



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 638 OF 2005

GUARANTY TRUST BANK (KENYA) LIMITED.....PLAINTIFF

VERSUS

JAGDEEP LALJI KOTEDIA..... 1ST DEFENDANT

NILESH JAYANTILAL KOTEDIA.....2ND DEFENDANT

CONSOLIDATED WITH

HCCC NO. 383 OF 2005

MECHANIZED CARGO SYSTEMS LIMITED.....PLAINTIFF

VERSUS

GUARANTY TRUST BANK (KENYA) LIMITED....DEFENDANT

JUDGMENT

1. This Judgment is in respect to two consolidated matters being Nrb Milimani Commercial Court Civil Case No. 383 of 2005 Mechanized Cargo Systems Limited –vs- Guaranty Trust Bank (Kenya) Limited and Milimani Commercial Court Civil Case No. 638 of 2005 Guaranty Trust Bank (Kenya) Limited –vs- Jagdeep Lalji Kotedia and Nilesh Jayantilal Kotedia.

2. Although the order of consolidation was made on 25th April 2008, the order was revised slightly by a consent order of counsel for the parties on 11th July 2017 in which they appointed HCCC No. 638 of 2005 as the lead file. Taking cue from this agreement, and only for ease of reference, I refer to the parties as follows:-

- a. Guaranty Trust Bank (Kenya) Limited...Plaintiff or GTB or the Bank
- b. Jagdeep Lalji Kotedia..... 1st Defendant or Jagdeep
- c. Nilesh Jayantilal Kotedia.....2nd Defendant or Nilesh
- d. Mechanized Cargo Systems Limited.....3rd Defendant or Mechanized

3. Prior to the change of name entered in the Register of Companies and for which certificate No. 31073 (a certificate of change of name) was issued, GTB was known as Fina Bank Limited. The Bank's case is that on or about October 1996, it granted Mechanized an overdraft with a limit of Kshs.60 Million and the terms of the borrowing were subsequently varied and in June 2005 it obtained a loan facility (this is drawn from Paragraph 4 of the Complaint in 383/2005 which the Bank admits in Paragraph 1 and 2 of its Amended Defence in that matter.)

4. The Bank avers that it took a debenture dated 4th August 2003 which provided, inter alia, that:-
 - a. The sum of Kshs.50 Million would be secured by the debenture.
 - b. The Bank reserved the right to charge such rate of interest as it deemed fit without informing the Plaintiff of any change. The interest would be charged on daily balances and debited monthly by way of compound interest.
 - c. The Bank was at liberty to appoint a receiver and manager in the event of default.
 - d. The Plaintiff would meet the Bank's costs on an advocate client basis.
 - e. The Plaintiff would not transfer or alienate any of the motor vehicles secured by the debenture.
5. That contrary to the terms of the debenture, Mechanized disposed of motor vehicles covered by the debenture to its detriment.
6. The Bank avers that the company has on several occasions admitted its debt and is estopped from reneging on its past promises to settle the debt. The particulars of admission which are set out in the statement of claim are discussed in greater detail later in this decision.
7. The Bank's case is that Mechanized owes it a sum of Kshs.49,018,651.77 as at 30th June 2005. This is also the amount claimed by the Bank from Jagdeep and Nilesh, jointly and severally. The Bank's claim against the two are continuing guarantees and indemnities dated 2nd December 1999 allegedly given by them to guarantee loan facilities or other accommodation advanced or granted to Mechanized by the Bank.
8. The Bank asserts that, by a letter dated 2nd August 2005, it called upon Jagdeep and Nilesh as guarantors to pay or caused to be paid the said sum of Kshs.49,018,651,77 together with interest at 13.5% per annum.
9. Jagdeep and Nilesh filed separate statements of defence but which substantially raise same issues.
10. Both state that the guarantees are invalid for lack of consideration as the principal borrower had already obtained credit facilities at the time the guarantees were taken. Further, that the guarantees stand discharged, as the Plaintiff, has without their consents materially, and to their detriment as guarantors, altered the terms of lending to the principal borrower thus imposing a heavier and unexpected burden on them.
11. That they are also discharged as the Bank, without their consent or knowledge, failed or neglected to implement all the securities agreed upon in the letter of offer.
12. The two state that in breach of implied conditions for the consideration given by them, the Bank has illegally and fraudulently charged and altered interest rates, levied penalties and Bank charges purporting that the Minister's approval has been obtained in accordance with the provisions of Section 44 of the Bank Act. The particulars of fraud are set out in the pleadings.
13. In addition, the two state that the sums sought including penalties are statute barred by virtue of the Limitations of Actions Act.
14. Nilesh has his own further grievances. He states that the bank failed to pay cheques which it had guaranteed and for that reason the principal borrower was unable to function as its credit worthiness had been destroyed. As a consequence, the principal borrower incurred unnecessary expenses in demurrage. Nilesh thinks this to be a breach of an implied consideration upon which he offered the guarantee.
15. In Paragraph 8c of his Amended pleaded he states:-

