



**First Community Bank Limited v Aima Enterprises Limited & 3 others (Civil Case 456 of 2016) [2021] KEHC 177 (KLR) (Commercial and Tax) (15 October 2021) (Judgment)**

Neutral citation: [2021] KEHC 177 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 456 OF 2016  
MW MUIGAI, J  
OCTOBER 15, 2021**

**BETWEEN**

**FIRST COMMUNITY BANK LIMITED ..... PLAINTIFF**

**AND**

**AIMA ENTERPRISES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MOHAMED ABDI ABUKAR ..... 2<sup>ND</sup> DEFENDANT**

**ABUBAKAR MOHAMED ABDI ..... 3<sup>RD</sup> DEFENDANT**

**UPPERHILL RADIOLOGY CENTER LTD ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1 The Plaintiff filed an Amended Plaintiff dated 8<sup>th</sup> December 2016 and filed on 15<sup>th</sup> December 2016. The Plaintiff averred that it advanced financing facilities to the 1<sup>st</sup> Defendant on various dates via various Letters of Offer.

1<sup>st</sup> Letter of Offer dated 18<sup>th</sup> February 2011 - The Plaintiff averred that it advanced to the 1<sup>st</sup> Defendant Kshs.5, 000, 000 on 13<sup>th</sup> May 2011.

2<sup>nd</sup> Letter of Offer dated 14<sup>th</sup> July 2011 - The Plaintiff averred that it advanced to the 1<sup>st</sup> Defendant Kshs.15, 000, 000 on 20<sup>th</sup> July 2011.

3<sup>rd</sup> Letter of Offer dated 3<sup>rd</sup> May 2012 - The Plaintiff advanced to the 1<sup>st</sup> Defendant Kshs.100, 000 on 30<sup>th</sup> June 2012.

4<sup>th</sup> Letter of Offer dated 4<sup>th</sup> June 2012 - The 1<sup>st</sup> Defendant had requested the Plaintiff to restructure the 1<sup>st</sup> Defendant's facility with the plaintiff from a short term loan to a seven-year term loan.



- 5<sup>th</sup> Letter of Offer dated 31<sup>st</sup> March 2015 for the restructure of the loan facility and the profits arising therefrom. The Plaintiff averred that this Letter of Offer could not be honored because the terms and conditions set out therein, in particular, the first legal charge of Kshs.100, 000, 000 over property title Number KJD/KAPUTEI-NORTH/14774 could not be perfected as the same property had been charged to ABC Bank.
- 2 The 1<sup>st</sup> Defendant breached the terms in the Letters of Offer and failed, neglected and/or refused to make payments when the same fell due. This amounted to breach of the terms of the agreement between the Plaintiff and the 1<sup>st</sup> Defendant.
- 3 That at all material times the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Letters of Offer would be secured by *inter alia* joint and several Guarantees executed by the Directors of the 1<sup>st</sup> Defendant and a Corporate Guarantee executed by the 4<sup>th</sup> Defendant. In compliance with the said term, necessary Guarantees were executed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants binding themselves to remedy any default in repayment on the part of the 1<sup>st</sup> Defendant.
- 4 The Plaintiff prayed for judgment against the Defendants for; -
- a. The sum of Kshs.136, 000, 000 being the outstanding loan amount.
  - b. The cost of the suit together with interest thereon at court rates from the date of filing suit until payment in full.
  - c. Interest on (a) and (b) at court rates until payment in full.

#### **DEFENCE**

- 5 The Defendants' defense on the face of it is a mere denial and they deny the averments made in the Amended Plaint. The Defendants stated that the alleged letters of offer were a series of transactions which transactions were conditional upon the Plaintiff honoring obligations and all other terms and conditions of the agreement regarding security which the Plaintiff refused to honor. Further, that the Plaintiff did not facilitate the loan as agreed which act made the Defendants lose business and incur losses.
- 6 The Defendants further pleaded that the Plaintiff did not adhere to the conditions of the agreement as it breached the same making the Defendants to incur losses as pleaded in case no. HCC No. 297/2016 (Mediation No. 110 of 2016). The Defendants jointly and severally pray that the Plaintiff's suit be dismissed with costs.

