



REPUBLIC OF KENYA



**Bank of Africa Limited v Morganite Limited & 3 others (Civil Case E053 of 2019)
[2021] KEHC 378 (KLR) (Commercial and Tax) (22 December 2021) (Judgment)**

Neutral citation: [2021] KEHC 378 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E053 OF 2019
DAS MAJANJA, J
DECEMBER 22, 2021**

BETWEEN

BANK OF AFRICA LIMITED PLAINTIFF

AND

MORGANITE LIMITED 1ST DEFENDANT

BARTONJO CHESAINA 2ND DEFENDANT

ELISHA KIPROP CHIRCHIR 3RD DEFENDANT

KIPRUTO CHIRCHIR 4TH DEFENDANT

JUDGMENT

1. The Plaintiff (“the Bank”) is a licenced bank under the *Banking Act* (Chapter 488 of the Laws of Kenya). It commenced this suit by the plaint dated 29th March 2019 seeking the following reliefs against the Defendants jointly and severally:
 - a. Judgment against the 1st, 3rd and 4th Defendants jointly and severally for the sum of Kshs 57,097,583.28 together with interest at the Plaintiff’s commercial rates from 8th January 2019 until payment in full.
 - b. Judgment against the 2nd Defendant for the sum of Kshs. 4,402,000 together with interest at the Plaintiff’s commercial rates from 17th August 2018 until payment in full.
 - c. Costs of the suit on a full indemnity basis and interest thereon at 14% per annum from the date of judgment until payment in full.



2. The Bank’s case is founded on a Letter of Offer dated 12th September 2014 where the 1st Defendant (“the Company”) requested and the Bank agreed to reschedule the existing banking facility advanced to the Company on terms contained therein. As security for the facility, the 2nd Defendant executed a personal Guarantee and indemnity dated 22nd October 2012 for KES. 35,000,000.00 together with interest, fees, commission, costs, charges and expenses and a First Charge in favour of the Bank dated 27th November 2012 over his property; L.R. No MN/1/6672 (“the suit property”). The Company executed an all assets debenture dated 14th June 2013 over its assets for KES. 165,000,000 with interest, commissions, fees, costs charges and expenses. The 3rd and 4th Defendant provided directors’ Guarantees and Indemnities dated 14th June 2013 for KES. 165,000,000.00 each together with interest, fees, commission, costs, charges and expenses.
3. In due course, and on diverse dates in February and March 2016, the Company issued 14 cheques of KES. 950,000.00 each to the Bank. When the Bank presented the cheques they were dishonoured for lack of sufficient funds. The Bank proceeded to issue and serve statutory notice on the 2nd Defendant following default by the Company. The Bank sold the suit property by public auction on 2nd June 2017 for KES. 38,000,000.00. However, the purchaser failed to complete the payment of the balance of the purchase price. It forfeited the deposit of KES. 9,500,000.00 which was credited to the Company’s Account Number 040*****05 on 31st July 2017.
4. The 2nd Defendant entered into an agreement dated 20th December 2017 with the purchaser at the auction sale and agreed to refund the deposit of KES. 9,500,000.00 which he had forfeited. Thereafter, the 2nd Defendant held a meeting with the Bank’s officials on 8th March 2018 where it was agreed the Bank would, without prejudice, accept KES. 38,000,000.00 which he had offered to redeem the suit property on condition that he would indemnify the Bank against any action following the agreement with the purchaser whose deposit of KES. 9,500,000 had been forfeited and that the Bank would receive a no objection letter from the Company to facilitate the discharge of his personal guarantee and indemnity. In addition, the 2nd Defendant would cover all proportionate expenses amounting to KES. 2,750,925.85 related to the realisation process.
5. According to the Bank, the 2nd Defendant substantially complied with the agreement reached on 8th March 2018. The Bank informed him in writing that out of the redemption amount of KES. 38,000,000.00, he had paid KES. 33,000,000.00 leaving a balance of KES. 5,000,000.00 as at 4th June 2018. The 2nd Defendant also settled his proportionate share of expenses of KES. 443,019.36 on 15th March 2018. The Bank informed the 2nd Defendant by a letter dated 16th August 2018 that out of the balance of KES. 5,000,000.00 he had only paid KES. 598,000.00 and no further payments have been made to date. The Bank now claims the outstanding amount together with interest.
6. As a result of default by the Company, the Bank claims KES 57,097,583.00 due and owing as at 7th March 2019 from the Company made up as follows:

