



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CIVIL SUIT NO. 52 OF 2011**

**BETWEEN**

SOKHI INTERNATIONAL (K) LTD .....1<sup>ST</sup> PLAINTIFF  
VIJAY KUMAR SINGH ..... 2<sup>ND</sup> PLAINTIFF  
LABH SINGH SOKHI .....3<sup>RD</sup> PLAINTIFF  
RAJEEV PARMA .....4<sup>TH</sup> PLAINTIFF  
RAJU NARENDRANATHAN VETILYATIL .....5<sup>TH</sup> PLAINTIFF  
ASHISH KUMAR SAMANTHA .....6<sup>TH</sup> PLAINTIFF  
CHANDER BHAN SINGH .....7<sup>TH</sup> PLAINTIFF  
MUMTAZ MUGHAL.....8<sup>TH</sup> PLAINTIFF

AND

EQUATORIAL COMMERCIAL BANK.....1<sup>ST</sup> DEFENDANT  
KERETO MARIMA.....2<sup>ND</sup> DEFENDANT  
IAN SMALL.....3<sup>RD</sup> DEFENDANT

AND

**COUNTERCLAIM**

**BETWEEN**

EQUATORIAL COMMERCIAL BANK LIMITED.....PLAINTIFF

AND

VIJAY KUMAR SINGH.....1<sup>ST</sup> DEFENDANT  
LABH KUMAR SINGH.....2<sup>ND</sup> DEFENDANT  
HARPAL SINGH SOKHI .....3<sup>RD</sup> DEFENDANT

**JUDGMENT**

1. This case is between a bank and its customer. The 1<sup>st</sup> plaintiff (“Sokhi International”) and the 1<sup>st</sup> defendant, previously known as Southern Credit Banking Corporation (“the Bank”), had a longstanding

relationship which went sour after the Bank appointed the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as receiver managers (“the Receivers”) on 20<sup>th</sup> November 2008 over its property and business undertaking causing it and its directors to file suit.

2. In the plaint dated 4<sup>th</sup> April 2011, the plaintiffs sought the following reliefs:

- a. *A declaration that the appointment of the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants as joint receiver managers pursuant to advertisement in the Standard newspaper of 28<sup>th</sup> November 2008 is illegal null and void.*
- b. *The honourable court be pleased to order the revocation and annulment of the appointment of by the 1<sup>st</sup> defendant of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as joint receivers of the 1<sup>st</sup> plaintiff.*
- c. *The honourable court be pleased to grant an order removing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from being joint receiver managers of the 1<sup>st</sup> plaintiff.*
- d. *The honourable court be pleased to grant a permanent injunction restraining the defendants, their agents, servants, employees and/or representatives from carrying on activities/business for and on behalf of the 1<sup>st</sup> plaintiff as joint receiver managers and/or its representatives and they be further restrained from dealing or carrying out themselves in whatsoever manner for and on behalf of the 1<sup>st</sup> plaintiff.*
- e. *General Damages.*
- f. *This Honourable Court be pleased to grant such further and/or other justifiable relief as it may deem fit in the circumstances.*
- g. *The defendant be condemned to pay costs of this suit.*

3. The Bank and Receivers filed a defence and counterclaim dated 4<sup>th</sup> July 2011 in which they denied the plaintiffs’ claims. The Bank prayed for judgment in the counterclaim for Kshs. 105,264,683.30 against the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff and Harpal Singh Sokhi based on guarantees issued to the Bank.

4. The suit was filed together with a Notice of Motion made under **Order 40** of the **Civil Procedure Rules** seeking an order, amongst others, a temporary injunction restraining the Receivers from carrying out their duties as such pending the hearing and determination of the suit. The application was heard and dismissed on 3<sup>rd</sup> February 2012. It is worth noting that although the Receivers were appointed on 20<sup>th</sup> November 2008, this suit was filed in 2011. By the time the suit came up for hearing the Receivers had completed their mandate and had been discharged by the Bank. As a result of dismissal of the application for injunction, the court cannot grant prayers (b), (c) and (d) of the plaint.

5. At the pretrial conference, the parties agreed that the following facts were not in dispute:

- a. The parties, that is the Sokhi International and the Bank entered into an agreement being the Debentures dated 19<sup>th</sup> October 2004 and a Supplementary Debenture dated 2<sup>nd</sup> March 2006.
- b. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the counterclaim guaranteed advances to the Bank by Deed of Guarantee dated 19<sup>th</sup> October 2004.
- c. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were appointed as Receivers under the debentures.