#### **PLAINTIFF'S SUBMISSIONS**

- 7 The Plaintiff submitted that there were valid and legally binding agreements between the Plaintiff and the Defendants herein. The Defendants failure, refusal and/or neglect to perform its end of the bargain as per the terms of the different agreements amounted to breach of contract. The Defendants executed the said agreements an equivocal indication that the Defendants accepted the Plaintiff's offer. The parties agreed to be bound by the terms of the said agreements.
- 8 On the issue whether the Defendants should be ordered to pay the sum of Kshs.136, 000, 000 being the outstanding amount, the Plaintiff submitted that the Defendants were advanced a loan which was duly accredited to their account and no evidence to the contrary has been shown. The principal amount



was Ksh.100, 000, 000 and the profit margin was Kshs.36, 000, 000. The Plaintiff relied on the case of *Kenya Commercial Bank Limited versus Joseph Njoro Kabechu [2017] eKLR* where the court held;

“The contract duly executed between the plaintiff and the defendant and the ensuing series of correspondence over the subject matter removes any doubt that the defendant was indebted to the plaintiff. To the extent that the validity of that contract has not been questioned on any of the grounds known in law, it goes without saying that the parties thereto are bound by it. According to the common law principle of freedom of contract, parties are best judges of their own interests and if they freely and voluntarily enter into a contract, the only function of the law and, of course, the courts, is to enforce it.”

- 9 The Plaintiff further submitted that the Defendants confirmed that the outstanding principal was Kshs.100, 000, 000 as shown in Pg. 118 of the Plaintiff's bundle of documents. Any party that signs a contract with an obligation must be held liable for the same as was held in the case of *Mrao Limited versus First American Bank of Kenya & 2 Others [2003] KLR 125*;

“I have always understood 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. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf.”

- 10 The other issue the Plaintiff submitted on was whether it is entitled to the damages sought. The Plaintiff submitted that as a general rule damages are not recoverable in cases of alleged breach of contract. However, the Plaintiff pleaded for special damages in its Plaintiff and stated the amount owed to it as a result of the Defendants breach and the same has been proven through documents availed to this Court.
- 11 The Plaintiff urged the court to allow the Plaintiff as prayed as it is a financial institution which will suffer greatly if the Defendants do not pay the outstanding amount.

### **DETERMINATION**

- 12 The Court considered the pleadings evidence adduced during the hearing and Plaintiff's submissions, the issue for determination is whether the Plaintiff is entitled to prayers /reliefs sought in the Plaintiff.
- 13 This matter came up for hearing on 21<sup>st</sup> June 2021. The Plaintiff was present while the Defendants were absent. The Plaintiff filed an Affidavit of Service by Vincent O. Maiga dated 18<sup>th</sup> June 2021 confirming that the Defendants were indeed served with a hearing Notice. On 3<sup>rd</sup> June 2021, the Plaintiff's advocate gave the Process Server Hearing Notice dated 2<sup>nd</sup> June 2021 to serve the Defendant's advocates on record M/S Onesmus Githinji & Co Advocates at 4<sup>th</sup> Floor, Westery Towers, off Muthithi Road. The Hearing Notice was served and stamped and signed by Secretary of the Law firm. The hearing proceeded ex parte.
- 14 PW1 Mohammed Adan Mohammed testified on behalf of the Plaintiff as Recovery Manager of the bank. The Witness relied on his Statement of 12<sup>th</sup> March 2020 and relied on the Plaintiff's bundle of documents filed on 14<sup>th</sup> November 2016. He informed the Court in detail the 1<sup>st</sup>



Defendant's engagement with the Plaintiff Bank; the 1<sup>st</sup> Defendant sought from and received loan/overdraft facilities from the Plaintiff. PW1 made reference to the letters of offers of facilities granted to the 1<sup>st</sup> Defendant and securities lodged. The relevant documents are housed at Pg 1,46-51,52,53-59,213,224-228 of plaintiff's bundle. PW1 presented the Statement of Account that confirmed the funds credited to the 1<sup>st</sup> Defendant's Account.