ACCOUNT	AMOUNT (KSHS)
Current Account	3,392,394.70
Loan Account	53,705,188.58
Grand Total	57,097,583.28



7. The Bank further claims that the 3rd and 4th Defendants as guarantors are also liable to pay the KES. 57,097,583.28 which they have failed, refused, and/or neglected despite demand and notice of intention to sue.
8. The Defendants opposed the suit through the Statement of Defence dated 5th February 2021. They deny any liability for the debt. The Defendants specifically deny the existence of the Letter of Offer, the contractual arrangement made between the Bank and the Company and the Guarantees issued by the 2nd, 3rd and 4th Defendants. The Defendants also deny the particulars of settlement between the Bank and 2nd Defendant and aver that the settlement ameliorated the lender –guarantee relationship.
9. During the pre-trial, the parties agreed that the Plaintiff’s List and Bundle of Documents dated 29th March 2019 would be the agreed bundle and the documents would be relied on by both parties. The parties also agreed on the following issues for determination:
 1. Whether the Company borrowed money from the Bank and is liable to repay the amounts sought in the Plaintiff.
 2. Whether the 2nd to 4th Defendants executed guarantees and are thus liable to pay the amounts sought in the Plaintiff.
 3. Whether any Defendants made repayment proposals.
 4. Whether the reliefs sought in the Plaintiff should be allowed as prayed.
 5. Whether the Plaintiff should be dismissed.
10. At the hearing, the Bank called as its witness; Charles Waiyaki (PW 1), its Senior Recoveries Officer. The Defendants did not call any witness and elected to close their case. Counsel for both parties made brief oral submissions in support of their respective positions.
11. I do not propose to outline PW 1’s testimony as it mirrored what is set out in the Plaintiff and which I have summarized above. Further, the Plaintiff’s documents were admitted without objection. I would also point out, and I agree with the submission by counsel for the Bank, that the Defendants’ defence is a bare denial. The Defendants have not set out an affirmative defence. They have not challenged the Letter of Offer, the securities and the Statement of Account. Since the Defendants did not call any witness or controvert the Bank’s evidence, the task of the court is to determine whether on the material before the court, the Bank has made out its case on the balance of probabilities.
12. The first issue for determination is whether the Company borrowed money and whether it is liable to repay the amount sought in the Plaintiff. On this issue, the Letter of Offer is the basis of the relationship between the parties. The substance and tenor of the Defendants’ counsel cross-examination and submission was that the amount of KES. 45,000,000.00 was not advanced to the Company.
13. It is important to note the facility subject of the suit was “Conditional Restructure of Existing Facility” meaning that the Company was already indebted to the Bank and the purpose of the facility was to restructure the outstanding debt. At the time of the Letter of Offer, the Company already owed the Bank KES. 61,000,000.00 hence under Clause 7 of the Letter of Offer, the Company was to pay the bank KES. 16,000,000.00 to cover the difference between the restructure amount being KES. 45,000,000.00 and the outstanding balance of KES. 61,000,000.00. Thereafter, the sum of KES. 45,000,000.00 was to be paid over a period of 48 months with interest calculated on a floating rate basis at a percentage rate per annum to the aggregate of the margin of 9.87% p.a. above the Kenya Bank’s



Reference Rate (then at 9.13%) totalling 19% p.a. According to PW 1, the Company never paid the KES. 16,000,000.00.