6. In addition to the agreed facts, the fact that the Bank advanced to Sokhi International monies evidenced by the following documents was not disputed;

- A facility letter dated 22<sup>nd</sup> July 2004 where the Bank offered Sokhi International a credit facility of Kshs. 15,000,000/- made up of Kshs. 6,500,000/- overdraft facility repayable over 12 months and Kshs. 8,500,000/- term loan repayable over 36 months on condition that it would create a debenture over the assets, undertaking and stock in favour of the Bank.
- A debenture by Sokhi International over its assets, stock and undertaking in consideration of the Bank granting a credit facility of Kshs. 15,000,000/- duly registered at the Companies Registry.
- A charge created by Sokhi International over its property known as KISUMU BLOCK 2/107 in favour of the Bank.
- Personal guarantees by Harpal Singh Sokhi, Vijay Kumar Sokhi and Labh Singh Sokhi.

7. Sokhi International requested for further facilities and the Bank offered it another credit facility through the letter dated 22<sup>nd</sup> February 2006 for the sum of Kshs. 31,300,000/- made up as follows; Kshs. 4,000,000/- overdraft facility, letters of credit for Kshs. 20,500,000/- and Performance Bond for Kshs. 6,800,000/-. This facility was secured by;

- Supplemental debenture dated 2<sup>nd</sup> March 2006 in favour of the Bank duly registered at the Companies Registry.
- A further charge dated 2<sup>nd</sup> March 2006 created over KISUMU BLOCK 2/107 in favour of the Bank.

8. In line with prayers (a) and (e) of the plaint and the counterclaim, the parties settled the following issues for determination:

- a. Whether the 1<sup>st</sup> defendant issued Notice of Demand and whether such notice was illegal and untenable.
- b. Whether the plaintiffs suffered any loss and damage as result of the appointment of Receivers.
- c. Whether the 1<sup>st</sup> defendant is entitled to judgment as prayed in the counterclaim.

9. Both sides called witnesses. The 7<sup>th</sup> plaintiff, Mumtaz Mughal (PW 1), who was the Chief Executive Officer of Sokhi International at the time material to this suit, testified on behalf of all the plaintiffs. Jeconiah Achieng Agoro (DW 1) testified on behalf of the Bank while Kereto Marima, the 2<sup>nd</sup> defendant, testified on behalf of himself and the receivers. The parties also filed written submissions. In summary the testimony was as follows.

10. The facilities granted by the Bank to Sokhi International were intended for the implementation of a contract between Sokhi International and Magadi Soda Company Limited (“Magadi”). Sokhi International authorized Magadi to remit payments due to it under the contract to be applied towards reducing its indebtedness to the Bank. According to PW 1, Magadi did not honour the guarantee to the Bank and causing the Bank to place Sokhi International under receivership as the debt was outstanding. PW 1 told the court that she only learnt of the receivership from the newspapers whereupon she approached the Bank to remove the receivership so that an amicable solution could be sought. She testified that since the plant and machinery had been delivered and paid for and Sokhi International had completed the works, the only issue was delayed payment by Magadi, a matter which could be resolved without affecting their business. PW 1 denied that Sokhi international received any demand prior to the Receivers being appointed.

11. PW 1 further testified that after their appointment, the Receivers contracted her as a consultant to assist in recovery of the Magadi debt. She testified that the Magadi debt was the only debt owed to Sokhi International and after the Receivers took office, they did not attempt to revive the company as it was a going concern servicing many other businesses. In due course, Bank consented to the sale by Sokhi International of its engineering and mechanical workshop including the land for Kshs. 7.2 million to her. She contended that this was the only amount recovered out of the total debt due to the Bank. She further

testified that the Receivers did not give any account and she was not aware that the receivership had been lifted.

12. DW 1 testified that Sokhi International was placed under receivership after it defaulted in servicing the debt due to the Bank. According to him the only credits made on the account were recoveries made as a result of the sale of the charged land and machinery and the money recovered from Magadi. He told the court that the debt remained outstanding hence the Bank was entitled to sue on the guarantees for the sum prayed for in the counterclaim.

