



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 452 OF 2012

BARCLAYS BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

NETWORK SOURCE LIMITED.....1ST DEFENDANT

ECHAMINYA MBALANI.....2ND DEFENDANT

GRACE NDONGO ECHAMINYA.....3RD DEFENDANT

JUDGMENT

[1] The Plaintiff, a limited liability company carrying on business as a Bank under the provisions of the **Banking Act, Chapter 488** of the **Laws of Kenya**, filed this suit against the three Defendants, claiming **Kshs. 6,461,443.05**, interest at 24% per annum from **6 June 2012** until payment in full and costs of this suit together with such other or further relief that the Court may deem fit to grant. The Plaintiff's cause of action was that, at all material times, there existed between it and the 1st Defendant, the relationship of banker/customer; and that pursuant thereto, and by its Letter of Offer to the 1st Defendant, the Plaintiff granted to the 1st Defendant a banking facility by way of Invoice Discounting Facility in the principal sum of **Kshs. 3,870,000/=**.

[2] It was further the case of the Plaintiff that the facility was subject to the Banking Facilities Terms and Conditions dated **7 October 2009**, which included the following:

- [a]** The facility was for a maximum period of 180 days but was otherwise payable on demand;
- [b]** The facility would attract interest at the rate of 17.50 % per annum which interest was payable upfront by way of deduction from the principal sum;
- [c]** In the event of default, the facility would attract interest at the rate of 24% per annum;
- [d]** The 1st Defendant would pay to the Plaintiff all fees, charges and commissions in respect of the facility;
- [e]** The 1st Defendant would exclusively assign to the Plaintiff the invoices paid/honoured under the facility;

[f] The 1st Defendant would ensure that the account through which the funds were disbursed had adequate funds at the maturity date of all discounted invoices due under the facility;

[g] The facility would be secured by a Guarantee and Indemnity by the 2nd and 3rd Defendants.

[3] It was further pleaded by the Plaintiff that, pursuant to the aforesaid terms and conditions, the 2nd and 3rd Defendants created a Guarantee and Indemnity in favour of the Plaintiff to secure the principal sum of **Kshs. 3,870,000/=** together with interest, fees, commission, costs, charges and expenses; and that thereupon, the Plaintiff disbursed the sum of **Kshs. 3,526,338.70**, being the principal sum less interest, to the 1st Defendant by crediting the 1st Defendant's account number 045/1088092 at the Plaintiff's Hurlingham Branch in Nairobi. According to the Plaintiff, the 1st Defendant defaulted in repayment of the facility and failed and or neglected to honour the aforesaid terms and conditions, and that as a result thereof, the Plaintiff debited the aforesaid account with the principal sum of **Kshs. 3,870,000/=** and had the account classified. It was further the contention of the Plaintiff that, following persistent default by the 1st Defendant, it sent formal notices of demand to the Defendants requiring the immediate repayment of the principal sum together with interest at the rate of 24% per annum; which notices elicited no response, hence this suit.

[4] The Defendants denied the claim vide their joint Defence, contending that they did not take any loan of the nature described by the Plaintiff; and that the Plaintiff did not advise them to seek legal counsel on the impact of guaranteeing a loan taken out by a third party; and in its Reply to Defence filed on **24 September 2012**, the Plaintiff joined issues with the Defendants, and averred that it was upon the 2nd and 3rd Defendants, if they so desired, to seek independent legal and or technical advice prior to giving the Guarantee and Indemnity; and that having executed the Letter of Guarantee and Indemnity of their own volition and in the presence of an advocate of their choice, the 2nd and 3rd Defendants are deemed to have been well versed with the contents and consequences thereof. The Plaintiff, thus, reiterated its contention that the monies claimed herein are rightfully due and owing from the Defendants jointly and severally pursuant to the Letter of Offer dated **7 October 2009** and the Letter of Guarantee and Indemnity, and that there is no issue of unsettled and or reconciliation of accounts, as no such issue was ever raised by the Defendants in spite of having been served with demand notices by the Plaintiff and its Advocates. Thus, the Plaintiff prayed for judgment in its favour against the Defendants, jointly and severally as prayed in the Plaintiff.

[5] Hearing of the suit proceeded *ex parte* on **14 November 2017**, after the Court satisfied itself that hearing Notice was served on the Defendants. Thus, the Plaintiff adduced evidence, through its Corporate Recoveries Manager, **Mr. Lucas Gikungu (PW1)**, which was entirely uncontroverted. **PW1** adopted his Witness Statement dated **8 May 2017** and produced the Plaintiff's List and Bundle of Documents filed herein on **13 July 2012** with the Plaintiff and the Supplementary List and Bundle of Documents filed by the Plaintiff on **9 May 2017**. Having perused and considered the pleadings, the Witness Statements and Bundles of Documents filed by both sides, as well as the evidence adduced by **PW1**, the issues that remain for my determination from the List of Agreed Statement of Issues filed herein on **18 April 2013**, are:

[a] Is the 1st Defendant indebted to the Plaintiff as alleged?