14. The amount due to the Bank is supported by the Bank statements of account which were also produced without objection. These are covered by section 176 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which 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.
15. Since there is a presumption in favour of the Bank, it is the Defendants to show what entries in the statements that have been omitted or are erroneous. Counsel for the Defendant seemed to suggest that the statements did not contain payments made by Nakumatt Holdings Limited and Tusksys Limited under the Irrevocable Letters of Undertaking issued by the Company directing them to make all payments due to the Company through its account with the Bank. If any payments were made, this was a matter directly within the Company's knowledge and which it ought to have produced evidence to show that such payments were in fact made. Otherwise, I find and hold that the Statements of Account are a true reflection of the state of indebtedness of the Company to the Bank and that the Company is indebted to the Bank in the amount of KES. 57,097,583.28 as at 7th March 2019.
16. In the Statement of Defence, the Defendants merely deny the Guarantees issued by the 2nd, 3rd and 4th Defendants but they do not affirmatively challenge them by pleading invalidity or any other like defence. The Guarantees have been produced and I do not have any difficulty holding that the Guarantees are valid and enforceable. From the evidence, the demand letter dated 11th January 2019 was sent to each guarantor by registered post. They did not respond hence the Bank filed this suit. The guarantors are therefore liable to pay the debt due from the Company.
17. As regard the settlement by the 2nd Defendant, there is more than sufficient documentary evidence to support the averments in the Plaint and to demonstrate that he entered into an agreement under which he agreed to redeem his suit property which had been auctioned by paying off the Bank. He has admitted his indebtedness to the Bank and has made substantial payment. He therefore owes KES. 4,402,000.00 with interest thereon.
18. At this stage I would point out that the debt due to the Bank by the Company is a single debt guaranteed by the 2nd, 3rd and 4th Defendants. Since the 2nd Defendant has paid part of the debt under his Guarantee and Indemnity, the Company, 3rd and 4th Defendants should be given credit for what the 2nd Defendant has already settled.
19. Having found that the Bank is entitled to the amount claimed in the Plaint subject to the findings I have made, the next issue concerns the interest due on the amount. The Bank prays for interest at commercial rates. Under the Letter of Offer the agreed interest is, "interest calculated on a floating rate basis at a percentage rate per annum to the aggregate of the margin of 9.87% p.a. above the Kenya Bank's Reference Rate (then at 9.13%) totalling 19% p.a." In the absence of any other rate of interest or proof of variation, I award interest at 19% per annum on the basis of the contractual arrangements.
20. The Bank has asked for costs on a full indemnity basis. The justification for this prayer is to be found in Clause 13 of the Letter of Offer which states, in part, as follows:

13. Costs and Expenses



The Borrower shall reimburse to the Bank on demand on a full indemnity basis (whether or not the Facility is drawn down) all valuation and legal fees and other out of pocket expenses (including stamp duties and Value Added Tax) incurred by the Bank in connection with the creating or any revaluation of the Security or enforcement or preservation by the Bank of its rights under the Offer Letter, the Conditions or the Security (or the documents referred to in them).

21. I therefore award the Bank costs on an indemnity basis as this is part of the agreement under the Letter of Offer. Since the Defendants have the opportunity to contest the costs reflected in the Statements of Account presented in court, I direct that the all costs incurred after 7th March 2019 must be certified by the Deputy Registrar.
22. In conclusion, I find and hold that the Plaintiff has proved its case against the Defendants on a balance of probabilities. I therefore enter judgment for the Plaintiff against the Defendants as follows:
 - a. Judgment be and is hereby entered against the 1st, 3rd and 4th Defendants jointly and severally for KES 57,097,583.28 together with interest at the 19% pa. from 8th January 2019 until payment in full subject to them being given credit for the amount paid by the 2nd Defendant under his Guarantee and Indemnity.
 - b. Judgment be and is hereby entered against the 2nd Defendant for KES. 4,402,000 together with interest at the court rates from 17th August 2018 until payment in full.
 - c. The Plaintiff is awarded Costs of the suit to be paid by the Defendants jointly and severally on a full indemnity basis and interest subject to the Deputy Registrar of this court certifying all costs incurred after 7th March 2019.
 - d. Interest on costs shall accrue at court rates from the date of certification until payment in full.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Gichuhi instructed by Wamae and Allen Advocates for the Plaintiff.

Mr Omamo instructed by Prof. Tom Ojienda and Associates Advocates for the Defendants.

