



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT NO.13 OF 2017

(FORMERLY NUMBER NO.255 OF 2011)

ECOBANK KENYA LIMITED.....PLAINTIFF

VERSUS

BELCOM AGENCIES LIMITED.....1ST DEFENDANT

ABEL MORANGA ONGWACHO.....2ND DEFENDANT

JUDGMENT

1. The plaintiff, Ecobank Kenya Limited, was approached by the 1st defendant with a request for a Term Loan facility for Kshs. 15,000,000/= and an Overdraft facility for Kshs. 15,000,000/= sometimes in the year 2009. It was intended that the Term Loan facility would be utilized to offset the 1st defendant's liabilities with Family Bank and Diamond Trust Bank and the Overdraft facility would finance the 1st defendant working capital requirements. The terms of the application for the facilities were set out in a Letter of Offer dated 10th July 2009.

2. In its plaint dated 7th November 2011, the plaintiff claims that since the securities offered by the 1st defendant could not be easily discharged, the parties agreed that a Temporary Overdraft facility in the sum of Kshs. 15,000,000/= be released to the 1st defendant on document deferral to enable it offset its liabilities with Diamond Trust Bank directly and forwarded the titles to the plaintiff for securitization. The plaintiff alleges that contrary to what had been agreed, the 1st defendant, in flagrant breach of the agreement, utilized the advanced funds for other uses. The plaintiff averred that the 1st defendant had later on sought a loan of Kshs. 20,000,000/= which was denied because the facility was already exhibiting signs of delinquency.

3. Having failed to secure the release of the titles held by Diamond Trust Bank, the 1st defendant purported to replace the securities in the offer letter with new titles. In a letter dated 26th February 2010, the 1st defendant offered titles in the 2nd defendant's name to wit Wanjare / Bogitaa / 1249, Wanjare/ Bogitaa / 4087, Wanjare / Bogitaa / 4086, Wanjare / Bokeire / 4149, Bassi / Bondonya / 3030, Kisumu / Manyatta 'A' 3287, Wanjare / Bomorenda / 1403 - Suneka and also offered Central Kitutu / Daraja Mbili / 1762 in the name of Eunice Mariaria as security for the facility.

4. The plaintiff averred that it had the necessary charge documents over the newly offered titles prepared but the defendants declined to execute the documents despite the release of the sum of Kshs. 15,000,000/= to the 1st defendant. It is the plaintiff's case that the monies continued to accrue interest and as of 31st July 2011, the debt stood at Kshs. 28,860,963.72 together with interest. The plaintiff complained that the 1st defendant's failure to service the loan had exposed it to great loss for which it sought various remedies.

5. The plaintiff sought 13 prayers against the defendants in its plaint but by the time the matter was being heard, the plaintiff had abandoned the various prayers it sought with respect to land parcels Wanjare / Bogitaa / 1249, Wanjare / Bogitaa / 4087, Wanjare / Bogitaa / 4086, Wanjare / Bokeire / 4149, Bassi / Bondonya / 3030, Kisumu / Manyatta 'A' 3287, Wanjare / Bomorenda / 1403 - Suneka for the reason that the 2nd defendant had dealt with the titles notwithstanding the fact that the plaintiff was in possession of the original titles. The prayers sought by the plaintiff against the defendants were thus narrowed down to the following;

a. In the alternative, judgment against the 1st defendant for the sum of Kshs. 28,860,963.72 as at 31/7/2011

b. Interest on (c) above at Plaintiff's Current Base Rate plus 0.75% per annum and a Default Interest of 5% per annum over and above the interest rate herein

c. Costs of the suit

d. Interest on (e) above at court rates

e. Any other or further orders that this honorable court may deem fit and just to grant.

6. The defendants in their joint statement of defence conceded that there had been requests and offers for the facilities as claimed by the plaintiff. They agreed, in their counter claim, that the plaintiff had made the offer for financial facility in the letter of offer dated 10th July 2009 to enable it construct a petrol station, purchase petroleum products in wholesale and inject capital into their business.

7. They however denied that express agreements had been made or that the Temporary Overdraft facility amounting to Kshs. 15,000,000/= had ever been released to the 1st defendant. The defendants averred that they had offered other titles to the plaintiff due to plaintiff's inability to act expeditiously in perfecting its interest in the titles. According to the defendants, the losses suffered by the plaintiff were as a result of its failure to notify them of its inability to secure its interest in the titles which were in the plaintiff's possession. They asserted that the securities they had offered were sufficient to secure the plaintiff's interest and denied owing the plaintiff any monies at all. The defendants averred that they had relied on the plaintiff's representations to make substantial business transactions and claimed that the plaintiff's breach of agreed terms and timelines had caused it a loss of Kshs. 69,416,900/= which it sought against the plaintiff.

