



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 692 OF 2010**

**EXPORT IMPORT BANK OF AMERICA.....PLAINTIFF**

**VERSUS**

**ROYAL MEDIA SERVICES LIMITED.....1<sup>ST</sup> DEFENDANT**

**DEEP RIVER ESTATE LIMITED.....2<sup>ND</sup> DEFENDANT**

**ROYAL CREDIT LIMITED.....3<sup>RD</sup> DEFENDANT**

**SAMUEL KAMAU MACHARIA.....4<sup>TH</sup> DEFENDANT**

**PURITY GATHONI MACHARIA.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This is a claim for the recovery of a loan granted by Sentry Finance Corporation (SFC) to Royal Media Services Limited (RMS). The purpose of the loan was to facilitate RMS to acquire/purchase various television, radio and paging transmission equipment (the equipment). Those equipments were manufactured in the United States of America. In this regard RMS executed four promissory notes in favour of SFC. RMS also executed a security agreement. It was stipulated in the loan agreement, amongst other condition, that SFC would not be obligated to lend RMS until, inter alia, Export-Import Bank of the United States (Ex-Imp Bank) had issued an insurance for that loan. It is not denied that RMS failed to repay the loan and on SFC notifying Ex-Imp Bank of RMS's default SFC claimed the benefit of the insurance cover. Ex-Imp Bank approved SFC's claim and paid USD 486,283.12 being the insured cover. SFC executed a Release and Assignment, that is it assigned to Ex-Imp Bank, its successors and assigns, all rights, title and interest, and all sums of money due or to become due to SFC from RMS (although referred to as the buyer) under the loan agreement and the security agreement which secured the equipment. It is in that background that Ex-Imp Bank filed the present case.

2. Ex-Imp Bank is a statutory legal entity with a right to sue and be sued; it was created by legislation passed by the Congress of the United States of America (USA) and signed by the President of the USA. Its purpose is to create and sustain employment in the USA by financing export of goods and services from the USA to foreign countries. Its principal office is at 811 Vermont Avenue.

3. RMS is a Limited Liability company incorporated under the provisions of the Companies Act. Deep Rivers Limited, the 2<sup>nd</sup> defendant, and Royal Credit Limited, the 3<sup>rd</sup> defendant, are incorporated under the provisions of the Companies Act and are sued as guaranters of RMS. Samuel Kamau Macharia and Purity Gathoni Macharia are also sued as guaranters of RMS. They are collectively referred to as defendants.

4. Ex-Imp Bank seek by this action judgment jointly and severally against all the defendants for: USD 447,943.02 and further or in alternative judgment for the reimbursed amount of USD 486,283.12 plus interest. Those claims are denied by the defendants.

**ANALYSIS**

5. The first issue I need to determine, before others, is: what is the applicable law to this claim.

6. The loan agreement dated 15<sup>th</sup> October 1998 between SFC and RMC and the security agreement, between the same parties and of the same date are to be construed in accordance with the Laws of the "State of New York and the Laws of the USA, in all matters including construction, validity, interpretation and enforcement, without giving effect to any conflict of law rules". It is important to note that although that is what is provided in those documents the same was not pleaded nor was it proved. Instead both the learned counsels, in this matter,

submitted, in their written submissions that it is the law in the state of New York which this court should apply to this matter. Even in that, there was discordance in what that law provides. According to the learned counsel for the defendants Dr Kamau Kuria Senior Counsel (Sc) the court should apply both the foreign and Kenyan Law. The learned counsel for Ex-Imp Bank Ms Raore submitted that Kenyan Law applied and in the alternative the law of New York State applied.

7. In my view and in view of the fact the Ex-Imp Bank failed to plead and to prove the law that is applicable, it follows that it is the Kenyan Law that will apply. I find support on this from a Canadian case **JPMorgan Chase Bank v. Lanner (The), 2008 FCA 399 (CanLII), [2009] 4 FCR 109**, thus:

*“Per Richard C.J. (Ryer J.A. concurring): Whenever a Canadian court is asked to apply the substantive law of a foreign jurisdiction, it must apply a “choice of law” analysis using Canadian conflict of laws rules. Absent a statutory and/or treaty provision directing the forum to apply a particular choice of law rule, Canadian common law conflict of laws rules will apply in a proceeding where a court is asked to apply foreign law. The first step in a choice of law analysis is the determination of the legal nature of the questions or issues to be adjudicated. The court must then determine what choice of law rule applies to that particular category and finally apply the appropriate jurisdiction’s law to the issue. In general, foreign law must be specifically pleaded and proved to the satisfaction of the court. Otherwise the court will apply the law of the forum.”* (emphasis mine.)

