



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 174 OF 2019

BETWEEN

GULF AFRICA BANK LIMITED.....PLAINTIFF

AND

SUZIE GENERAL AGENCIES LIMITED.....1ST DEFENDANT

CYNTHIA NDUNGE.....2ND DEFENDANT

SUSAN NDUKU JOSHUA.....3RD DEFENDANT

JUDGMENT

1. In its plaint, the plaintiff (“the Bank”) seeks judgment for Kshs. 20,386,681.20 due and owing to it as at 24th June 2019 with accrued profits and damages together with interest at 20% p.a. against the 1st defendant (“the Company”) and judgment for Kshs. 20,000,000.00 together with profits and damages with interest thereon at a rate of 20% p.a. until payment in full against the 2nd and 3rd defendants. The Bank also prays for costs on an Advocate-Client basis.
2. The Company was awarded a tender to construct the Wamba North Sub-County Water Dam in Samburu County for the sum of Kshs. 56,000,000.00 by the Ministry of Water and Sanitation by a letter dated 17th January 2018. In order to finance the contract, the Company approached the Bank for financing support.
3. By a letter of offer dated 12th April 2018 (“the Letter of Offer”), the Bank advanced to the Company, at its request, Kshs. 20,000,000.00 under its Tawarruq Local Purchase Order Finance Facility. In consideration of the plaintiff granting the 1st defendant banking facilities, the 1st and 2nd defendants executed a guarantee and indemnity dated 16th April 2019 (“the Guarantee and Indemnity”). The Company also executed a Letter of Set-off irrevocably authorizing the plaintiff to set off at any time all monies held by the bank against the amount of the Company’s account or indebtedness arising from the aforesaid facilities. The initial facility was later restructured at the Company’s request by a Letter of Restructure dated 23rd November 2018 (“the Letter of Restructure”) on terms set out therein.
4. The Bank pleaded that according to the terms of the Letter of Offer and the Letter of Restructure, the Company was supposed to provide a duly executed contract between it and the Ministry of Water and Irrigation and also channel the contract proceeds directly into a Margin/Escrow account with the plaintiff.
5. The Company failed to honour the terms of the facility causing the Bank to demand the entire debt from the 1st and 2nd defendant’s guarantors and thereafter filed this suit for recovery of the outstanding amount.
6. The defendants filed a joint statement of defence. They denied the banking facilities advanced to the Company as pleaded by the Bank and in particular the letter of offer dated 12th April 2018, Letter of Restructure dated 23rd November 2018 and the Guarantee and Indemnity and the Letter of Set-off.
7. In the alternative, the 2nd and 3rd defendants stated that if the Letter of Restructure was issued, it was done without their authority. The 2nd

and 3rd defendants admitted that although they were directors of the Company and had authority to enter into agreements, they denied that they entered into any of the agreements with the Bank.

8. The defendants denied that there was an executed contract between the Company and the Ministry of Water and Irrigation as alleged and that if indeed there was such a contract, it was done through fraud and/or misrepresentation of material facts by employees of the Company. The defendants also denied that there was any contract between the Company and the Ministry of Water and Irrigation. The defendants further averred that the Bank failed to conduct due diligence and comply with the terms of the agreement including taking security and realizing security from one Grace Wangui Nyagu.

9. The defendants denied that the Bank was entitled to any relief as prayed or at all.

10. By a Notice of Motion dated 22nd February 2020, the Bank applied to strike out the Defendants' statement of defence and for judgment to be entered for the Bank against the defendants' jointly and severally as prayed in the plaint.

11. I heard the application and by a ruling dated 22nd June 2020, I allowed it on terms that judgment be and is hereby entered for the plaintiff against the defendants jointly and severally as follows:

(a) Kshs. 23,396,681.20 save that the 2nd and 3rd defendants shall be liable to the extent of Kshs. 20,000,000.00 only.

(b) The defendants shall bear costs of the application.

(c) The matter shall be set down for determination of interest, profits and damages as claimed in the plaint.

12. The matter was set down for hearing of the issue of interest, profits and damages claimed in the Plaint. The Plaintiff's Legal Officer, Lawi Sato, testified and produced the documents in support of the case. Since the issue concerned profits and damages, PW 1 referred to the Letter of Offer dated 12th April 2018 at Clause 5 which provides as follows:

Profit Rate

5.1 The Customer shall pay Profit to the Bank of 13.5% comprising the Central Bank Rate (CBR) of 9.5% per annum plus the Bank's margin comprising of not more than 4% above the CBR (for the time being).

And as regards Default Damages the letter of offer Clause 6.5 provided as follows:

6.5 In the event that the Customer does not pay any amount payable hereunder on its due date for payment the Customer undertakes (without prejudice to the exercise by the Bank) to pay to the Bank (as well after as before any demand or judgment or the liquidation of the Customer) an amount calculated at the rate of 20% per annum on the amount due from (and including) the date of the same becoming due until actual payment of such amount (together with additional amounts payable pursuant to this clause) in full and such sums shall hereinafter be referred to as 'Default Damages'.

13. The provisions governing profit and damages on default are contractual in nature and the court is bound to give effect to those provisions. As was stated by the Court of Appeal in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another NBI CA Civil Appeal No. 35 of 1999 [2001] eKLR**, "A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge." The terms of interest were agreed upon in the facility and since the defence has been struck out it is not open to the Defendants to deny these terms. I shall therefore enter judgment as prayed in the plaint.

Disposition

14. I therefore enter Judgment for the plaintiff against the defendants jointly and severally as prayed in the plaint as follows:

(a) Kshs. 23,396,681.20 save that the 2nd and 3rd defendants shall be liable to the extent of Kshs. 20,000,000.00 only.

(b) The sum of Kshs. 23,396,681.20 shall accrue interest at 20% p.a from the date of filing the suit until payment in full.

(c) The defendants shall bear costs of the suit.

DATED and DELIVERED at NAIROBI this 13TH day of NOVEMBER 2020.

D. S. MAJANJA

JUDGE

Mr Wawire instructed by Wamae and Allen Advocates for the plaintiff.

Mr Mulandi instructed by Mulandi Kisabit and Associates Advocates for the defendants.