[b] Are the 2nd and 3rd Defendants liable to the Plaintiff as Guarantors to the 1st Defendant?

[d] Who should bear the costs of this suit?

[a] On Whether the 1st Defendant indebted to the Plaintiff as alleged

[6] The uncontroverted evidence of **PW1** was that, through a letter signed by the 2nd Defendant, in his capacity as a director of the 1st Defendant, the 1st Defendant applied for a short-term loan facility from the Plaintiff in the sum of **Kshs. 4,500,000/=**. That letter was produced herein as an exhibit at page 1 of the Plaintiff's Supplementary Bundle of Documents. It reads:

"We hereby apply to a short-term loan facility of Kshs. 4.5m from your bank repayable within 180 days. Enclosed please find details of our financial statements that we are supposed to submit to the bank in this regards.

I look forward to your favourable consideration..."

[7] Pursuant to the said application, the Plaintiff granted the 1st Defendant a banking facility by way of Invoice Discounting, in the sum of **Kshs. 3,870,000/=** as per the Letter of Offer dated **7 October 2009** at pages 1 to 10 of the Plaintiff's initial Bundle of Documents filed on **13 July 2012**. The Letter of Offer was subject to the Special Terms and Conditions dated **7 October 2009** at page 11 of the Plaintiff's initial Bundle of Documents; and a perusal of both instruments clearly shows that the Borrower was **Network Source Ltd**, the 1st Defendant herein and that the Guarantors were **Echaminya Mbalani**, the 2nd Defendant and **Grace Odongo Echaminya**, the 3rd Defendant herein.

[8] The Plaintiff further adduced evidence to show that the terms of the Letter of Offer and its Special Conditions were presented to the 1st Defendant's Board of Directors for discussion and approval and that the borrowing was duly sanctioned through a Resolution dated **8 October 2009**. A copy thereof was exhibited by the Plaintiff in the Supplementary Bundle filed on **9 May 2017** and it confirms that a copy of the Letter of Offer dated **7 October 2009** containing the principal terms and the conditions of the proposed facility were produced at the meeting along with the proposed credit agreement in the Plaintiff's printed forms, a proposed Charge of the Company's immovable property and a proposed Letter of Pledge. The minutes further confirm that it was the unanimous resolution of the Company that the terms of the facility be approved as it was in the best interest of the Company. The 2nd Defendant was further authorized to sign the Form of Acceptance set out in the Letter of Offer.

[9] It was further the uncontroverted evidence of the Plaintiff that the Form of Acceptance to the Letter of Offer was duly signed by the 2nd Defendant on behalf of the 1st Defendant; and that the 2nd and 3rd Defendants provided the requisite Guarantee and Indemnity Instrument to secure the borrowing. A copy of the Instrument was exhibited by the Plaintiff at pages **14 to 23** of the Plaintiff's initial Bundle of Documents. The Plaintiff also produced as an exhibit, a copy of the Drawdown Instructions issued by the 2nd Defendant for and on behalf of the 1st Defendant dated **8 October 2009** (see page 13 of the Plaintiff's initial Bundle of Documents).

[10] **PW1** testified that there was a drawdown of the funds as agreed. The Statements of Account at pages 34 to 37 of the Plaintiff's initial Bundle of Documents confirm that the funds were placed at the disposal of the 1st Defendant with effect from **23 October 2009**. The contention by the Plaintiff that the 1st Defendant fell into default in connection with the terms and conditions of the facility and has been in default to date, is also lent credence by the Statements of Account aforementioned. It is therefore evident that, as at **6 June 2012**, the debt had accumulated to the sum of **Kshs. 6,461,443.05**. There is ample and credible evidence therefore that the 1st Defendant is indeed indebted to the Plaintiff in the sum claimed herein.

[b] On whether the 2nd and 3rd Defendants are liable to the Plaintiff as Guarantors to the 1st Defendant:

[11] The Plaintiff adduced uncontroverted evidence to the effect that it was one of the conditions precedent that directors' personal guarantees for **Kshs. 3,870,000/=** signed by **Echaminya Mbalani** and **Grace Odongo Echaminya** (the 2nd and 3rd Defendants, respectively) be provided. This condition was set out in **Clause 6** of the Letter of Offer. At **Clause 9** of the Letter of Offer, it was again stipulated that:

"The facility shall be secured by ... Directors' personal guarantees for KES. 3,870,000 signed by Echaminya Mbalani and Grace Odongo Echaminya..."

[12] As pointed out hereinabove, the terms of the borrowing were duly presented to the Board of Directors of the 1st Defendant and were duly approved by the directors, who, as the Minutes at pages 2 and 3 of the Plaintiff's Supplementary Bundle confirm, are the 2nd and 3rd Defendants herein. The

Minutes further confirm that the directors approved the borrowing which included the requirement for the furnishing, by the directors personally, of Guarantee and Indemnity, as security for the facility. In similar vein, the Plaintiff produced a Form of Acceptance of the Letter of Offer and the aforementioned terms of the facility and the Form of Acceptance, duly signed by the 2nd and 3rd Defendants, which explicitly states as hereunder:

"We M. ECHAMINYA director and G. ECHAMINYA director/company secretary of the Borrower having been duly authorized to witness the affixation of the common seal of the Borrower to the Facility Letter pursuant to a Resolution of the Board of Directors dated 8/10/09 confirm that we have read and understood the contents of the Facility Letter. The Borrower hereby accepts the offer for the Facility on the terms and conditions contained in the Facility Letter..."