“That further and without prejudice to the foregoing, it was also an implied condition that in consideration of the 2nd Defendant executing the guarantees, the Plaintiff would not, in any way, interfere with the management of the principal borrower. In breach thereof, the Plaintiff's Chairman, Mr. D. Chandaria, insisted that the principal borrower had to clear and freight goods of Kenpoly Manufactures Limited, a company in which he was also a director, at lower rates. Mr. Chandaria also insisted, and to the detriment of the principal borrower, that all payments due from Kenpoly Manufactures Limited could only be banked with the principal borrowers account with the Plaintiff thus interfering with the principal borrowers, management, financial planning and cash flow. That further, the Plaintiff's Chairman, Mr. Chandaria would also instruct 3rd party Companies he was associated with or those that banked with the Plaintiff to only issue cheques made out to the principal borrower, but could only be banked with the Plaintiff.”
16. Again, the principal debtor aligns himself with Jagdeep and Nilesh. In Civil Suit 383 of 2005 in which it is the Plaintiff, Mechanized seeks the following orders against the Bank:-
 - a. A permanent injunction do issue restraining the Defendant, its agents or servants from appointing a receiver manager or interfering with the management or assets of the Plaintiff company in any way whatsoever.
 - b. A declaration that the interest rates and penalties applied by the Defendant are contra statute.
 - c. A declaration that penalties more than 2 years old are statute barred and therefore irrecoverable.

- d. An account be taken to establish the amount due to the Plaintiff from the Defendant, together with an order that the Defendant do pay such sums to the Plaintiff together with interest thereon at rates the Banks has been applying.
- e. All further proper accounts and directions.
- f. Damages for trespass to the Plaintiffs' business and for breach of contract.
- g. Costs and interest.

17. Three witnesses gave evidence Jagdeep and Abincha Onono for the Defence and Charles Amanga for the Plaintiff. Their evidence is discussed in relation to the issues that arise for resolution.

18. While no common set of issues were presented by the parties, the Court sees the following as emerging from the pleadings:-

- i. What facilities, if any, were granted to the Principal debtor by the Bank?
- ii. Did the Bank breach the implied terms of those facilities by charging and altering interest, rates, levying penalties and Bank charges contrary to Section 44 of the Banking Act?
- iii. Did the 1st and 2nd Defendants execute guarantees in favour of the Bank in respect to the facilities?
- iv. Would those guarantees be invalid for lack of consideration if the principal facility or a portion of it had been granted before the taking of the guarantee?
- v. Should the guarantees be deemed as discharged because of the alleged breaches raised in issue (ii) above?
- vi. Did the Bank alter the terms of lending to the principal borrower, without the consent of the guarantors and if so should the guarantees stand discharged?
- vii. Did the Bank fail or neglect to implement all securities agreed upon in the letter of offer, without the consent of the guarantors, and therefore to their detriment and if so, should the guarantees be deemed as discharged?
- viii. Has the Bank otherwise proved that the Defendants are indebted to it to the sum of Kshs.49,018,651.77 with interest thereon at 13.5% per annum?
- ix. Is the Bank's claim time barred?

