



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 447 OF 2010**

**BARCLAYS BANK OF KENYA LIMITED .....PLAINTIFF**

**VERSUS**

**MIDLANDS MEDIA AGENCY LTD .....1<sup>ST</sup> DEFENDANT**

**ELIAS KABURU MURIITHI .....2<sup>ND</sup> DEFENDANT**

**APHIA KARWIRWA MURITHI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit in court on the 30<sup>th</sup> June 2010 vide a plaint dated 28<sup>th</sup> June 2010, seeking for judgment against the Defendants jointly and severally in the following terms:

- (a) *The sum of Kshs. 21,182,831.60 together with interest thereon at the rate of 24% per annum from 14<sup>th</sup> November 2009 till payment in full;*
- (b) *The costs of this suit plus interest;*
- (c) *Any other or further relief that this Honourable Court will deem just to grant.*

2. The background facts of the Plaintiff's case are that by a letter of offer dated 7<sup>th</sup> March 2008 The Plaintiff, advanced to the 1<sup>st</sup> Defendant various banking facilities for the aggregate sum of Kshs. 11,000,000.00 as follows:-

- (a) *Overdraft facility – Kshs. 4,000,000.00 to finance the working capital requirements;*
- (b) *Ancillary facility up to a maximum of Kshs. 7 million made up as follows:-*
  - i) *Bonds, guarantees and indemnities of up to Kshs. 4,000,000.00 to facilitate issuance of bonds, guarantees and indemnities to the 1<sup>st</sup> Defendant in the normal course of business;*
  - ii) *Un-cleared effects facility of up to Kshs. 3,000,000.00, to assist the Borrower to draw funds on its accounts against unpaid cheques*

3. The said facilities were secured by charge over the 2<sup>nd</sup> Defendant's registered parcels of land known as, L.R. No. Portion Numbers 9660, 9661, 9664 and 9665 Malindi and the Director's guarantees and indemnities as follows:-

- (a) *A mortgage dated 23<sup>rd</sup> February 2001, over all that parcel of land known as L.R. No. Portion Numbers 9660, 9661, 9664 and 9665 Malindi together with buildings and improvements standing and erected thereon, registered in the name of the 2<sup>nd</sup> Defendant for the sum of Kshs. 5,000,000.00;*
- (b) *Further mortgage dated 10<sup>th</sup> June 2003 over the properties for Kshs. 1,700,000.00;*
- (c) *2<sup>nd</sup> Further Mortgage dated 20<sup>th</sup> May 2003 over the properties for Kshs. 800,000.00;*

(d) 3<sup>rd</sup> Further mortgage dated 14<sup>th</sup> February 2006 over the properties for Kshs. 1,500,000.00;

(e) Guarantee and indemnity dated 21<sup>st</sup> July 2008 by the 2<sup>nd</sup> Defendant for Kshs. 15,000,000.00;

(f) 4<sup>th</sup> Further Mortgage dated 21<sup>st</sup> July 2008 over the properties for Kshs. 3,000,000.00

4. However, the letter of offer dated 7<sup>th</sup> March 2008, was varied by a first letter of variation dated 16<sup>th</sup> June 2008 in which the Plaintiff advanced to the 1<sup>st</sup> Defendant an ancillary facility of an aggregate sum of Kshs. 10,000,000.00 as follows:-

a) Bonds, Guarantee and Indemnities – Kshs. 7,000,000.00;

b) Un-cleared Effects Facility – Kshs. 3,000,000.00

5. It is averred that the 1<sup>st</sup> Defendant defaulted in meeting its loan obligation under the facilities, and in particular repaying the loan amount, interest and charges due under the mortgage and further mortgages. That the 1<sup>st</sup> Defendant also issued cheques which were dishonoured, whereupon Nation Media Group Limited, the Defendant's major supplier, withdrew its distributorship contract with the 1<sup>st</sup> Defendant and called for the Bank guarantee of Kshs. 7,000,000.00 which the Plaintiff duly honoured the Bank guarantee.