8. When the matter came up for hearing the plaintiff called one witness and the defence called two witnesses. They adopted their statements and listed documents as their evidence without objection.

9. Edith Wanjiku Wambui (PW 1), an officer working for the plaintiff in the remedial management office testified that the 1st defendant had accepted the terms of the Letter of Offer and the terms stipulated in it but unfortunately, one of the condition precedents that the bank had to have the security documents registered in its favour, was not met. She testified that it had been agreed that the plaintiff would take over the defendant's loan from Family Bank and Diamond Trust Bank. They wrote to the two institutions and prepared charge documents for each of the titles issued by the defendants but the defendant complained that the cost of Kshs. 60,000/= for each title was expensive and it was agreed that one charge instrument be prepared for all titles.

10. Family Bank released the requested documents to the firm of advocates representing their interests against an undertaking that the plaintiff would pay off the outstanding liabilities but Diamond Trust bank did not. PW1 stated that after numerous attempts to communicate with the Diamond Trust Bank, the bank informed their advocates that they would not release the documents as the customer told them that plaintiff would not be taking up the facility.

11. She testified that the defendant wrote to the bank requesting to access Kshs. 5,000,000/= after signing the letter of offer and the bank allowed a temporary overdraft under a previous credit facility. The defendant made another request for Kshs. 3,000,000/= and was given a separate term loan for Kshs. 7,000,000/=. PW1 testified that the bank communicated its inability to register the original titles and the defendant offered 6 other properties to substitute the original titles. It also offered 2 properties held at Family Bank.

12. She stated that the bank later on conducted a search on the titles offered by the defendant and found that there had been dealings on them. One had been charged to Equity Bank and another closed for subdivision while the plaintiff was in possession of the original documents.

13. PW1 told the court that the defendant continued to utilize the overdraft facility without security and the plaintiff's claim, as of 31st July 2011 was for a sum of Kshs. 28,860,963.72. She stated that the plaintiff was also seeking interest as per the offer and costs of the suit but had abandoned the prayers for injunction which had been overtaken by events.

14. On the counterclaim, PW1 stated that the plaintiff had assisted the defendant in progressing his business and the plaintiff could not be blamed for the loss especially given that the defendant had other facilities at Diamond Trust Bank, Family Bank and Standard Bank.

15. The 2nd defendant, Abel Maranga Ongwacho (DW 1) who was one of the 1st defendant's directors, accepted that they had been offered the facility as per the letter dated 10th July 2009. He stated that some of the properties offered as security were attached at Diamond Trust Bank and Family Bank which had agreed on how the titles would be passed to the plaintiff. He stated that despite the agreement, the plaintiff did not obtain or charge the titles from Diamond Trust Bank and Family Bank.

16. He denied that the overdraft facility or the term loan for Kshs. 15,000,000/= had been given to the 1st defendant and stated that the plaintiff only gave them a loan of Kshs. 7,000,000/= based on a separate transaction with a different security. He told the court that when he saw his statement of accounts he took it to the Interest Rates Advisory Centre ("IRAC") in order to better comprehend the interest charged. He testified that they got an opinion from IRAC to the effect that their Account No. 1020013 had been overcharged by Kshs. 5,589,938.56. He stated that the 1st defendant had collapsed because the money they had been expecting from the plaintiff was not forthcoming. He put the loss suffered at Kshs. 69,416,900/= based on an audit he claimed had been conducted by IRAC.

17. During cross examination, DW1 admitted that some of the cheques he deposited were cleared despite his account being in the negative. He was referred to the 1st defendant's Interim Financial Statements for the period of 6 months ending on 30th June 2010 where one of the bank facilities listed was an overdraft facility from the plaintiff of Kshs. 23,143,168/=. He also admitted that since none of the titles held by the plaintiff were charged, one of the titles was subsequently subdivided. He however insisted that the bank had only given him an overdraft facility of Kshs. 7,000,000/= which was paid off in full.

18. Wilfred Abincha Onono (DW 2), a certified public accountant stated that he was the managing consultant with IRAC Limited which had been in existence for 17 years. He informed the court that they served borrowers who approached them for advice on whether interests applied to their loans complied with the offer letter and charge document. They would assess the loan account of the individual or company, examine all transactions then apply the rates as agreed by the parties and come up with a report which they compared with the bank's statement.