8. That stand is also what is stated by the learned authors Dicey, Morris and Collins in their book. **“The conflict of laws”**. I shall quote passages from that book at pages 319 to 326 that speak to this as follows:

*“Foreign law must be pleaded. The general rule is that if a party wishes to rely on a foreign law he must plead it in the same way as any other facts.*

.....

*The court may decide a question of foreign law without proof if it is requested to do so by both parties.....*

*It is now well settled that foreign law must, in general, be proved by expert evidence. Foreign law cannot be proved merely by putting the text of a foreign enactment before the court, nor merely by citing foreign decisions or books of authority. Such materials can only be brought before the court as part of the evidence of an expert witness. Since without his assistance the court cannot evaluate or interpret them. This may be especially important (even if the ultimate task of the judge is made little easier) when the foreign law in quest is found in a number of sources whose relationship to each other is not easily understood or explained, or in cases in which the essence of the foreign law is that a local judge will inform himself as to what the material principles of religious law require in circumstances in which he is not bound to follow previous decisions, even his own, and there is no tradition of textbook writing. No precise or comprehensive answer can be given to the question who, for this purpose, is a competent expert. A judge or legal practitioner from the foreign country is always competent.*

.....

*(ii) Use of foreign sources. An English court will not conduct its own researches into foreign law, in the common law system, the trial is not an inquisition into the content of relevant foreign law any more than it is an inquisition into other factual issues that the parties tender for decision by the court”. But if an expert witness refers to foreign statutes, decisions or books the court is entitled to look at them as part of his evidence.”*

9. Following the above discussion this case will be decided on the basis of Kenyan Law.

10. The issues that present themselves, in this matter, are:

- (i) Is this claim statute barred;*
- (ii) Does Ex-Imp Bank have a cause of action against the defendants;*
- (iii) Has Ex-Imp Bank proved its case; and*
- (iv) Who shall pay the costs.*

#### **FIRST ISSUE**

11. The loan and security agreements are both dated 15<sup>th</sup> October 1998. The loan to RMS was secured by four promissory notes issued to SFC by RMS. It was also secured by the equipment and it was further secured by guarantees of the 2<sup>nd</sup> to the 5<sup>th</sup> defendants. RMS repaid USD 9,319.15\$ towards the loan but by mid 1999 there were no further repayments of the loan.

12. There were various correspondences between SFC and RMS, on this default. SFC demanded repayment of the entire loan by letter dated 30<sup>th</sup> July 1999 addressed to all the guarantors. There was a response from RMS by letter dated 20<sup>th</sup> August 1999 and 7<sup>th</sup> October 1999 whereby RMS requested for indulgence to pay the loan. SFC made another demand to RMS and all the guarantors by letter dated 15<sup>th</sup> October 1999. RMS responded by its letter of 4<sup>th</sup> November 1999 confirming it intended to pay the outstanding amount. That was the last of correspondence between SFC and RMS and its guarantors. RMS did subsequently respond to a demand by Ex-Imp Bank by its letter dated

3<sup>rd</sup> April 2000 where it proposed it would make payment.

13. Ex-Imp Bank relying on the provisions of section 19(1) of the Limitation of Action Act, Chapter 22, argued that the period applicable to this action is 12 years. This is what section 19(1) of Cap 22 provides:

***“An action may not be brought to recover a principal sum of money secured by a mortgage on land or moveable property, or to recover proceeds of sale of land, after the end of twelve years from the date when the right to receive the money accrued.”***

14. Ex-Imp Bank argued that the period of the cause of action, in this matter, should be considered from 3<sup>rd</sup> April 2000, the date RMS wrote to it proposing to settle the amount due. That the right to recover the debt accrued from that date as provided under section 23 (3) of Cap 22. That is the section which provides that fresh accrual of right of an action occurs where there is acknowledgment or part payment of the debt.

15. Ex-Imp Banks argument, in respect to this first issue is two pronged. The first is that the security agreement is a chattels mortgage and even though it was not registered with the Registrar of Companies the debt is recoverable as provided under section 96 of the Companies Act, Chapter 486. That is the section which provides that notwithstanding non registration of a charge with the registrar of companies, even though the charge becomes void under that section, the money secured by that charge becomes immediately payable. When calculating the period within which the charge should have been registered Ex-Imp Bank pleaded that the money was payable, under that section, on 26<sup>th</sup> November 1999. Therefore that the 12 years under section 19(1) of Cap 22 began to run from that date.

