I note that the initial Guarantee which the 4th Defendant relied on to make his case was never produced by the Bank as an exhibit. Unless it is formally produced, it does not acquire the status of an exhibit (see **Kenneth Nyaga Mwige v Austin Kiguta & 2 others NRB Civil Appeal No. 140 of 2008 [2015] eKLR**). On the other hand, Exhibit P1 and P2 produced without any objection, contained the Guarantee which indicates the Company as the principal debtor and limits the guarantor's liability to KES. 3,600,000.00 interest, fees, commission, costs, charges and expenses provided. Since DW 1 does not dispute his signature thereon, it follows that the Guarantee was properly executed by him and is valid and binding on him.

23. The 4th Defendant submits that he was not served with the demand. It is trite law that a guarantor does incur any liability under a guarantee unless there is default by the principal debtor and notice of such default has been issued and served on the guarantor (see **Kenya Commercial Finance Company Ltd v Kipng'eno Arap Ngeny & another NRB Civil Appeal No. 100 of 2001 [2002] eKLR** and **Delphis Bank Limited (Under Statutory Management) v Shield Hire Purchase Limited & Four (4) Others ML Civil Case No. 672 of 2002 [2007] eKLR**).

24. DW 1 denies receiving any demand letter from the Bank. He further denies that the address indicated in the said letter belonged to him. The Bank maintains that it served the demand dated 25th May 2011 ("the Demand") on him by registered mail and by hand. Since DW 1 denied service of the Demand, the burden was on the Bank to show that it complied with the law by serving it (see **Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others [1995-1998] 2 EA 260**).

25. The Bank produced certificates of postage in evidence which indicated that the Demand was sent to an address "101493-00100". When the question of correctness of the address was put to PW 1, he was not certain that it belonged to DW 1. He admitted that the address belonged to the 2nd Defendant. The Guarantee signed by DW 1 does not indicate therein DW 1's address nor is his address indicated in any other document on record from which the court can conclude that he was served at his address. There is also no evidence that the Demand was hand delivered to DW 1. This leads to me to find that DW 1 was never served with the Demand. In the absence of a demand to the 4th Defendant as a guarantor, no liability to pay would have arisen.

26. As the 2nd Defendant, did not oppose the suit and evidence, I would have found him liable under the respective guarantees and indemnity for the two facilities he guaranteed.

Conclusion

27. I have found that while the Bank proved that it advanced the 1st Defendant three facilities, it was only able to prove that the 1st Defendant was indebted to it under the Overdraft Facility for which it produced the Statement of Account. From the pleadings and evidence, the Overdraft Facility was not secured by the guarantees furnished by the 2nd, 3rd and 4th Defendants hence they are not liable for any indebtedness arising from the Overdraft Facility. In respect of the loan facilities, the 2nd and 4th Defendant cannot be called upon to pay a debt that has not been proved.

28. As regards the 4th Defendant who defended the suit, apart from finding that the debt upon which it is called to satisfy had not been proved, I also find that he was not issued with a demand under the Guarantee as a precondition of his liability. Based on the totality of findings, the Bank has proved the debt arising from the Overdraft facility.

Disposition

29. For the reasons I have set out above, I now order as follows:

- a. Judgment be and is hereby entered for the Plaintiff against the 1st Defendant for the sum of KES. 1,650,627.00 together with interest at the rate of 12% p.a., from the date of filing suit, that is 4th September 2012, until full payment.
- b. The suit against the 2nd, 3rd and 4th Defendant is dismissed.
- c. The 1st Defendant shall pay the Plaintiff's costs.
- d. The Plaintiff shall pay the costs of the 4th Defendant only.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2021

JOHN M. MATIVO

JUDGE

Ms Nyabenge instructed by Kale, Maina and Bundotich Advocates for the Plaintiff.

Mr Ng'ethe instructed by Kinyua Mwaniki and Wainaina Advocates for the 4th Defendant.