6. As a result the Plaintiff issued the 1<sup>st</sup> Defendant with various demands which did not elicit positive response and the Plaintiff instructed M/s Iseme, Kamau and Maema Advocates its Advocates on record to pursue recovery of the loan amount. As a consequence of which, the said firm of Advocates issued the following notices:-

a) Statutory notice dated 17<sup>th</sup> July 2009 issued to the 2<sup>nd</sup> Defendant being the Mortgagor and copied to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants requiring the 2<sup>nd</sup> Defendant to repay the outstanding loan amount failure to which the Plaintiff would proceed to realize the security;

b) Letter dated 8<sup>th</sup> September 2009 to the Defendants' Advocates on record, M/s Meenye & Kirima Advocates reminding the 2<sup>nd</sup> Defendant to honour the statutory notice by settling the outstanding amount which stood at Kshs. 19,358,443.85 as at 10<sup>th</sup> July 2009 and which continued to accrue interest at 8.25% above the base rate then of 15.75% (i.e. 24%).

7. By a letter dated 14<sup>th</sup> September 2009 the Defendants' Advocates responded stating that they had instructions to seek legal redress against any attempt by the Plaintiff to enforce the payment.

8. However, upon expiry of the three months statutory period, the Plaintiff instructed Dominion Valuers to conduct a valuation of the properties with a view to determining the current open market value as well as the forced sale value thereof. The Plaintiff averred that according to the valuation report dated 24<sup>th</sup> September 2009, the market value of the four properties charged being L.R. No. Portion Numbers 9660, 9661, 9664 and 9665 Malindi was Kshs. 6,000,000 million and the forced sale value was Kshs. 4 million.

9. As a result, the Plaintiff on 11<sup>th</sup> November 2009 instructed Garam Investments Auctioneers to demand payment of the loan balance which stood at Kshs. 21,182,831.60 as at 13<sup>th</sup> November 2009 and which continued to attract interest at 8.25% above the base rate then of 15.75% (i.e. 24%) of 24% per annum. The Auctioneer proceeded as follows:-

(a) Issued a notification of sale together with a letter of notice dated 18<sup>th</sup> November 2009 requiring the 1<sup>st</sup> Defendant to redeem the property by repaying the loan amount within 45 days from the date of service of the notice failing which the properties would be sold by way of public auction on 5<sup>th</sup> February 2010 outside the main Post Office in Malindi Town; and

(b) Advertised the properties in the Daily Nation on 18<sup>th</sup> January 2010 and 1<sup>st</sup> February 2010.

10. However, on the auction date, the sale was not concluded as the property did not attract acceptable bids due to the presence of squatters, thereby preventing the auctioneers from concluding the sale. Consequently, the Plaintiffs called up the Guarantees and indemnity issued by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants requiring the Defendants to pay the outstanding loan amount. The Defendants failed to honour the demand to pay and the Plaintiff subsequently filed the present suit for the sum of Kshs. 21,182,831.60 together with interest thereon at the rate of 24% per annum from 14<sup>th</sup> November 2009 till payment in full.

11. The Defendants filed a joint statement of defence and a counter claim dated 5<sup>th</sup> August 2010, denying indebtedness to the Plaintiff but admitted the claim to the extent that the Plaintiff advanced the 1<sup>st</sup> Defendant certain moneys although the sum of Kshs. 12,000,000 claimed was disputed. The Defendants further admitted the guarantees and indemnity alluded to argue that none are enforceable in law or at all.

12. The Defendants argued that, that the Plaintiff, without notice to any of them as sureties, unlawfully, unilaterally, unreasonably, without assigning any or sufficient and/or acceptable discontinued and withdrew the "un-cleared effects" credit facility of Kshs. 3,000,000 million advanced to the 1<sup>st</sup> Defendant for its day-to-day operations and which was its trade lifeline, as a consequence of which the 1<sup>st</sup> Defendant was unable to trade and meet its obligations to the Plaintiff thereby leading to its total collapse and as such the Defendant automatically became discharged and freed from all its liabilities with the Plaintiff.

13. It was pleaded that, the Plaintiff has not made serious efforts to realize the securities; consequently, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied that the Plaintiff has any recourse to any one of them, in particular that the debt outstanding under the lending as at 13<sup>th</sup> November 2009 is Kshs. 21,182,831.60.