19. This Court proposes to start by making an observation on the question whether the Bank's claim is statute barred by virtue of the Limitation of Actions Act. The Bank's case is that the principal debt was secured by a debenture dated 4th August 2003 (P. Exhibit 1, Pages 765-787) and registered on 18th August 2003 and guarantees given by the 1st and 2nd Defendants. The guarantees and indemnity are both dated 2nd December 1999 (P. Exhibit 1, Page 662-664).

20. In so far as these three securities subsist then the time for recovery of the sums for which they were taken cannot start to run. The proposition by Gikonyo J made in Rajnikantkhetshi Shah Vs. Habib Bank A.G. Zurich [2016] eKLR in respect to debts secured by charges would hold true here. The Judge held:-

“That the Charge herein still subsisting on the suit property. In my considered opinion, as long as the Charge is subsisting and has not been discharged, the cause of action consisting in a discharge of charge is unaffected. Similarly, unless there exist circumstances to the contrary, as long as the debt for which such charge was given as security or guarantee remains unpaid, the cause of action to recover the debt through lawful realization of the security or enforcement of the guarantee thereof is also alive.”

21. For that reason, an inquiry on whether the Bank's claim is time barred must await the interrogation as to the validity of the securities. This is because the Defendants have impugned the legality of securities and have made an alternative argument that they have been discharged.

22. Returning to the substance of the dispute, there is common evidence that through a letter of offer dated 23rd October 1996 (D. Exhibit Pages 1-2) the Bank granted a sum of Kshs.60,000,000.00 to Mechanized. In a subsequent letter of offer of 3rd April 1997 (D. Exhibit Page 3-4), the overdraft was increased to Kshs.65,000,000.00.

23. In a further letter of 2nd June 2020 (P. Exhibit 2 Page 15-17) the various credit facilities extended to the company were restructured into an overdraft of Kshs.65,000,000.00., Bill discounting (cum GU) of Kshs.15,000,000.00 and a demand loan of Kshs.15,000,000.00. Then on 16th June 2004 (P. Exhibit 2 Page 18-21), there was a restructure by converting a portion of the OD facility into a term loan.

24. The evidence before Court is both the 1st and 2nd Defendants executed all the letters of offer aforementioned on behalf of the Company. Although the 2nd Defendant had, in his testimony, stated that there was no company resolution to authorize the borrowing of

Kshs.80,000,000.00, that does not relieve the Company of the liability because its sole directors (the 1st and 2nd Defendants) of duly accepted the offer. It has to be presumed that in executing that letter of offer, the two directors would be aware that the internal arrangements of the company had been complied with so as to formalize the borrowing. Nothing can turn on that.

25. Turning to the guarantees, it is common ground that the two directors (the 1st and 2nd Defendants) took out separate guarantees and indemnity for a maximum sum of Kshs.80,000,000.00 each on 2nd December 1999. (D. Exhibit 2 Pages 1-6). Although these would have come before the letters of offer of 2nd June 2000 (whose centrality to this dispute is that it was a restructure of all the earlier facilities), that letter explicitly provides that part security of the restructured facility would be existing individual guarantee for Kshs.80M provided by the directors. Needless to repeat, the two directors who had granted individual guarantee of Kshs.80,000,000.00 earlier were the same directors of company who accepted the restructure on behalf of the Bank. By executing the letter of offer on behalf of the Bank, they were well aware that the guarantees they had given would be used to secure the facility. It cannot now fall from their mouth that the terms of lending to the principal borrower (at least on the letter of 2nd June 2000) was altered without their consent and to their detriment. It would be too pedantic to insist that they needed to take out fresh guarantees or to hold that, although they would be aware of the contents of the letter of offer as directors, they were blind to it in their capacities as guarantors.

