



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 473 OF 2012

I & M BANK LIMITED.....PLAINTIFF

- VERSUS -

BENIR INVESTMENTS LIMITED.....1ST DEFENDANT

JOSEPH MURIITHI KANYITA.....2ND DEFENDANT

FAITH GATHONI KABIRU.....3RD DEFENDANT

JUDGMENT

1. **I & M BANK LIMITED** (the Bank) has brought this case against three defendants seeking judgment against all those defendants, jointly and severally, for Ksh 33,865,045.90 with interest and costs.

2. The defendants filed their defences but failed to attend the hearing of this case. It follows that their defences remain mere allegation for lack of proof though evidence. See the case **SHANEEBAL LIMITED V COUNTY GOVERNMENT OF MACHAKOS (2018) eKLR**. It follows that the Bank's case was unopposed.

3. The Bank's case was supported by the evidence of **SRINIVASAN PARTH**, the Bank's general manager.

4. The Bank's case is that by letter of offer dated 9th October 2007 it agreed to advance to the 1st defendant banking facilities for an aggregate sum on Ksh 18 million. The said facilities were secured by a charge of 2nd defendant's immovable property, that is parcel of land known as **NAIROBI/BLOCK 94/170**. They were also secured by guarantee and indemnity executed by the 2nd and 3rd defendants dated 17th October 2007. The facilities were further secured by a debenture dated 14th November 2007, between the Bank and the 1st defendant.

5. The 1st defendant defaulted in the repayment of those facilities. The Bank consented to the 2nd defendant procuring a purchaser of the charged property in order to repay the outstanding facilities. The 2nd defendant secured a buyer for the charged property but the sale did not materialize because it transpired that the title documents of the charged property were forged. Accordingly, that the 2nd defendant was not the lawful owner of the charged property. Indeed, the 2nd defendant was charged and convicted, together with another person of forgery and obtaining registration by false pretences of the charged property title documents. Further the lawful owner of the charged property filed case in this court being case number **HCCC No 423 of 2009 CAPTAIN MOSES KARIUKI WACHIRA VS JOSEPH MURIITHI & OTHERS**. In that case the court by its judgment dated 19th February 2016 declared the charge to the Bank dated 14th November 2007 as illegal and void and without contractual effect whatsoever. This was because the Bank relied on forged title documents in creating the charge.

6. It is because of the above cases the Bank's witness stated that the Bank's only remedy was to pursue the debt against the 1st defendant as the borrower and against the 2nd and 3rd defendants as guarantors.

7. The Bank proved its claim on the required standard of proof. It produced in evidence the documentary evidence of the 1st defendant's indebtedness. It produced bank account statement which show that indebtedness and also produced the instruments of guarantee proving that the 2nd and 3rd defendants guaranteed the 1st defendant's indebtedness. Accordingly, judgment will be entered as sought and the Bank is entitled to the costs of the suit.

CONCLUSION

8. In the end judgment is entered for the plaintiff against all the defendants jointly and severally as prayed in the plaint. The plaintiff is

awarded the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of SEPTEMBER 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the plaintiff:

For the defendants:

ORDER

This decision is hereby virtually delivered this 30th day of September, 2020.

MARY KASANGO

JUDGE