



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL SUIT NO. 1673 OF 2001

BETWEEN

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

AND

CHARLES IRERI MUTUNGA.....1ST DEFENDANT

JACKSON MWANGI MBUTHIA2ND DEFENDANT

JUDGMENT

1. The plaintiff in this matter is a commercial bank ("the Bank"). By an amended plaint dated 29th May 2009, it prays for judgment against the defendants jointly and severally for Kshs. 4,676,064.20 with interest at 22% per annum from 1st September 2004 until payment in full.
2. The Bank's case as set out in the Amended plaint and testimony of Ronald Kobe (PW 1), a Remedial Analyst with the Bank is that Dyepole Communication Limited ("Dyepole") applied for financing under the European Investment Bank – Kenya Global Private Enterprise Loan III Program. By letters of offer dated 25th April 1998 and 10th October 1998, the Bank agreed to provide facilities on condition that the defendants, who were directors of Dyepole, provided joint and several guarantees and indemnities and a security by way of Legal Charge on LR No. 14662 to secure full repayment of the parties.
3. The defendants executed a joint guarantee dated 1st September 1997 in consideration for the Bank advancing Dyepole banking facilities. The guarantees were specified to be continuing security for the whole amount due and owing to the bank by Dyepole to a maximum of USD 100,000 or its Kenya Shilling equivalent (at the time Kshs. 7,900,000.00).
4. Dyepole defaulted in repayment and the Bank was forced to realise the security by selling of L.R. No. 14662. It also sold motor vehicles KAC 996N and KAJ 498E. The Bank placed Dyepole under receivership but the equipment and software covered by the debenture was obsolete. The shortfall after realizing the securities was Kshs. 4,676,064.20 which the Bank, through its Advocates, demanded from the defendants by letters dated 27th August 2001. It is this amount that is now claimed.
5. At the hearing of the suit, neither the defendant appeared before the court despite being served with legal process. In the circumstances the Bank's case and evidence remained uncontroverted. In their respective statements of defence, the defendants denied the validity of the guarantees. They contended that the guarantees did not contain any figures reflecting the amount of the guarantee and that the same could not be enforced without the Bank realizing the securities.
6. I am satisfied that the defendants executed valid guarantees in which they undertook to guarantee lending to Dyepole. Further, the Bank demonstrated that it realized the securities and only demanded the outstanding amount thereafter though it was not under any obligation to do so.
7. I find that the Bank has proved its case on a balance of probabilities that the defendants are duly indebted on account of the guarantees.
8. As regards the interest, under clause 7 of the letter of offer dated 25th April 1997, the interest rate was 12% per annum over the period of the loan. However, under clause 8(i) and (ii) the Bank was entitled to charge 2% per annum above the interest charged in the event of default. The interest will run from the date when the amount was demanded from the defendants which is 27th August 2001.

9. For the reasons I have set out I now grant the following orders: -

a) Judgment be and is hereby entered for the plaintiff against the defendants jointly and severally for Kshs. 4,676,064.20 together with interest at 14% per annum from 27th August 2001 until payment in full.

b) The plaintiff shall have costs of this suit.

DATED and DELIVERED at NAIROBI this 23rd day of JANUARY, 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms Mutua instructed by Moronge and Company Advocates for the plaintiff.