26. The next issue for consideration is whether the Bank charged or altered interest rates, levied penalties and Bank charges contrary to Section 44 of the Banking Act. Section 44 of the Banking Act reads:-

“No Bank shall increase its rate of banking or other charges except with the prior approval of the Minister.”

27. While the Plaintiff may think otherwise, the Court of Appeal in the decision of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR has held that this provision of statute also covers increase of interest rate. In other words, no Bank ought to increase the interest rate charged to a client except with prior approval of the minister (now the cabinet secretary) for the time being responsible for matters relating to finance.

28. On who bears the burden of proving the allegation made by the Defendants, the Defendants counsel correctly cites Margaret Njeri Muiruri (Supra) as providing the answer. The Court of Appeal held:-

“19. The trial court held that the appellant, because she is the one who claimed that the bank acted without the minister’s approval, was the one to adduce evidence to prove this assertion. With respect, this is not the correct position. It is generally true that he who asserts must prove. That much is contained in Section 108 of the Evidence Act. However, Section 112 of the Evidence Act further provides that:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

In the case of Munyu Maina v Hiram Gathiha Maina [2013] eKLR (Civil Appeal No. 239 of 2009) this Court, differently constituted held that:

“Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

20. In the appeal before us, it was the respondent bank which fell within Section 112 and which had a duty to demonstrate that it had indeed sought approval to increase the interest rate because this would be a fact that would be within its knowledge. We find and hold therefore, that the burden remained on the bank to prove that the rate of interest that was being charged was charged with the consent of the Minister. This is especially so because Section 44 of the Banking Act places the burden on the bank to seek the approval. How would the applicant be able to tell if indeed the bank had sought approval from the Minister?

21. To illustrate this point, we find persuasive authority in the High Court case of John Gatu Nderitu v Kenya Commercial Bank Ltd [2011] eKLR (Civil Case No. 55 Of 2001) where Sergon J. found that it was the bank that is enjoined to provide documentary evidence to the Court to the effect that it had complied with Section 44 of the Banking Act. A failure to do so would attract the presumption that the bank did not comply with the statutory requirement to increase the interest rate. To our knowledge, the principle stated in that High Court decision was not challenged on appeal.”

29. As I understand it, the customer who asserts that the provisions of Section 44 have been breached bears the light burden of simply showing that interest rates were increased beyond what was contracted. The burden then shifts to the Bank to demonstrate that the increase was made only after getting ministerial approval or sanction.

30. The Defendants produced several letters showing that interest rates had been increased. These letters cover the period of 30th July 1999 to 13th January 2000 (See D. Exhibit 1 Pages 5-9). On its part, the Bank did not produce any evidence that the various increments had the prior approval of the minister. In that event, it was apparent that the Bank had run afoul of the provisions of Section 44 of the Banking Act.

31. Yet there are events after that may insulate the Bank from the liability that would otherwise have arisen from its infraction of the law. On 2nd June 2000, the customer accepts a restructure of its debt upto that date and executes a letter of offer. The effect in the new contract was that the customer had accepted the debt as set out in that letter and any misfeasance on the part of the Bank had been excused.

32. The Bank specifically pleaded that because of the several admissions of debt by Mechanized it was estopped from reneging on its past promises to settle the debt. The following particulars of admission were set out:-