14. However, in their counter claim, the Defendants prayed for orders as here below reproduced;

*(a) The Defendants and each one of them pray that the Plaintiff's suit be dismissed with costs;*

*(b) The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and each one of them, counter claim against the Plaintiff for a declaration that by virtue of the Plaintiff's breach of the terms of the lending to the 1<sup>st</sup> Defendant, the guarantees sued on are void and unenforceable and they are each discharged and freed of all and any liability in respect of the same and they be awarded the costs of the counter claim.*

15. The Plaintiff filed a brief reply to the defence and defence to the counter claim, and denied having unlawfully, unilaterally and/or unreasonably discontinued an un-cleared effects facility as alleged or at all. The Plaintiff further contends that;-

*a) The un-cleared effects facility was issued under a letter of offer dated 7<sup>th</sup> March 2008 which clearly provided that the facility was repayable strictly on demand;*

*b) The Plaintiff had a right under the letter of offer to demand payment at any time and to review the facility at any time;*

*c) The Defendants cannot rely on withdrawal of the un-cleared effects facility to avoid their obligations to the Plaintiff for the sums outstanding to the Bank as claimed for in the Plaintiff*

*d) that the Defendants cannot rely on their breach of contractual obligations to escape and/or avoid their obligations to repay moneys advanced and utilized.*

16. The hearing proceeded on 16<sup>th</sup> November 2017. At the close of the pleading after the close of the pleading. The Plaintiff called Lukas Gikungu who adopted his statement dated 14<sup>th</sup> June 2017 and basically reiterated the averments in the pleadings. He testified that, the un-cleared effect facility was not cancelled. However, it was not renewed in August 2008 due to an abuse where cheques were issued but they were not honoured. He also reiterated that, the suit property cannot be sold due to the squatter invasion.

17. The Defendants called Elias Kaburu Muriithi, the 2<sup>nd</sup> Defendant and Managing Director of the 1<sup>st</sup> Defendant. He adopted the statement dated 7<sup>th</sup> March 2012 and filed in court on 8<sup>th</sup> March 2012. He testified that he tried to evict the squatters on the suit property and it became violent. In response to the issue of un-cleared effect facility, conceded that he issued a cheque which was returned unpaid, as the Plaintiff had unilaterally cancelled the un-cleared effects facility.

18. At the conclusion of the hearing, I noted from the record that, the parties had filed the following agreed issue for determination;

*a) Whether the amount advanced or lent to the Defendants by the Plaintiff was Kshs. 12,000,000.00;*

*b) Whether the Guarantees given by the Defendants are enforceable;*

*c) Whether the Plaintiff has made various attempts to realize the debt owed to it by the Defendants;*

*d) Whether the Plaintiff has any recourse against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants under their personal guarantees;*

*e) Whether the Plaintiff was entitled to discontinue/withdraw without notice the un-cleared effects facility provided to the 1<sup>st</sup> Defendant;*

*f) Whether the Plaintiff breached its contract with the 1<sup>st</sup> Defendant;*

*g) Whether the Defendants are indebted to the Plaintiff to the sum of Kshs. 21,182,831.60 plus interest as prayed for in the Plaintiff;*

*h) What is the order on costs of this Plaintiff.*

19. I have considered the said issues and I will deal with them generally in this determination. In that regard, I have considered the evidence adduced herein and I find that, there is no dispute by a letter dated 7<sup>th</sup> March 2008, the 1<sup>st</sup> Defendant was offered the subject facilities amounting to an aggregate of Kshs. 11,000,000 and not Kshs. 12,000,000. The facility was for the purpose of working capital requirements by the 1<sup>st</sup> Defendant (as per clause 4 of the letter of offer) and were secured by a personal guarantee signed by Elias Kaburu Muriithi for Kshs. 11 million and existing securities of a legal charge over portions 9660, 9661, 9664 and 9665 (Original No. 8409/7) in the names of Elias Kaburu Muriithi registered. The same was stamped to cover Kshs. 9 million (as per clause 9 of the letter of offer). This letter of offer was accepted and signed by the 1<sup>st</sup> Defendant. As aforesaid, it was varied on 16<sup>th</sup> June 2008 whereby the facility aggregate amount was indicated as;

*(a) Bonds, Guarantee and indemnities – Kshs. 7,000,000*

(b) *Un-cleared effects facility – Kshs. 3,000,000*

20. The securities were varied to reflect as follows:-

(a) *New securities legal charge to be unstamped and registered to cover Kshs. 12 million;*

(b) *Existing securities (already referred to herein) save for the personal Guarantee signed by Elias Kaburu Muriithi was for Kshs. 15,000,000.*

21. It is evident from the above, that the original letter was amended so that the aggregate sum of the facility was Kshs. 10,000,000 and the legal charge and/or guarantees were enhanced and remained in force. Therefore the aggregate sum is not Kshs 12,000,000.