19. DW 2 testified that in 2010, IRAC was instructed to verify the interest on facilities issued by the plaintiff to the 1st defendant. They were to interrogate two accounts. The first was current account no. 10200013 and loan account no. 154000056. He testified that he had analyzed the offer letter between the plaintiff and defendant and the 1st defendant's statements of account and recalculated the balance. He found that as of 31st July 2011, the balance stood at Kshs.21, 656, 236/= as opposed to the bank's balance of 28,860,963/72 which made a difference of Kshs. 5,589,938/56. His recalculation of the balance for the loan account showed that the balance was Kshs. 7,289,344/= on 31st July 2011, whereas the bank's balance on the same date was Kshs. 6,712,525/79.

20. The witness explained that from the letter of offer, the interest rates were to be levied at a base lending rate of 15.75 % plus 0.75%. The offer letter also provided for default interest which DW2 interpreted to mean that if the plaintiff withdrew above 15 million shillings they would be charged an additional 5%. He testified that they had observed a temporary overdraft charge of 3% which been charged severally when the defendant had not reached the limit of 15 million shillings. He testified that it was improper to give an overdraft of 15 million and also charge for a temporary overdraft which had added up to Kshs.2, 152,093.86. He told the court that if the plaintiff had operated the account properly, it would have charged Kshs. 21,656,636/= as opposed to an excess of Kshs. 28,000,000/=. He calculated a difference of Kshs. 7,204,327/= between his calculations and the plaintiff's statement of account.

21. DW2 further testified that from the current account statement the bank advanced the defendant a term loan of Kshs. 7,000,000/= on 7th October 2009, which reduced the overdraft of 14 million. The loan had been given in a separate loan account which ran for a year after which the defendant was not allowed to withdraw from the account. The loan was transferred to his current account to reduce the overdraft but the defendant withdrew 4 million shillings after 4 days.

22. During cross examination, DW2 acknowledged that he had not sought clarification from the bank in the course of preparing his reports as he knew banks did not willingly give customer's information to outsiders. He stated that he received all documents from the defendants who had also paid him for his services.

23. DW2 stated that the defendant overdraw beyond 15 million in the first year. He also testified that the bank would not have given the defendant any money if it did not have the facility. He confirmed that the offer letter gave the bank the right to charge additional interest without notice. He also admitted that it was not a practice that an overdraft had to be marked in a statement. He stated that he was unaware that the defendants had claimed Kshs. 69,416,900/= from the plaintiff and denied that the claim had been included in his report.

PARTIES SUBMISSIONS

24. The parties filed written submissions to canvass their respective positions after the hearing. The plaintiff submitted that although a term loan was not offered to the 1st defendant an overdraft facility was extended to the 1st defendant. The plaintiff relied on the statement of the 1st defendant's account produced in court to show that the 1st had enjoyed the benefits of the over draft facility. The plaintiff submitted that if the 1st defendant had made good on the payments, the balance would not have soared to Kshs. 28,860,963.72 as at 30th July 2011.

25. Relying on the cases of *Kenya Commercial Bank Limited v Rupa (K) Limited & 2 others [2014] Eklr* and *John Njuguna Mugo v Kenya Commercial Bank Limited [2018] eKLR* the plaintiff urged the court to treat DW 2's evidence with caution as the initial report by the witness had shown a difference of Kshs. 1,677,434.11 between IRAC's balance and the Bank's balance but a subsequent report done five months later had shown a difference of Kshs. 5,589,938.56. In the plaintiff's view, this was an indication that 2 was not as independent and neutral party as he claimed. The plaintiff also urged the court to dismiss the counterclaim which it argued had not been proved.

26. For their part, the defendants denied receiving the overdraft facility from the plaintiff. They argued that there is no document to show that the parties agreed on the release of the temporary overdraft facility and assert that there was no express agreement detailing the terms and conditions of such a facility. They submitted that the plaintiff had not specified when the alleged temporary overdraft facility had been offered and what other uses the defendants had used the facility for. It is the defendant's case that the only funds released to the 1st defendant was a sum of Kshs. 7,000,000/= based on a letter of offer dated 28th August 2009, which had not been brought up by the plaintiff during the proceedings.

