



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. 214 OF 2013

BETWEEN

BANK OF INDIA.....PLAINTIFF

AND

RAMAN ENTERPRISES LIMITED.....1ST DEFENDANT

MANSUKH BALDEO DAS.....2ND DEFENDANT

PURNIMA DAS.....3RD DEFENDANT

JUDGMENT

1. The plaintiff is a bank (“the Bank”) while the 1st defendant (“the Company”) was its longtime customer. The 2nd and 3rd defendants are directors of the Company. The plaintiff’s case against the defendants is for judgment for **Kshs. 58,729,421.65** together with interest thereon at 28.5% per annum from 1st December 2012 on account of bank facilities advanced to the Company at its request and which the defendants defaulted in paying.

2. The plaintiff’s case is set out in the plaint dated 21st May 2013 and supported by several documents which were produced by **Etter Rainy (PW 1)**, its Assistant Manager Advances, Industrial Area Branch. She testified that the Company had been its customer and on 13th September 2007, it applied for a loan facility of Kshs. 10,000,000.00. The facility was secured by an indemnity and guarantee of its directors, the 2nd and 3rd defendant and in addition, land parcel **CHEMBE/KIBABAMSHE/220** belonging to the 2nd defendant was charged to the Bank to secure the facility of Kshs. 10,000,000/-. In addition, Kshs. 26,000,000/- for a letter of credit the bank was to issue on behalf of the Company.

3. On 4th April 2008, the Company requested the Bank to enhance the credit facility from Kshs. 10,000,000/- to Kshs. 20,000,000/-. By a Letter of Agreement for Advance Accounts dated 7th April 2008, the Company accepted an increased overdraft facility of Kshs. 20,000,000/-. This further facility was secured by a deed of guarantee and indemnity dated 17th April 2008 executed by the 2nd and 3rd defendants. The 2nd defendant provided a further charge dated 25th April 2009 securing the additional overdraft facility over and above the existing charge debt of Kshs. 36,000,000/-.

4. By March 2009, as the Company had utilized the facilities granted to it, it applied for further additional credit of Kshs. 10,000,000/-. As security, the Company executed an Agreement dated 17th April 2009 in which it agreed to pay on demand an additional sum of Kshs. 10,000,000/- and a counter guarantee and indemnity dated 17th April 2009 executed by the 2nd and 3rd defendants. By a charge dated 22nd September 2009, the 2nd defendant in consideration of the Bank continuing to grant credit facilities to the Company upto Kshs. 46,000,000/- (made up of the Kshs. 30,000,000/- overdraft, Kshs. 16,000,000/- bank guarantee) charged his property **NAIROBI/BLOCK 34/160/39** to the Bank.

5. The Company continued to enjoy the facilities and once again on 1st October 2009, the Company accepted by a Letter of Agreement for Advance dated 1st October 2009 in which it admitted its indebtedness and agreed to repay on demand, Kshs. 4,000,000/- and the 2nd and 3rd defendant executed a guarantee and indemnity dated 1st October 2009. The Company by a debenture dated 22nd September 2009, pledged it

assets to secure upto Kshs. 46,000,000/-.

6. By a Letter of Agreement of Advance Account dated 1st February 2010, the Company agreed to pay Kshs. 10,000,000/- on demand and that 2nd and 3rd defendants executed guarantees. Once again and by a Letter of Agreement of Advance Accounts dated 10th January 2010, the Company executed a Letter of Lien and Set Off authorizing the Bank to hand all securities and proceeds from the same for advance and collateral security.

7. The Company defaulted in payment of installments due and by letters dated 7th June 2011 and 22nd June 2011, the Bank demanded payment from the Company of monies the outstanding. The Company failed to make payment and the Bank through its Advocates, *Mutitu, Thiong'o and Company Advocates* issues statutory notices to the defendants as charges and demanded payment of Kshs. 53,389,375.45 as from 4th July 2011. The Bank sold **NAIROBI/BLOCK 31/160/26** at a public auction for Kshs. 5,500,000/- while the sale of **CHEMBE/KIBABAMSHE/220** was unsuccessful. Despite further demand for payments the defendants have failed to make outstanding payments.

8. The defendants filed a statement of defence in which they admitted that the Company was advanced facilities which were secured by guarantees and indemnities and the properties owned by the 2nd and 3rd defendants. At paragraph 28 of the defence, the defendants admitted that they owned certain sums to the Bank but that it was charging them interest over and above what was agreed between the parties. They claimed that the securities ought to be sold to recover the entirety of the debt.

9. At the hearing, the matter proceeded in the absence of the defendants who had been served by substituted service through the newspapers. The Bank's claim was therefore uncontested and there was no evidence to support the defence. I am satisfied that all the advances were duly supported by the necessary documents and that it was proved that the defendants were duly indebted to the Bank.

10. As regards interest, the Bank claimed interest at 28% above its base rate from 1st December 2012 as shown in the final letter of demand to the defendants. The Bank did not provide evidence of the base rate and since it fluctuates, this court cannot give a rate of interest that is indeterminate. I therefore award interest at 13% per annum.

11. Since the plaintiff has proved its case on a balance of probabilities, I enter judgment for the plaintiff against the defendants jointly and severally for the sum of Kshs. 58,729,451.65 with interest thereon at 13% pa from 1st December 2012. The defendants shall bear costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2019.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Dave instructed by LJA Associates Advocates for the plaintiff.