- a. The company by its minutes of 2nd June 2000 agreed to borrow an additional sum of Kshs.15 Million from the Bank. It was admitted that the debt with the bank stood at about Kshs.95 Million.
- b. By a letter of offer dated 16th June 2004 the Plaintiff agreed to restructure its credit facility and accepted the terms and conditions set out in the said agreement which restructured part of the overdraft facility into a term loan for Kshs.49 Million.
- c. By a letter dated 11th November 2003 the Plaintiff requested the Bank to allow an overdraft of Kshs.95 Million.
- d. By a letter dated 2nd December 2003 the Plaintiff made repayment proposals by paying the sum of Kshs.1.6 Million to reduce the overdraft to Kshs.89.5 Million.
- e. By a letter dated 3rd December 2003 the Plaintiff proposed to:
 - Pay of the 'assumed' balance of Kshs.46 Million outstanding at 31st December 2003 after the sale proceeds from the sale of property charged by Laxmi Enterprises Limited amounting to Kshs.43 Million which were to be credited to its account. This was on the Plaintiff's assumption that the account balance would be brought down to Kshs.89 Million.
 - Clear the balance of Kshs.46 Million by August 2009 in various installments as particularized in the letter of 3rd December 2003.

33. The borrower's acceptance of the status of its indebtedness was further fortified in another letter of restructure of 16th June 2004 (P. Exhibit Pages 18-21).

34. Let me say a little more about the interest rates contracted in these two letters. The letter of 2nd June 2000 does not have any provision on the interest charged. However, it has this provision:-

“All the terms and conditions as advised to you vide our earlier offer letter dated 5th October 1995 and amended from time to time will continue to apply to the renewed facilities.”

35. The implication of this saving provision is that interest rate contracted in earlier letters and amended from time to time would apply to the renewed facilities. The last amendment on interest had been that in the letter of offer of 12th October 1999 which provided:-

“Interest on overdraft, demand loan and bills discounting facilities to be levied @base + 7% giving effective rate of 30% p.a till further notice.”

36. After this the only change in rate of interest was made by the subsequent letter of 16th June 2004 but only on the loan facility. The letter provided:-

“.....For the present the effective rate of interest will be set at 14% p.a. This rate is subject to change at any time without prior notice. Provided instalments are up to date, rate of interest will be renewed to 12% p.a effective 01.09.2004.”

To be noted is that the Defence did not prove that the principal borrower was up to date in its installments so as to deserve the discounted rate at 12% p.a.

37. The effect of these two letters is that from 2nd June 2004 the contracted rate of interest on all the facilities was 30% p.a and the letter of 16th June 2004 amended the interest rate of the loan to 14% p.a. There is no evidence that the rates of interest was increased beyond these amounts. The inevitable outcome is that while the customer and guarantors have proved certain breaches of Section 44 of the Banking Act, they are estopped from pleading them on the basis of the renegotiations that happened on 2nd June 2004 and 16th June 2004.

38. I then turn to consider whether the 2nd Defendant has proved the further alleged breaches. The first is that, without due cause, the Bank failed to pay cheques it had guaranteed to 3rd parties thereby making the principal borrower unable to function as its credit worthiness had been destroyed. The Defendants left this allegation fairly unattended. The 2nd Defendant simply testified:-

“Mechanized is a logistics company. For us to run the business we need guarantee letters and bonds. In this case we got guarantees and Bonds from Fina Bank up to some values. From 2000 to 2005 Fina bounced the guarantees and bonds.”

There was no evidence of the cheques that were returned unpaid.

39. The same is true for the allegation that the Plaintiff's chairman, Mr. Chandaria insisted that the principal borrower had to clear and freight goods of Kenpoly Manufactures Limited at lower rates and that all payments due from Kenpoly Manufactures could only be banked with the Bank. This remained just that, an allegation.

40. The findings of this Court, this far, is that there was no breach by the Bank of its implied or express obligations under the contracts of lending. Further, that there are two valid guarantees for the sum of Kshs.80,000,000.00 taken out separately by the 1st and 2nd Defendants .

41. Given that the Court has upheld the validity of the Debenture and the Guarantees and that the said securities still persist then the clock cannot start to run as against the Bank for purposes of the Limitation of Actions Act.

42. The Bank's claim against the Defendants jointly and severally is for Kshs.49,018,651.77 together with interest thereon at the rate of 13.5% per annum from 30th June 2005 until payment in full. The Bank, in addition to the various letters of offer, relies on statements it has produced and what it sees as admissions by the customer. Let me start with the latter.