27. The defendants maintained that they had deposited the titles of the proposed securities as specified in the letter of offer and the responsibility to have those titles perfected was entirely the plaintiff's. They submit that the plaintiff failed to communicate the difficulties they were experiencing in perfecting the titles to them and also failed to demonstrate that they had informed the defendants that the charges were ready for their execution. The defendants also argue that it was unconventional for the plaintiff to release such a large sum of money when the conditions listed in the letter of offer had not been met.

28. They strenuously protested the claim that they owed the plaintiff any money as claimed and were adamant that the buildup of interest on the principal sum of Kshs. 15,000,000/= to the sum of Kshs. 28,860,963.72 between 10th July 2009 and 3rd July 2011 was exorbitant and unconscionable. They blamed the increment of the account to the figure of Kshs. 28,860,963.72 on unlawful interests and the fact that their accounts were irregularly merged with other facilities that had been secured separately. To prove that the plaintiff had levied unreasonable interests amounting to Kshs. 16,724,310.84/= the defendant relied on the evidence of PW2 whom they argued had a wealth of experience in his field.

29. The defendants submitted that the plaintiff's claim is premised upon the statement of accounts which was heavily manipulated to the detriment of the 1st defendant and thus urge the court to dismiss the claim.

30. The defendants also contend that based on the representations made by the plaintiff, they proceeded to undertake certain business transactions, only for the plaintiff to renege on its offer and cause the 1st defendant a loss of Kshs. 69,416,900/=. They argued that the bank accounts are manifestly clear on the downward turn the defendants' business took due to the plaintiff's unfulfilled promises and manipulation of the accounts. They contend that the sums they had claimed in their counterclaim were unchallenged and therefore urge the court to grant

the monies as prayed.

ISSUES

31. The issues raised by the parties in this suit are;

- a. Whether the 1st defendant was issued with an overdraft facility by the Plaintiff;
- b. Whether the Plaintiff is entitled to the reliefs sought in the plaint; and
- c. Whether the Defendants are entitled to the counterclaim in the statement of defence.

ANALYSIS AND DETERMINATION

32. From the parties' pleadings and the evidence it is agreed that the plaintiff made an offer for a term loan facility of Kshs. 15,000,000/= and an overdraft facility for Kshs. 15,000,000/= by a letter of offer dated 10th July 2009 which was duly executed by the parties.

33. Some of the properties listed in the letter of offer as security were charged to Family Bank and Diamond Trust Bank and it had been agreed that the term loan would be used to offset the defendants' liabilities with the banks. A letter by the plaintiff to its advocates dated 10th July 2009 indicated that land parcels No. Kisii Municipality Block 11/233 and Kisii Town Block 1/103 were charged to Diamond Trust Bank while land parcels No. Wanjare/Bokeira/2986&3416 and Central Kitutu /Daraja Mbili /1762 were charged to Family Bank.

34. The plaintiff claims that since it was unable to discharge the titles held by the banks promptly, it offered the 1st defendant a Temporary Overdraft Facility of Kshs. 15,000,000/= to enable it offset its liabilities with Diamond Trust Bank directly but the defendant diverted the funds to other uses. The defendants denied that the overdraft facility had ever been issued. They claimed that the plaintiff had failed to act expeditiously in perfecting its securities and had not notified them of its inability to secure its interest in the titles.

35. Although there was no formal notification by the plaintiff to the defendants that the titles they had offered could not be easily discharged, I am doubtful that the defendants were oblivious of the difficulties experienced by the plaintiff as they claimed. As early as 22nd July 2009, the 2nd defendant wrote a letter to the plaintiff offering additional titles as security, based on a discussion the parties had had. These additional facilities were offered despite the fact that the titles furnished earlier in the letter of offer were sufficient to secure the facility. This was, in my view, a demonstration that the defendants were aware that the plaintiff was not able to register its interest in the titles offered earlier with ease.

36. Nevertheless, it remained the plaintiff's duty to ensure that the securities had been perfected according to the general terms and conditions of the letter of offer.

37. The correspondence between the plaintiff, its advocates and the banks holding the titles that had been offered as security, as exhibited in the plaintiff's second supplementary list of documents, indicate a very casual approach by the plaintiff to its duties. From the time the letter of offer was executed on 10th July 2009, the plaintiff was never in haste to perfect the securities.

38. The delay could be blamed on the defendants' insistence that all titles be registered under one security document. PW1 told the court that the defendants had requested that all titles be registered under one document to reduce the costs of perfecting the security. Family Bank responded positively to the offer by the plaintiff to pay off the 1st defendant's loan but Diamond Trust Bank took time to respond to the plaintiff's offer. It can be argued that the bank's reluctance to respond to the plaintiff's offer slowed down the transaction but it is not clear why the plaintiff failed to act on an earlier advice by its advocates in a letter dated 27th November 2009, to pay off the amounts outstanding with Diamond Trust Bank to enable it obtain the titles from the bank.

39. That said, it is worth noting that soon after executing the letter of offer, the defendants requested for an overdraft to finance its business. Whereas one of the conditions precedent to a drawdown in the facility was that security documents had to be registered in favour of the bank, the letter of offer provided as follows;

"The offer contained in this letter is available to the Borrower for acceptance within Fifteen (15) days from the date of this letter after which date the offer will lapse unless extended in writing by the Bank, unless the Bank shall in its absolute discretion waive the lapse by either proceeding with the preparation of the security or [make] the facility or part thereof available to the Borrower."
[Emphasis added]

40. The statement of accounts for the 1st defendant's account no. 10200013 show that the account was in arrears as from 22nd July 2009. It is dishonest of the defendants to claim that no overdraft facility was extended to them yet the statement of account was clear that the defendants withdrew monies they did not have in the account. It is therefore my finding that a temporary overdraft facility was issued to the 1st defendant according to the letter of offer dated 10th July 2009.

41. The second issue is whether the defendants owed the plaintiff a sum of Kshs. 28,860,963.72 together with interest as claimed. From the evidence before this court, it is apparent that the defendant operated two accounts with the plaintiff bank. The first was current account no. 10200013 and the second was loan account no. 154000056. The statement of account shows that the defendants drew the overdraft facility from the current account which was opened on 8th July 2009. A term loan of Kshs. 7,000,000/= was advanced to the defendant on 7th October 2009 in the loan account, which was merged with the current account to reduce the defendant's debt in the current account. It was agreed by

the parties, at clause 11 of the letter of offer that the plaintiff could consolidate any of the defendant's accounts in reduction of any sums due to the bank. The defendant's contention that such a merger was irregular is therefore unfounded.

42. The letter of offer also provided at clause 13 that the plaintiff's statement and records would constitute conclusive evidence of indebtedness in a court of law. The clause purports to oust the court's jurisdiction to look into statements and records prepared by the plaintiff.

43. In the case of **Lee v The Showmen's Guild of G B (1952) 2QB 329(CA)** cited with approval by the Court of Appeal in **Niazsons (K) Ltd v China Road & Bridge Corporation Kenya Civil Appeal No 157 of 2000[2001] eKLR** Denning LJ held:

"If parties should seek, by agreement, to take the law out of the hands of the Courts and put it into the hands of a private tribunal, without any recourse at all to the Courts in case of error of law, then the agreement is to that extent contrary to public policy and void: see Czarnikow & Co Ltd vs Roth Schmidt & Co (1922) 2 KB 478, 488 ..." (emphasis supplied)

44. In this case, the letter of offer gave no alternative means of redress in case the borrower was dissatisfied with the plaintiff's records. The High Court has unlimited jurisdiction to hear and determine the dispute herein and give the reliefs sought. It would be contrary to public policy and the defendants' right of access to justice for them to be forbidden from challenging the plaintiff's records. The defendants had a right to challenge the sums claimed by the plaintiff. In doing so the defendants relied on the evidence of DW2 who testified that he had been a certified public accountant since 1978.

45. **Section 48 of the Evidence Act** provides that specially skilled persons may be called to give their expert opinion on issues within their specialty.

46. In **Mutonyi versus Republic (1982) KLR 203** the Court of Appeal held;

Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.

...

In Cross on Evidence 5th edition at page 446, the following passage from the judgment of President Cooper in Davie versus Edinburgh magistrates (1933) SC 34,40, as scinting the functions of expert witnesses:

"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence."

So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

1. Establish by evidence that he is specially skilled in his science or art.

2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.

3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness."

47. The expertise of DW2 on examination of financial records is undisputed. I am however in agreement with the observations of the courts in **Kenya Commercial Bank Limited v Rupa (K) Limited & 2 others** and **John Njuguna Mugo v Kenya Commercial Bank Limited (supra)** that I must exercise caution while considering the evidence of DW 2 since his evidence was based on documents and narratives given to him by the defendants who had paid him for his services.

48. DW 2 told the court that his services had been procured to analyze the statement and confirm whether the interest rates charged by the plaintiff adhered to the terms in the letter of offer. From DW 2's recalculation, the plaintiff had irregularly charged a sum of Kshs. 5,589,938/56 in the current account as at 31st July 2011 and undercharged the loan account which was supposed to be Kshs. 7,289,344 as opposed to the plaintiff's balance of Kshs. 6,712,525/79.

49. In his witness statement dated 20th June 2019, DW2 rightly stated that the interest rate to be charged in the facility was the base lending rate of 15.75% plus a margin of 0.75%. A penalty rate of 5% per annum would also apply over and above the rates applied on amounts drawn in excess of the overdraft limit and amounts in arrears on the loan limit.

50. DW 2 observed that a temporary overdraft fee of 3% was levied on amounts drawn. He indicated that this fee had not been provided for in the facility and he deducted a sum of Kshs. 2,152,093.86 levied as temporary overdraft charges from the plaintiff's balance. He also deducted a commitment fee of Kshs. 225,000/= being 1.5% fee on the undisbursed loan facility of Kshs. 15,000,000/=. DW2 also deducted a sum of Kshs. 105,000/= charged as appraisal fee and commitment fee for the term loan of Kshs. 7,000,000/= on the grounds that the fees were above what had been indicated by the plaintiff in a facility dated 28th August 2009. The deduction was made pending verification from the plaintiff. DW2 also omitted a total of Kshs. 116, 449.52 cash handling fees from the balance. He indicated that as of 1st July 2014, the difference between his recalculation and the plaintiff's debit balance for the current account was Kshs. 16,724,310.84 in favour of the 1st

defendant and Kshs. 1,734,009.06 in the loan account.

51. I am in agreement with DW2 that the offer letter did not provide for a temporary overdraft fee of 3%. The parties are also in agreement that the term loan of Kshs 15,000,000/= provided in the offer letter was not disbursed to the 1st defendant therefore the commitment fee of Kshs. 225,000/= was unwarranted. DW 2 admitted that he had not consulted the plaintiff, therefore the omission of Kshs. 105,000/= charged as appraisal fee and commitment fee for the term loan of Kshs. 7,000,000/= is disregarded. As the cash handling fees were also not provided for in the facility, I agree with DW 2 that the sum of Kshs. 116, 449.52 should be deducted from the debt owing to the plaintiff.

52. I therefore deduct the sum of Kshs. 2,152,093.86 being temporary overdraft charges, Ksh. 225,000/= charged as commitment fee and Kshs. 116,449.52/= being cash handling fees from the balance of Kshs. 28,860,963.72 as at 31st July 2011. I find that the plaintiff is entitled to a sum of Kshs. 26,367,420.34/= together with interest at the rate of 15.75% plus 0.75% per annum as at 31st July 2011.

53. I now turn to the defendants' counterclaim. The defendants complained that the plaintiff's failure to disburse money to them promptly led to a loss of Kshs. 69,416,900/=. DW1 told the court that plaintiff's failure to disburse to them a sum of Kshs. 15,000,000/= led to the losses suffered by the 1st defendant and its subsequent collapse. As observed elsewhere in this decision, the term loan of Kshs. 15,000,000/= set out in the offer letter was never given to the 1st defendant. The term loan was intended to pay off the debts the 1st defendant had with other banks.

54. The plaintiff's flippant performance of its duty to register security documents and take over the loans from the other banks may have been detrimental to the defendants' business. However, the defendants did not lead any evidence to prove the extent to which this was so especially given the fact that there was an indication they may have meddled with the process to take over the facility from the bank as seen in a letter sent to the plaintiff's advocates by Diamond Trust Bank on 13th February 2010. DW1 also stated that the calculation of the losses suffered by the 1st defendant was based on a report prepared by DW2 but DW2 disowned the said report.

55. Since the plaintiff extended an overdraft facility to the defendants as soon as the letter of offer was executed, I dismiss the defendants' argument that the plaintiff's failure to release funds to them led to the collapse of its business. I find that the defendants did not prove their counterclaim to the required standard and dismiss it.

56. In the end, I find that the plaintiff's claim is merited and allow it to the following extent;

a. Judgment is entered against the defendants jointly and severally for the sum of Kshs. 26,367,420.34/= together with interest at the rate of 15.75% plus 0.75% per annum as of 31st July 2011.

b. The defendants shall bear the costs of this suit.

Dated, signed and delivered at Kisii this 13th day of March 2020.

R.E.OUGO

JUDGE

In the presence;

Mr. Kemboi h/b Mr. Kimani For the Plaintiff

Defendants Absent

Defendant's Counsel Absent

Ms. Rael Court Assistant