22. It is also evident from the letter written by the 1<sup>st</sup> Defendant dated 11<sup>th</sup> August 2008, that the “un-cleared effects” facility was terminated and that is what informed the request for reinstatement of the facility. In deed the the cheque issued from Equity Bank Limited was dishonoured. The 1<sup>st</sup> Defendant wrote and requested the Plaintiff to treat the dishonor, as a human error and reinstate the facility. In the same letter, the 1<sup>st</sup> Defendant makes reference to cash flow constraints witnessed in the last four months as a consequence of the transfer by Nation Media Group Limited to them, a large corporate on a monthly credit terms and over which they had not provided for their cash flow impact. The 1<sup>st</sup> Defendant indicated that, it had sought for facility from Equity Bank Limited and an overdraft of Kshs. 3 million will be provided, and continued to plead that the un-cleared effects be reinstated.

23. However it suffices to note that, on 18<sup>th</sup> May 2009, the Nation Media Group Limited called in the Guarantee for the sum of Kshs. 7,000,000 and the Plaintiff honoured it. Therefore the dishonor of the cheque and the calling in o the guarantee are indicative that, the 1<sup>st</sup> Defendant was experiencing financial constraints. It supports the Plaintiff’s claim that the 1<sup>st</sup> Defendant did not honour its obligation under the contract. It is not disputed that indeed to date the 1<sup>st</sup> Defendant has not made good the Kiss 7,000,000 paid under the Guarantee.

24. I shall now consider the issue of un-cleared effects facility. The Defendants argue that, the facility was unilaterally withdrawn without notice. However, the Plaintiff responded that, the facility was a demand facility in which the Plaintiff reserved the right to withdraw at any time particularly, where the Defendant was in breach of its obligations. That the 2<sup>nd</sup> Defendant in his own witness statement at paragraph 7 confirms that the un-cleared effects facility advanced by the Plaintiff was on demand facility.

25. I have considered clause 5 in the letter of offer and it clearly states that the un-cleared effect facility was repayable strictly on demand. This presupposes that the Plaintiff would issue a demand notice before withdrawing the facility. However, it suffices to note that under clause 5 of the letter of offer, the Plaintiff reserved the right to review the facility from time to time. It is also noteworthy that, the un-cleared effects facility was purely to assist the borrower to draw funds on current account against cheques which were yet to be paid by the drawer’s bank,

26. In my considered opinion, the dishonor of the cheques entitled the Plaintiff to review the provision of the facility. I also find that, the failure to issue any demand notice before terminating the facility was not prejudicial to the 1<sup>st</sup> Defendant especially in view of the fact that the Nation Media Group Limited had called up Kshs. 7,000,000 guarantee and the business was in its control, as such the serviceability of the overdraft and the guarantee was in doubt (as indicated in the Plaintiff’s letter dated 25<sup>th</sup> May 2009).

27. It does appear still that, the parties had been discussing this issue of un-cleared facility as evidenced by the letter dated 11<sup>th</sup> August 2008, where the 1<sup>st</sup> Defendant makes reference to a meeting held on a Friday, regarding the issue of un-cleared effect facility and where it explained the circumstances under which the cheque was dishonoured and the need for the facility to be reinstated.

28. Be that as it were, I find that, the Plaintiff was not in breach of the contract by terminating the un-cleared effects facility. In the given circumstances, their action was justifiable.

29. The question that arises therefore is whether; the Defendants are liable as sued and/or whether the court should grant the orders sought for herein. Similarly whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are liable as claimed herein. I note from the documents produced that, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants executed a guarantee and indemnity dated 18<sup>th</sup> October 2005, and the 2<sup>nd</sup> Defendant executed a further guarantee and indemnity dated 21<sup>st</sup> July 2008. They have not denied the same.

30. Further evidence adduced, reveals that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were served with a statutory notice dated 17<sup>th</sup> July 2009, which was also served upon the 1<sup>st</sup> Defendant but they did not make good the default. Indeed, on 12<sup>th</sup> May 2009, the Plaintiff demanded immediate repayment of Kshs. 11,680,934.70 with interest charged at 8.25% per annum above the Bank’s rate at that time being 15.75% as at that date. A further demand letter was sent on 25<sup>th</sup> May 2009. There was no compliance.

31. I find that although the Defendants denied the sum claimed, the statement produced on the 1<sup>st</sup> Defendant’s loan account shows that, as at 12<sup>th</sup> November 2010, the outstanding sum was Kshs. 27, 235,203.90. This is the figure claimed and not rebutted.