15 The Plaintiff's case was closed and the Plaintiff filed written submissions dated 12<sup>th</sup> July 2021. PW1 relied on all the documents and statements as evidence in court.

16 The Plaintiff prayed for judgment against the Defendants for; -

- a. The sum of Kshs.136, 000, 000 being the outstanding loan amount.
- b. The cost of the suit together with interest thereon at court rates from the date of filing suit until payment in full.
- c. Interest on (a) and (b) at court rates until payment in full.

17 The Plaintiff's position is that the all four Letter of Offer were executed by the 1<sup>st</sup> Defendant and this shows the Defendant accepted and acknowledged the terms therein.

18 1<sup>st</sup> Letter of Offer dated 18<sup>th</sup> February 2011. At Pg 1-6 of the Plaintiff's bundle of documents the Plaintiff contributed and/or advanced to the 1<sup>st</sup> Defendant a sum of Kshs.5, 000, 000 and the same was acknowledged by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

19 2<sup>nd</sup> Letter of Offer dated 14<sup>th</sup> July 2011, at Pg 46-51 of the Plaintiff's bundle of documents, the Plaintiff contributed and/or advanced Kshs.15, 000, 000 to the 1<sup>st</sup> Defendant and the same was signed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. This was secured by a Debenture dated 30<sup>th</sup> March 2011.

20 3<sup>rd</sup> Letter of Offer dated 30<sup>th</sup> June 2012, the Plaintiff advanced to the 1<sup>st</sup> Defendant Kshs.100, 000, 000 which was signed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Pg 53-59 of the Plaintiff's bundle of documents. The same was secured by a further Debenture dated 11<sup>th</sup> June 2012.

21 4<sup>th</sup> Letter of Offer dated 4<sup>th</sup> June 2013 (Pg 108) the Plaintiff accepted the Defendants request (Pg 107) to restructure the facility due to business hardships it had incurred and was therefore unable to make the schedule repayments.

22 The Letters of Offer as produced by the Plaintiff in their bundle of documents show that the relationship created between the Plaintiff and the 1<sup>st</sup> Defendant was that of a joint partnership under an Investment Musharaka financing agreement where profit was shared between them.

23 According to Dr. M. Imran Usmani, A Guide to Islamic Banking:

The root of the word Musharaka ... means being a partner. Under Islamic Jurisprudence Musharakah means a joint enterprise formed for conducting business in which the profit ... and loss..... is shared according to the ratio of the contribution.

However, Clause 9 of the Investment Musharaka Agreements provided that;

The Agreement shall not be deemed to create a partnership or company and in no event has the Client any authority to bind the Bank. In no event shall the Bank be liable for the debts and obligations of the Client incurred for other purposes except as stipulated in this Agreement



24 The Court of Appeal in *National Bank of Kenya Limited versus Pipeplastic Samkolit (K) Limited and Another [2001] eKLR* held as follows; -

A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved... it is ordinarily no part of equity function to allow a party to escape from a bad bargain.

25 The Defendants stated in their defense that the alleged letters of offer were a series of transactions which transactions were conditional upon the Plaintiff honoring obligations and all other terms and conditions of the agreement regarding security which the Plaintiff refused to honor. Further, that the Plaintiff did not facilitate the loan as agreed which act made the Defendants lose business and incur losses.

26 The Plaintiff and the 1<sup>st</sup> Defendant had agreed to share profit on the basis of 80% for the Plaintiff and 20% for the 1<sup>st</sup> Defendant. Vide a letter dated 19<sup>th</sup> January 2015 (Pg 122-123 of the Plaintiff's bundle of documents) pursuant to a loan restructure the Defendants sought to review the Kshs.36, 000, 000 profit as they had paid Kshs.18, 000, 000. The Defendants further proposed for the Plaintiff to share a security with ABC Bank. Clearly, the Defendants had recognized the existence of a loan, and the need to service the said loan.