[13] That the directors signed a joint Guarantee and Indemnity is indubitable. The said instrument was produced herein at pages 14 to 23 of the Plaintiff's initial Bundle of Documents. At page 22 thereof, the Guarantors names are shown to be **Echaminya Mbalani** and **Grace Odongo Echaminya**. The document further shows that the instrument was signed by the two Guarantors before an Advocate of the High Court of Kenya. Needless to say that by that Guarantee, the 2nd and 3rd Defendants made it their responsibility to ensure punctual performance, by the 1st Defendant, of its obligations to the Bank in accordance with the terms of the Letter of Offer, agreements and arrangements pertinent to the Facility. Moreover, the Guarantors covenanted thereby to pay to the Bank, on demand, all monies due to it from the 1st Defendant in the event of default by the 1st Defendant.

[14] It is further noteworthy that at **Clause 27** of the Letter of Guarantee and Indemnity, it was provided that the Guarantors' liability would be joint and several. That Clause provides that:

"Where this guarantee is signed as guarantor by more than one person or is signed by one person for himself and on behalf of other persons (whether such person is signing on behalf of a partnership or otherwise), the expression "the Guarantor" shall include all such persons and the liability of the Guarantor under this guarantee shall be the joint and several liability of such persons and any demand for payment made by the Bank to any one or more of the persons so jointly and severally liable shall be deemed to be a demand made to all such persons..."

[15] It is manifest therefore that the claim by the Plaintiff against the Guarantors is well-founded. There is on record a Witness Statement made by the 2nd Defendant, **Echaminya Mbarani** dated **20 March 2012**, in which he stated on his own behalf and on behalf of the 3rd Defendant, that they did not take a loan in their personal capacities. It is not the Plaintiff's contention that the loan was given to the 2nd or 3rd Defendants and therefore this contention is misguided. It was further the contention of the Guarantors, as is evinced by that Witness Statement, that the Plaintiff did not advise them to seek legal counsel on the impact of guaranteeing a loan taken out by a third party. A perusal of the Letter of Guarantee and Indemnity however shows otherwise; for it contains a clear and bold warning at the top of pages 14 and 22 thereof in the following words:

"If you sign this document, you will be legally bound by its terms. You will be liable to us instead of, or as well as the Principal Debtor. You should get independent legal advice before signing this document."

[16] The Letter of Guarantee and Indemnity clearly shows that it was signed by the Guarantors before an Advocate. It was therefore their responsibility to ensure they understood the contents of the documents before appending their signature thereto, and that if need be, to be advised thereon by an independent legal practitioner. Accordingly, I find apt the words of **Kwach, JA** in **Mrao Ltd vs. First American Bank of Kenya Limited & 2 Others [2003] eKLR** that:

"...it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I

have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters..."

[17] Accordingly, it is not open for the 2nd and 3rd Defendants to now argue that they are not liable to the Plaintiff because the Plaintiff did not explain the terms of the Guarantee. Similarly, the contention in the 2nd Defendant's Witness Statement that they did not receive any notices of intention to sue cannot lie, in the face of the various notices exhibited herein at pages 24 to 31 of the Plaintiff's original Bundle of Documents. The notices were addressed to the very address that was provided by the Defendants in their loan application letter dated **29 July 2009** (see page 1 of the Plaintiff's Supplementary Bundle). The same address was supplied by the Defendants for purposes of the Letter of Offer, the Letter of Guarantee and Indemnity. It is also noteworthy that the demand notices were specifically addressed to the 1st Defendant as the Principal Borrower, and to the 2nd and 3rd Defendants as Guarantors and directors of the 1st Defendant. The Certificates of Posting were also exhibited at page 33 of the Plaintiff's initial Bundle of Documents. The Court is therefore in no doubt at all that the notices were duly issued and served by the Plaintiff.

[18] In the premises, there is uncontroverted and ample evidence to prove that the 2nd and 3rd Defendants are indeed liable to the Plaintiff on the basis of the Letter of Guarantee and Indemnity dated **19 October 2009**. Accordingly, it is my finding that the Plaintiff has proved on a balance of probabilities that the Defendants are jointly and severally liable to it in the sum claimed of **Kshs. 6,461,443.05**; and that the Plaintiff is similarly entitled to costs of this suit. Thus, Judgment is hereby entered in the Plaintiff's favour against the Defendants jointly and severally in the aforesaid sum of **Kshs. 6,461,443.05** together with interest thereon at 24% per annum from **6 June 2012** until payment in full, together with costs of this suit and interest on costs at Court rates.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY, 2018

OLGA SEWE

JUDGE