32. However, the Defendants raised the issue that, the Plaintiff is holding securities granted to secure the debt herein, which should be realized before enforcing any personal liability against them. The court was referred to its own decision in the case of; *Clesoi Holdings Limited vs Prime Bank Limited HCCC No. 148 of 2011*

33. However, I find that the Plaintiffs have led evidence to the effect that, attempts to realize the securities have been futile due to the

presence of squatters and/or the value of the property which is too low for the sum claimed. The Plaintiff also relied on clause 14 of the deed of agreement, where the bank reserved the right to follow the guarantors before resorting to any other means of recovery available.

34. In my considered opinion, in the circumstances in this case, the Plaintiff is entitled to sue as they have done. However, the Plaintiff cannot sue at the same time hold on to the securities advanced. If the Plaintiff intends to execute the judgment herein, then it should relinquish the securities held and/or release the guarantors from liability forthwith. In the case of Clesoi quoted above this court had this to say:-

*“ In this matter, the Applicant has chosen the remedy of realization of the security through the sale of the charged property. Under Section 90(3) of the Land Act 2012, the remedies available to the charge cannot be exercised simultaneously. The Chargee who sues for money secured, will have to realize the security first, and if the security is rendered insufficient, then can it resort to the other alternative remedies. Basically there are five remedies available to the charge. I sum them up as “SAFES” meaning: sale of Property, Appointment of a Receiver, Foreclosure and Enter possession and Suing of the chargor on the personal covenant under the charge document. The first four are against the Property and the last against the person. As such the chargee cannot set to realize the security at the same time, file a suit against the principal Borrower and the Guarantors. It will definitely be prejudicial to the Respondents if both causes of action are allowed to run simultaneously. If in the end the court allows the charge to proceed to realize the security and at the same time it makes an order for award payment of the sum sought under the counter-claim that will amount to double jeopardy against the Borrower and the Guarantors. Equally, it will be unjust enrichment of the Creditor and an injustice to the Respondents. In that regard, I find that the claim in the counter-claim is premature”.*

35. It therefore follows that if judgment is entered for the Plaintiff then for the Plaintiff to enforce the same the securities held must be released unless otherwise lawfully held.

36. I shall now deal with the issue of interest. The Plaintiff submitted that, the applicable interest rate was 4% above the base lending rate applicable then of 13.75%. That interest rate was contractual and expressly agreed upon in the letter of offer under clause 7 which states as follows:-

*a) Clause 7.1 – Facility designed as an overdraft – applicable interest 4% above the prevailing CBK base rate as may be amended from time to time. In the year 2008 the base rate was 13.75%;*

*b) Clause 7.3 permitted the Plaintiff to vary the applicable reference rate and methods of calculating the interest applicable from time to time*

37. However, the Plaintiff submitted that, it is instructive to note that the Defendants did not raise the issue of the interest rate in their defence, they only raised it in their witness statements. As such, this issue was not pleaded as required and the Defendants cannot seek to introduce it by way of a witness statement. A party is bound by its pleadings.

38. The Plaintiff further submitted that in the year 2009, when the Defendant’s account fell in arrears, the base lending rate was at 15.75% per annum. As at 14<sup>th</sup> November 2009, the reference rate was 8.25%. Thus the applicable interest rate was therefore 15.75 plus 8.25% to make 24% per annum. This was clearly set out in the Plaintiff letter dated 12<sup>th</sup> May 2009. As such the allegation that the Plaintiff unilaterally altered the interest rate applicable has no basis. The Plaintiff’s claim be allowed as pleaded together with the contractual interest at the rate of 24% from 14<sup>th</sup> November 2009, until payment in full. The Plaintiff finally submitted that the principles of the law are that costs follow the event.

39. In my considered opinion, the Plaintiff is entitled to the contractual interest rate subject to the date when the law on capping of interest took effect. In that case, I award interest at 24% on the amount claimed herein from the date of filing of the Plaint to the date when the law on capping of interest came into force in which case the interest is reduced to 14%, until payment in full. Costs are awarded to the Plaintiff.

40. The upshot of all this, is I enter judgment in favour of the Plaintiff in the sum of Kshs21,182,831.60 plus interest as stated above and costs.

41. It is so ordered.

**Dated, delivered and signed in an open court this 28<sup>th</sup> day of March, 2019.**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Akhaabi -----for Mr. M. Munyu for the Plaintiff

No Appearance -----for the Defendants

One Defendant -----in person