27 Further to the above, the Plaintiff explained that the 5<sup>th</sup> Letter of Offer, could not be honored because the terms and conditions set out therein, in particular, the first legal charge of Kshs.100, 000, 000 over property title Number KJD/KAPUTEI-NORTH/14774 could not be perfected as the same property had been charged to ABC Bank.

28 In the Court's view, the Defendants cannot claim that they incurred losses as a result of the Plaintiff's refusal to honor the agreement without stating what specific conditions the Plaintiff was to comply with and specific instance(s) of actual loss.

29 The Defendants made a proposal which was rejected by the Plaintiff and therefore there was no agreement pursuant to the 5<sup>th</sup> Letter of Offer.

30 The Statements of Account produced by the Plaintiff show that the Defendant did not make payments towards the facility as from 30<sup>th</sup> August 2014. This is clear evidence of default by the Defendants in their obligations under the agreements. (Pg 210).

31 The Plaintiff averred that the business assets secured by the Debenture and further debenture had been moved to unknown location to avoid repossession. The Defendants did not produce any evidence to rebut the Plaintiff's averments.

32 Clause 11 (b)(ii) and 12 of the Investment Musharaka Agreements provided as follows;

In case

The Client delays the payment of any amount due under the Principle Documents and/or the payment of amount to a Charity Fund as envisaged under Clause 11 (a) above, as a result of which any direct or indirect costs are incurred by the Bank, the Bank shall have the right to approach a competent court for recovery of any amounts remaining unpaid as well as imposing the default damages on the Client. In this regard the Client is aware and acknowledges that notwithstanding the amount paid to a Charity Fund of the Bank, the Court has the power to impose further damages, at its discretion, and from the amount of such default damages, a smaller or bigger part, depending



upon the circumstances, can be awarded to the Bank, determined on the basis of direct and indirect costs incurred by the Bank, other than the opportunity cost.

12. (a) where any amount is required to be paid by the customer under the principal documents on a specified date and is not paid by that date, or an extension thereof, permitted by the Bank without any increase in the amount payable, the Customer hereby undertakes to pay the Bank, a sum calculated at 15% per annum for the entire period of default, calculated on the total amount of the obligations remaining undischarged. The Customer hereby acknowledges that the default damage sum under this clause represents a reasonable pre-estimate of the loss to be suffered by the Bank in funding the default of the customer.

- 33 The Court finds from the above evidence, that the 1<sup>st</sup> Defendant requested for loan/overdraft facilities which were availed from 2011. The Plaintiff and 1<sup>st</sup> Defendant executed documents to these Agreements and the validity of Letters of Offer is not contested by the Defendants in their Defense. The Defendants have not denied disbursement of funds and use thereof. The Defendants made payments of Ksh 18m upto 2013 and thereafter defaulted. The outstanding remains due and owing.
- 34 The Defendants deposed in the Defense that there is an impending suit HCCC 297 of 2016 (Mediation No 110 of 2016) over the same subject-matter. The Defendants did not avail any other information on the position of the suit whether mediation resolved the dispute or not. The Defendants were duly served with the hearing date and failed to attend Court and no reasons were advanced for the Court to consider.
- 35 The totality of the evidence is that the Plaintiff prayers are granted as the Plaintiff's evidence was not controverted and there is a debt outstanding for payment by 1<sup>st</sup> Defendant and/or Guarantors 2<sup>nd</sup> 3<sup>rd</sup> & 4<sup>th</sup> Defendants.

#### **DISPOSITION**

1. The upshot of the above is that there is clear evidence and admission of default by the Defendants in their obligations under Agreements.
2. Judgment is entered for the Plaintiff as prayed.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 15<sup>TH</sup> OCTOBER, 2021. (VIRTUAL CONFERENCE DUE TO COVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)**

**M.W. MUIGAI**  
**JUDGE**