16. The second argument by Ex-Imp Bank is that the security was a chattels mortgage, which even though not registered under, the now repealed the Chattels Transfer Act, Cap 28, the debt is however recoverable. Reliance was placed on the case **Vehicle and Equipment Leasing Limited v Jamii Bora Bank Limited (2017) eKLR** as follows:

***“54. Registration of security documents however serves an additional purpose besides merely protecting the secured creditor. It is not only a priority perfection requirement which has to be complied with to make the security effective against a liquidator, administrators and creditors. It is also a form of notice. It constitutes notice of existence of the instrument and, a fortiori, the contents of the instrument. The party searching the register and obtaining details of the registered instrument is entitled to inspect a copy of the registered instrument by seeking a copy either from the registry or the parties to the security.***

***55. Registration per se is, however, in my view, not a necessary step to render security unenforceable against the debtor himself. He is the grantor of the security interest. He needs no notice of the security. As against the debtor, the creditor’s security interest will be deemed as perfected and effective on possession or where, non- possessory, on the completion (execution and stamping) of the security instrument.***

***56. Want of registration alone should not defeat a creditor’s security interest as against the debtor, also for the basic reason that, equity treats as done that which ought to be done. Once therefore the security agreement is complete and the subject matter of the security is identifiable and the creditor has completed his part of the bargain by actually making the monetary advance, the security agreement will give rise to security in favour of the creditor immediately. The contract for security is no longer executory, it deemed to have attached. The parties are then bound not just by the security but also the terms of the security agreement itself.”***

17. The response of the defendants is that the security relied upon was un-perfected for lack of registration. Defence argument is that there does not exist a mortgage.

18. In my view the submissions of the defence are correct and are applicable here, for more than one reason.

19. The first is that I am of the view that the effect of non registration of the mortgage was to render it an ordinary contract of debt recoverable as provided under section 4 of cap 22. The reason I so hold is because in my view without registration Ex-Imp Bank would not be entitled in law to reposses the equipment without an order of the court. It follows that the equipment cannot be regarded as security for the loan. I am not persuaded by the decision of Vehicle Equipment Leasing (supra) but I do agree with it finding to the extent that the security agreement, just like the loan agreement is evidencing the loan given to RMS.

20. The second reason I do not find that the security agreement is a mortgage is because for it to qualify to be a mortgage it ought to specifically identify the equipment that it refers to. In this case the reference made both in the loan agreement and the security agreement is “Target Equipment”. That target equipment is not identified what exactly it is, at all. How then can the security agreement be considered to be a mortgage when it does not identify the immovable or moveable property it refers to, for it to qualify to fall under section 19(1) of Cap 22. It is for that reason that I find that the claim of Ex-Imp Bank is a simple claim of money owed, that is a claim in contract. That being the finding of this court it follows that Section 4(1) (a) of Cap 22 applied which provides that such a claim may not be brought in court after the expiry of 6 years.

21. Having reached the above conclusion, when then does the 6 years period begin to run. It must be understood that there are two claims here, even though Ex-Imp Bank has lumped them together. The first is the claim against the principal debtor RMS. The second is against its guarantors. In respect to RMS the period will be calculated from 3<sup>rd</sup> April 2000. That is the date of the last letter, by RMS, confirming it was willing to pay the loan. The 6 years in respect to RMS ran out on May 2006. In other words the claim against RMS was time barred in the year 2006. In respect to the guarantors the period will be calculated from 30<sup>th</sup> July 1999 when the demand was made to them. Although subsequently there was another demand made to them that subsequent demand would not change the date of calculation because the calculation can only be from the date of first demand that is 30<sup>th</sup> July 1999. The 6 years period, in respect to all the guarantors ran out in August 2000. In other words that is the date the claim against the guarantors become time barred. This case was filed in 15<sup>th</sup> October 2010. It follows that having been filed on that date that the claims against the principal debtor RMS and against the guarantors were statutorily time

barred when it was filed.

### **THE SECOND ISSUE**

22. The other issue to consider is: does Ex-Imp Bank have a cause of action against the defendants. The loan, as stated before, was granted by SFC to RMS. SFC, as required under the loan agreement obtained insurance from Ex-Imp Bank thereby insuring against default. Ex-Imp Bank, on being notified of default by SFC, paid to SFC USD 4,86,283.12 under the insurance policy. On that payment being made SFC assigned all its rights, title and interest in the loan to Ex-Imp Bank.

23. Ex-Imp Bank submitted that the loan agreement provided a condition precedent to the disbursement of the loan to SFC obtaining an Insurance and that the expense of obtaining that insurance, as provided under the agreement, was borne by RMS. It was further submitted that a party to a contract can freely assign its benefit of the contract and after assignment the assignee is entitled to benefit of the contract, including filing proceedings.