13. DW 2 recalled that he and the 3<sup>rd</sup> defendant were appointed as Receivers on 20<sup>th</sup> November 2008. He pointed out that the bank had made two demands letters dated 4<sup>th</sup> April 2007 and 20<sup>th</sup> November 2007 to Sokhi International prior to their appointment. DW 2 informed the court that part of the duties of the Receivers was to collect debts due to the company under receivership. Since the PW 1 had custody of the documents that were necessary to pursue the debt, the Bank allowed the Receivers to enter into a consultancy agreement with PW 1 to assist in collecting the debt but the contract was later rescinded. In due course, the Receivers collected a total of Kshs. 20,741,278.00 on account of sale of land, plant and machinery and recovery of the Magadi debt. After completing their work, the Receivers filed an abstract of receipts and payments in Form No. 223 which showed that the debenture holders received Kshs. 9,731,107.70 net of costs. The Receivers filed Form No. 224 being the Notice to cease acting at the Companies Registry on 25<sup>th</sup> August 2014.

14. Before I consider the issues raised for determination, let me set out some preliminary matters. Sokhi International admitted to owing the Bank money advanced on the basis the debentures, charges and guarantees. Clause 20 of the Debentures provided that the Bank would appoint a receiver or receiver and manager over the company in the event of default or refusal to comply with a demand to repay the debt. The validity of the documents is not in dispute hence the responsibility of the court is limited to enforcing the contracts. In ***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another CA Civil Appeal No. 95 of 1999***, the Court of Appeal held that a court of law cannot rewrite a contract between the parties as the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. In this case no allegation has been made to undermine the agreements between the parties. I now turn to the issues framed for trial.

15. Did the bank issue demand notices to the Sokhi International? The Bank produced several demand letters and correspondence between it and Sokhi International sent to the address shown in the debentures. A demand letter by the firm of *J. Louis Onguto Advocates* was sent on 25<sup>th</sup> October 2007 by registered post and ordinary mail. On 20<sup>th</sup> November 2008, the Bank made a demand for the sum of Kshs. 121,085,783.15 which was received and signed for by PW 1. These documents were not disputed by the plaintiffs. The fact that demand letters were sent is corroborated by the fact that correspondence was exchanged between the Bank and Sokhi International trying to resolve the matter amicably following demand.

16. I therefore find and hold that since Sokhi International was indebted to the Bank, the Bank was entitled to make a demand for the debt. It was also entitled to appoint the Receivers as one of its remedies under the Debentures. Since the appointment of the Receivers was in accordance with the Debentures, Sokhi International cannot be said to have suffered any loss or damage as result of the receivership.

17. Despite the finding I have made on the first issue, I am required to consider whether and to what extent Sokhi International would be entitled to damages. PW 1 testified that as a result of the receivership, it was unable to service its contracts with businesses in the tea and sugar industry. It also lost business contracted as a subcontractor for construction of roads in Juba, South Sudan worth over half a billion shillings. The losses claimed by Sokhi International flowing from the alleged breach of the debentures in appointing the Receivers are special damages, which must be pleaded with particularity and proved (see ***Coast Bus Service Ltd v Murunga Danyi CA Civil Appeal No. 192 of 1992 (UR)***). I would disallow these losses as they are not specifically pleaded.

18. In addition, the evidence to support the loss was threadbare. The plaintiffs produced a contract dated 29<sup>th</sup> May 2005 between the South Sudan Government and Sunflower FCZ, UAE. I have looked at the contract and it does not show the Sokhi International was subcontracted. There is no evidence that the contract was cancelled because of the receivership given that the Receivers were appointed in 2008. They also produced a list projected contracts and orders for various works from local authorities but these were mere projections and not evidence of actual loss. Finally, there is evidence that by the time the Receivers were appointed in November 2008, Sokhi International was already insolvent, had laid off its workers and was not a going concern as evidenced by the letter of its advocate, B. M. Quadros, dated 2<sup>nd</sup> April 2008 to the Bank. In such circumstances Sokhi International was incapable of suffering loss and damage.

19. Counsel for the plaintiffs cited ***Jambo Biscuits (K) Limited v Barclays Bank Limited, Andrew Douglas Gregory and Abdul Zahir Sheikh [2003] 2 EA 434*** where Ringera J., stated;

*[T]he receivership would most probably result in the complete destruction of the business and goodwill of the company ... And I think it is a notorious fact which judicial notice may be taken that receiverships in this country have tended to give a kiss of death to many a business.*

The aforesaid statement cannot apply to this case as the evidence is clear that Sokhi International was already dead by the time the Receivers were appointed. Moreover, there were no allegations in the plaint that the Receivers committed malfeasance or acted contrary to their obligations during the receivership.

20. The final issue is whether the Bank is entitled to Kshs. 105,254,683.30 from the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff and Harpal Singh Sokhi as guarantors to Sokhi International. Their liability is secondary to that of Sokhi International. When cross-examined, PW 1 admitted that by the time the suit was filed, Sokhi International was indebted. The issue then is not whether the guarantors were indebted since their liability is secondary but the extent to which they were indebted.

21. In the witness statement filed by DW 1, the amount claimed by the Bank was Kshs. 145,983,669.90 accruing interest at contractual rates between 24% and 34% per annum. Evidence of the indebtedness is contained in the statements of account attached at pages 178 to 186 of the defendant's bundle of documents as follows:

Page No.	Particulars of Account	Date	Amount (Kshs)
177	A/C No. 3610000337 Harpal Singh Sokhi Main Branch	30.04.2009 to 04.08.2009	631,614.05
178	A/C No. 303001904 Sokhi International Main Branch	01.04.2009 to 04.08.2009	32,843,483.15
179	A/C No. 3610000334 Sokhi International Main Branch	01.01.2009 to 04.08.2009	13,925,722.20
180	A/C No. 3610000334	08.09.2006 to 03.04.2009	13,925,722.20

	Sokhi International Main Branch		
181	A/C No. 3510000240 Sokhi International Kisumu	01.01.2009 to 04.08.2009	22,831,860.85
182	A/C No. 3010000957 Sokhi International Kisumu	01.01.2009 to 04.08.2009	2,935,238.60
183	A/C No. 3510000239 Sokhi International Kisumu	01.01.2009 to 04.08.2009	2,864,616.85
184	A/C No. 3010000239 Sokhi International City Branch	01.01.2007 to 03.04.2009	3,086,950.90
185	A/C No. 3010000239 Sokhi International Kisumu	01.01.2009 to 04.08.2009	3,379,965.60
<b>TOTAL</b>			96,425,174.40

22. Although the statements were not disputed, counsel for the plaintiffs pointed out that DW 1, in his witness statement, claimed that the Sokhi International owed Kshs. 145,983,669.90 as at 31<sup>st</sup> July 2009 yet in the counterclaim the amount claimed was Kshs. 105,264,683.30 due as at 1<sup>st</sup> August 2009. DW 1 admitted that Sokhi International could not have paid Kshs. 40,000,000.00 in one month. I have noted that both these figures are pleaded in paras. 50 and 51 of the counterclaim. In resolving this issue, I have added the amounts set out statements from the various accounts held by Sokhi International. However, it is not clear how the amount of Kshs. 631,614.05 due from the account of Harpal Singh Sokhi is due to the Bank on account of the guarantees issued by him. I therefore give the guarantors credit for that amount. I accordingly enter judgment for the Bank for Kshs. 95,793,560.40.

23. Counsel for the plaintiffs submitted that the Bank's claim was illegal and untenable for being in violation of **section 44A** of the **Banking Act (Chapter 488 of the Laws of Kenya)** as it required the payment of interest amounting to more than the principal sum. This issue was not raised in the pleadings nor did plaintiffs point out, despite having admitted indebtedness, how much of the amount claimed was the principal and how much of it was interest. Once the Bank had provided statements setting out its claim, the plaintiffs and the guarantors assumed the burden of establishing that they were not indebted to

the extent claimed by the Bank particularly when indebtedness was admitted by Sokhi International.

24. Although the parties raised other issues in their written submissions, following the findings I have reached on the issues framed, I do not think it is necessary to deal with those matters. In conclusion I enter judgment as follows:

- a. The Plaintiffs claim against the defendants is dismissed with costs to the defendants.
- b. The counterclaim is allowed and judgment is entered for the 1<sup>st</sup> defendant against the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs and Harpal Singh Sokhi jointly and severally for Kshs. 95,793,560.40.
- c. The 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs and Harpal Singh Sokhi shall pay the costs of the counterclaim.

**DATED and DELIVERED at KISUMU this 18<sup>th</sup> day of May 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Abande instructed by Omondi and Abande and Company Advocates for the plaintiff.

Mr Makori instructed by Hamilton Harrison and Mathews Advocates for the defendants.