43. In a letter of 2nd December 2003 (P. Exhibit 2 Page 23) the customer proposes to make some payments so as to bring down its debt to 89.5 million by 15th December 2003. A clear admission that it was indebted to more than the said amount before that date. A day later (3rd December 2003) it makes a proposal of how to pay the balance of Kshs.46 million by August 2009 after paying Kshs.43 million from sale proceeds of a building of Laxmi Enterprises Limited (a related company).

44. Regarding the Bank statements, the Bank produced a bundle of statements of OD account No. 011-1001161. Although the 2nd Defendant at first told Court that he first saw the statements when the Bank filed this suit, he yielded to the truth and conceded that he had received the statements found in Pages 1 to 644 of the Plaintiff's bundle from time to time. What those statement show was that as at 21st December 2004, the overdraft was at Kshs.4,501,393.18 DR (P. Exhibit 1 Page 644). Although heavy weather was made by the Defendants about whether this account was the same as A/c 11130000127, the opening balance of that account being Kshs.4,606,863.64 corresponds with the last entry in account No. 011-1001161 being exactly the same (Kshs.4,606,863.64) on 31st December 2004.

45. The witness for the Bank had explained the change in the numbers. He stated:-

“Account numbers remain the same save when there is a system change or where an O/D account has been converted to a term loan.”

And I believe the witness because the opening balance in the statement to the new account is consistent with the closing balance in the old account.

46. The overdraft/current account shows a debit balance of Kshs.6,090,423.26 as at 30th June 2005.

47. I turn to the loan account. It has to be remembered that by the restructure letter of 16th June 2004, there was a conversion of a portion of the outstanding overdraft account to a term loan. The account (No. 011-4015255) statements on the loan produced by the Bank (P. Exhibit 1 Page 645) captures that entry. The account, according to the Bank was changed to account Number 1174100228 but its entries are consistent. As at 30th June 2005 the outstanding sum was Kshs.42,859,036.02.

48. The entries in Bank statements corroborate the admission made by the Company. An addition of the outstanding loan (42,859,036.02) to the OD amount (6,090,423.26) is 48,949,459.3. This is the amount that the Bank deserves as at 30th June 2005, plus contractual interest.

49. I have made reference to the Bank statements because they were formally admitted as exhibits when PW1 introduced them into evidence (without the objection of Defence counsel). An attempt to raise objections at submissions on account of Section 177 of the Evidence Act comes too late.

50. The ultimate issue is the costs that should be awarded to the Bank. It seeks costs on advocate-client basis. Such costs are a matter of substantive law. A suitor for such costs must demonstrate that the contract between parties contemplated costs of that nature in the event of recovery proceedings. The Debenture of 4th August 2003 persisted as security for the restructured facility of 16th June 2004. Under clause 2, the money secured by the Debenture includes legal costs, on advocate-client basis, incurred by the Bank in asserting its rights under the instrument. This suit by the Bank is such an assertion and costs at advocate-client rates are deserved.

51. The result is that the claim by Mechanized Cargo Systems Limited in HCC No. 385 of 2005 is dismissed with costs and Judgment is entered for Guaranty Trust Bank Limited as against Mechanized Cargo Systems Limited, Jagdeep Lalji Kotedia and Nilesh Jayantilal Kotedia jointly and severally for Ksh. 48,949,459.30 together with interest thereon at 13.5% per annum from 30th June 2005 until payment in full. The Bank shall also have costs in HCCC No. 638 of 2005. Costs in both matters shall be on advocate-client basis and shall attract interest at Court rates

Dated, Signed and Delivered in Court at Nairobi this 23rd Day of November 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual

platform.

F. TUIYOTT

JUDGE

PRESENT:

Ms Abuya for the Plaintiff.

Ms Ogola holding brief for Ms Davi for the 2nd Defendant