



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 86 OF 2008

DAIMA BANK LIMITED (IN LIQUIDATION).....PLAINTIFF

-VERSUS-

SAVANNAH DEVELOPMENT COMPANY LIMITED.....1ST DEFENDANT

LUCY W. KAIRU.....2ND DEFENDANT

JUDGMENT

1. **Daima Bank Limited** (the bank) (in liquidation) has filed this case against two defendants. The 1st defendant is **Savannah Development Company Limited** and the 2nd defendant is **Lucy W. Kairu**. The Bank's claim against the 1st defendant is for Ksh 32,586,532.00 being amounts, as it is pleaded, was advanced to the 1st defendant. The 2nd defendant is issued as guarantor of the 1st defendant's indebtedness.

2. The 1st defendant did not defend this suit. Accordingly judgments will be entered against it as prayed.

3. The Bank's evidence was led by Stephen Mijire Nderitu, the liquidation officer with the Kenya Deposit Insurance Corporation. It is that entity which is presently managing the affairs of the Bank. The witness stated that by letter of offer dated 16th July 1997 the 1st defendant was granted by the Bank an overdraft loan facility of Ksh 20 million. The applicable rate of interest to that loan was 36% per annum. That loan was secured by a continuing guarantee and indemnity of the 2nd defendant dated 15th June 1998. That the Bank advanced to the 1st defendant financial facilities between 1997 and 2002. Those facilities were granted on the strength of the letter of offer and the guarantee signed by the 2nd defendant. As at 31st December 2007 the 1st defendant was indebted to the Bank, in respect of the financial advances, interest and other charges ksh 32,586,532.00. It is this amount the Bank seeks judgment for which amount continues to attract interest at the rate of 15% per annum. The witness stated that the said amount remains unpaid to date.

4. The 2nd defendant stated in her evidence that when the 1st defendant obtained the loan from the Bank she was a silent director. That she was not dealing with the affairs of the 1st defendant on day to day basis. She also stated that because it was her late husband, her then co-director, who was carrying on the 1st defendant's business she was unaware that the Bank had given the 1st defendant a loan. Although the 2nd defendant did not inform the court exactly when her late husband passed away, she however said, inter-changeably, that she signed the guarantee one and half month after his death and later stated that she signed it one year after his death.

5. On being cross examined by the Bank's learned advocate, the 2nd defendant confirmed that she was not denying money was advanced to the 1st defendant but that her contention was that she was a silent director.

ANALYSIS AND DETERMINATION

6. The 2nd defendant by her defence pleaded that she did not guarantee the 1st defendant's debt with the Bank; pleaded that the 1st defendant was not operating due to the death of her co-director, her late husband; she denied in the defence that the Bank advanced money to the 1st defendant; and also pleaded that the plaintiff's claim is statute barred.

7. As it will be noted from the evidence the 2nd defendant adduced before the court she failed to support any of those issues pleaded in her defence. The 2nd defendant's defence, going by her oral evidence was that she was a silent director of the 1st defendant but she acknowledged that the Bank granted the 1st defendant a loan.

8. Section 107 and 109 of the Evidence Act lay the burden of proving what was pleaded in that defence on the 2nd defendant. Those sections provide as follows:

Section 107 of Evidence act

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

.....

Section 109 of Evidence act

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

9. The 2nd defendant had burden to prove that the 1st defendant was not operating, and if so what effect that had to the Bank's claim; and she also had a burden to prove that the Bank's claim was time barred. The 2nd defendant did not discharge that burden, at all.

10. The only issue that presents itself for consideration, in view of the evidence tendered herein is: has the Bank proved its case against the 2nd defendant.

11. The 1st defendant did not deny its indebtedness to the Bank. This is clear from various correspondences exhibited by the Bank which show acknowledgment, by the 1st defendant, of its indebtedness to the Bank.

12. There is a letter dated 12th July 1997 which was written by the 1st defendant's then managing director, D.M. Kairu, under the 1st defendant's letter head. In that letter the 1st defendant submitted an application to the bank for loan facility of Ksh 20 million. The Bank responded to that application by giving the 1st defendant a letter of offer of a loan for Ksh 20 million. That letter of offer was accepted by the 1st defendant which acceptance was signified by signature, on that letter of offer, by the 1st defendant's then managing director.

13. By letter dated 18th April 2003 the 1st defendant, under the hand of the managing director Lucy W. Kairu (the 2nd defendant) wrote the following letter to the bank:

“Statutory Manager

Daima Bank

P.O. Box 54319 Date 18th April 2003

Nairobi.

Dear Sir,

Ref: Account 000458009 & 0004508017

We are in receipt of your two demand letters dated 27/3/03 on the captioned accounts. We are ready and willing to come forth and discuss the payments arrangements but to enable us to do so, kindly furnish us with the following information.

1. Account details from initiation to date
2. Bank statements showing the transaction through the period to date.

The above information will enable us to put together a proposal for discussion.

yours faithfully

For Savannah Development Company Ltd

Lucy W. Kairu (Mrs)

Managing Director”.

14. There are two other letters written by the 1st defendant dated 24th April 1998 and 10th September 1998 whereby there is acknowledgment, by the 1st defendant of the debt owed to the Bank. In both those letters the 1st defendant undertook to repay the debt, for

example in the letter of 24th April 1998 the 1st defendant offered to pay to the Bank Ksh 12.5 million within 14 days of that letter.

15. The 1st defendant's bank statements show that on 11th December 2002 the 1st defendant made a deposit into its loan bank account Ksh 1,249,829.00.

16. Limitation of period for the Bank to file this case against the 1st defendant began to run from 11th December 2002, when that last payment was made by the 1st defendant. Although limitation for a claim of a debt is limited to six years, see section 4 of the Limitation of Causes Act, Cap 22. That limitation can be extended by acknowledgement of such debt or by part payment of the debt. This is what is provided under section 23 (3) of Cap 22, thus:

(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:

17. The 1st defendant's last payment into its loan account was on 11th December 2002. This suit was filed in February 2008. That was within the six years period from the date of the last payment by the 1st defendant into its loan account. I do therefore find that the Bank's claim is not time barred.

18. The Bank produced bank statements of the loan account, being account number 0004508009 showing a debit balance of Ksh 32,475,985.50 and legal fees account number 0004508017 showing a debit balance of Ksh 110,546.30. It is these two amounts that make up the amount of Ksh 32,586,532.00 which is what the Bank seeks in judgment against both defendants.

19. The Bank produced a guarantee dated 15th June 1998 which the 2nd defendant signed as guarantee of the 1st defendant's indebtedness to the Bank.

20. Having perused the documents produced by the Bank in this matter and having considered the evidence adduced before court, I do find that the Bank has proved on a balance of probability its claim against the 1st and 2nd defendants. Having proved its claim the Bank is entitled to the costs of this suit.

21. The judgment of the court is as follows:

a. There shall be judgment for the plaintiff against both the defendants jointly and severally for Ksh 32,586,532.00 with interest at the rate of 1.25% from the date of filing suit until payment in full.

b. The plaintiff is awarded costs of the suit to be paid by both defendants jointly and severally.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **29th** day of **April, 2020**.

MARY KASANGO

JUDGE