24. On behalf of the defence it was submitted that the action in subrogation. The defence admit that Ex-Imp Bank paid SFC money due from the defendants. Although the defence argues that SFC had breached the agreement by allegedly not timely delivery of the equipment thereby delaying installation, such submissions is not supported by any documentation and there seem to have been no obligation in the agreement on the part of SFC, who seems to only have been a lender, to ensure delivery of the equipment. The defence used that argument to support its submission that there was no right which was assignable to Ex-Imp Bank.

25. I have considered the parties submissions on this issue. It is important to reproduce the release and assign upon which Ex-Imp Bank relies on as authority to file this present suit as follows:

*“WHEREAS the Export-Import Bank of the United States (Ex-Im Bank) issued an Export Credit Insurance Policy to the Insured: AND WHEREAS, the Insured has filed a claim under insurance policy MSM 195149 on the proof of loss dated December 22 1999. NOW THEREFORE, the insured and Ex-Im Bank agree as follows: In the event the claim is approved for payment and the insured or its assignee or any agent negotiates a claim payment check, the insured does release Ex-Im Bank from all claims actions, and causes of action of whatsoever character and description which the insured ever had, now has or hereafter can, shall or may have relating to this claim. AND, in further consideration of the claim payment by Ex-Im Bank, the insured does assign to Ex-Im Bank, its successors and assigns, all right, title and interest in, and all sums of money now due, or to become due, to the insured from the buyer under the transactions and accounts relating to the claim, and any and all contracts, security and evidences of indebtedness relating thereto; to have and to hold the same, with full power at their own cost, to collect and enforce the same, for their own use and benefit by any action or proceeding in the name of the insured or otherwise, and to take all legal steps as they deem proper or necessary in connection herewith.*

*In witness whereof, the insured has caused this instrument to be sealed this 22<sup>nd</sup> day of December, 1999.*

SENTRY FINANCIAL CORPORATION

(Name of Insured)

By \_\_\_\_\_

(seal)

The Black's Law Dictionary Eighth Edition defines assignment as:

*“The transfer of rights or property.....*

*An assignment is a transfer or setting over of property or of some right or interest therein from one person to another..”*

26. Bearing in mind that definition, above, it would follow that what is being assigned must be specifically identified and the person receiving the property and right must also be identified. With that in mind let us consider the assignment in this case. To repeat, that assigning document provided what is being assigned as “all right, title and interest in, and all sums of money now due, or to become due, to the insured from the Buyer under the transactions accounts...” it is not clear, in my view, who the ‘Buyer’ is. Both the loan agreement and the security agreement do not refer to any party as ‘Buyer’. The loan agreement refers to SFC as the lender and RMS as the Borrower. The security agreement refers to SFC as the “secured party” and RMS as the “debtor”. One would then ask which rights were assigned to Ex-Imp Bank which related to the ‘Buyer’? I would answer that rhetorical question by saying none of the parties before me.

27. In my view, therefore, the assignment failed to assign the right of SFC to the claim it had against RMS. It is for that reason I find Ex-Imp Bank had no cause of action against the defendants based on the assignment before me.

### **THE THIRD ISSUE**

28. The third issue to consider is whether Ex-Imp Bank has proved its claim, against the defendants assuming it is properly before court and assuming the claim is not statutorily time barred.

29. There was, in my view, a valid agreement, signed by all parties acknowledging RMS obtained a loan from SFC. The loan agreement shows that RMS was to obtain a loan amount not exceeding USD 515,000. Apart from the letters of demand which stated the amount demanded from RMS there were no statements produced in this case showing the principal and the interest making up the total claimed in this action. It is important to state that the managing director of RMS did confirm that RMS obtained USD 447,943.02 for purchase of the equipment. He also confirmed that RMS only paid USD 9,319.15 of the loan. If indeed I had found that this claim is not statute barred I would have entered judgment for the admitted amount of USD 447,943.02 less the paid amount of USD 9,319.15 plus interest.

**THE FOURTH ISSUE**

30. The last issue is who pays the costs of the suit. In my view the costs in this case must follow the event. There is no reason why the costs should not follow the event, more particularly because Ex-Imp Bank slept on its rights and then brought this case after an unreasonable delay. Statute expects parties to be reasonably diligent in enforcing their rights before court.

**DECISION**

31. For the reasons set out above this case is hereby dismissed with costs to the defendants.

**DATED, SIGNED and DELIVERED at NAIROBI this 11th day of MARCH 2020.**

**MARY KASANGO**

**JUDGE**

***Ruling read in open court in the presence of***

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendants