REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 500 OF 1996

NATIONAL BANK OF KENYA LTD .....PLAINTIFF

VERSUS

1. **MWETA COMPANY LIMITED.....1ST DEFENDANT**
2. **MARTHA C. TOWETT.....2ND DEFENDANT**
3. **WILLIAM C. TOWETT.....3RD DEFENDANT**

JUDGMENT

1. By an Amended plaint dated the 30th March 2000, the plaintiff, National Bank of Kenya Limited sued Mweta Company Limited and its two directors William Chepkwony Towett and Martha Chepkwony Towett for a sum of Kshs.5,557,872/70 plus interest at the rate of 32% per annum calculated on daily balances and applied monthly from 1st September 1996 until payment in full.

It is stated that the said amount are loan advances and/or overdraft facilities granted to the 1st defendent and guaranteed by a joint and personal guarantee executed on the 15th January 1997 by the 2nd and 3rd defendants.

2. The 1st defendant's defence was filed on the 26th January 1996. He denied having requested for the loan or the over draft and denied being indebted to the plaintiff in the sum of Kshs.5,557,872/70 or any other sums of at all.

The 2nd and 3rd defendants filed their joint defence on the 16th November 2004 and likewise denied being indebted to the plaintiff in the above sum or any other sum or at all.

The 2nd and 3rd defendants however admitted having signed a guarantee on the 15th January 1997 but stated that the said guarantee was signed under a misrepresentation that the plaintiff could make further advances to the 1st defendant. Particulars of misrepresentation were stated that:

(a) The 2nd and 3rd believed that the plaintiff was going to make further advances to the 1st defendant.

(b) failing to inform them that the said guarantee was intended to cover amounts already advanced to the 1st defendant.

(c) failing to inform them that the advices made to the 1st defendant prior to the signing of the said guarantee were fully paid.

(d) failing to make full disclosure of the status of accounts of the 1st defendant before requiring them to sign the guarantee.

They further averred that the amount advanced to the 1st defendant was secured hence there was no need of signing the guarantees without further advances bing made. Finally, the 2nd and 3rd defendants denied having been served with any demand notice.

3. Reply to the defences were filed to the effect that the defences were vague, and ambiguous. The plaintiff denied all particulars of misrepresentation by the plaintiff. On the 8th April 2005 the plaintiff filed its list of documents. Among the documents were:

1. Fixed and floating debenture dated 1st November 1996,

2. Resolution of meeting held by the directors of the 1st defendant

3. Joint and several guarantees to debenture dated 15th January 1997

4. Bank of Mweta Company Limited between 30th June 1992 and 31st October 1996 and one dated 17th April 2004.

5. A demand notice to the defendants:

4. On the 30th July 2008, the plaintiffs case was heard before the Hon. Justice D.M. Maraga(as he then was).

The Plaintiff's case was that the 1st defendant had opened an account with on the 21st December 1991 being account **No.31041687** which changed to account **No. 0102019991700** after computerization. It was stated by the plaintiffs witness PW1, Jane Waithera Githutha who described herself as the officer who had worked with the bank for 20 years. That after opening of the above account, the 1st defendant never made any deposits, but the bank allowed the 1st defendant to withdraw without formal request for the over draft. She explained that the cheques issued against no deposit was itself a request for overdraft. She testified that there was no formal agreement on the interest chargeable. She continued that between 1992 and 1993 the 1st defendant issued to the bank with 19 cheques amounting to Kshs.1,637,750/= which cheques were paid and to prove that, the said cheques and the Bank statements were produced as exhibits. She further went onto state that the 1st defendant never paid the full overdraft, and by a letter dated 13th September 1994 and produced as an exhibit, the bank demanded payment of over Kshs.4 Million then outstanding.

It was her testimony that the said sum consisted of the overdrawn amount plus interest and other charges. The 1st defendant despite promises to pay continued in default, leading to this suit.

5. PW1 Jane Waithera stated that after this suit was filed, the 1st defendant executed a fixed and floating debenture on the 1st November 1996 to cover the debt owed to the bank, and a resolution by the directors of the 1st defendant to execute the debentures and the borrowing produced as PExh 6 and 7 respectively.

Further, it was stated that on 15th January 1997 the 2nd and 3rd defendants who were directors of the 1st defendant executed a joint and several guarantee to cover the then owing, in the sum of

Kshs.6 Million and any other debt that may arise thereafter. The joint and several guarantee were produced as exhibit No 8. The bank attempted to realise the securities by attaching the defendant's assets but were restrained by the court from selling them, so that at the date of the hearing, the amount owing to the bank was Kshs.15,856,610/= as demonstrated by a bank statement as at 8th August 2005 produced as exhibit No 11.

6. On misrepresentation alleged by the 2nd and 3rd defendants, the PW1 stated that there was no such misrepresentation.

On cross examination by advocate for the defendant, PW1 stated that the last payment by the defendants was Kshs.120,000/= by way of a deposit into the account. She reiterated that the 1st defendants withdrawals were authorised and the cheques issued were themselves requests for the overdrafts. She denied a suggestion that Kshs.6 million was to be advanced to the 1st defendant and that the resolution by the company directors authorizing the borrowing on the 25th January 1996 was made a year before execution of the joint and several guarantees.

7. The defendants did not testify. Despite the court according them numerous adjournments they did not present themselves before the court from the 30th January 2008 when the plaintiff closed its case.

8. On the 17th June 2014, the defendants were given a last adjournment to prosecute their defence, and once again on the 17th February 2015. A hearing date was taken by consent of Advocates for both parties on the 17th June 2015 in court for defence hearing. However, the defendants and their advocates failed to avail themselves in court. Upon application by Mr. Kiburi Advocate for the plaintiff, the defence case was closed.

9. Mr. Kiburi Advocate did not file submissions but opted to rely on the evidence on record.

This court has considered the pleadings as filed by the two opposing parties. Documents filed by the plaintiff have also been considered. The issues that present themselves, for the courts consideration in my view are:

1. Whether the 1st defendant was advanced a sum of Kshs.5,557,872.70/= with compound interest at 32% per annum from 1st September 1996.

2. Whether the 1st defendant made a request, for the said advance.

3. Whether the 2nd and 3rd defendants voluntarily executed guarantees jointly and severally to secure the advances to the 1st defendant by the plaintiff.

4. Whether there was misrepresentation by the plaintiff in the execution of the guarantees by the 2nd and 3rd defendants.

5. Whether the 1st defendant registered a debenture on the 25thJanaury 1996 over its assets to secure the advices to itself by the plaintiff, and if so, what was the agreed interest chargeable if any.

6. Is the plaintiff entitled to the prayers sought.

7. Costs.

The issues as framed are interrelated and will be addressed collectively.

10. The court has considered the plaintiffs documents produced as exhibits. The 19 cheques issued by the 1st defendant to the bank is enough evidence that there was some advances by way of informal overdraft. Indeed, the indebtedness was confirmed by letters by the managing director of the 1st defendant one William Towett Chepkwony who in his letters dated 31st October 1994 and 16th March 1996 to the bank confirmed his indebtedness to the bank and offered payment proposals by instalments, and also confirmed that interest rates had gone up to 40% during the period. To secure the the said advances, the 1st defendant registered a fixed and floating debenture over the assets of the company to secure the advances on the 25th January 1996. Nothing was tendered by the 1st defendant to show or indicate that the said debenture was not valid. It secured a sum of Kshs.6,000,000/=. A Certificate of Registration of a mortgage under **Section 99 of the Companies Act** was issued on the 8th November 1996 confirming registration of the fixed and floating debenture by Mweta Company Limited, the 1st defendant.

Further, two Directors of the Company William Chepkwony Towett and Martha Chepkwony Towett executed personal guarantees as directors of the 1st defendant, to pay the sum of Kshs.6 Million, as a continuing security to cover the whole amount owing or which may become due for three years, and all interest and bank charges on and in connection with such advances, as authorised by a company resolution dated the 25th January 1996.

It is noteworthy that the Managing director William C. Towett was the one making all the payment proposals referred to above. At all the material times, the said 1st defendant and by extension the 2nd and 3rd defendants being directors of the company, a fact confirmed by an official search from the Registrar of Companies produced in court, had legal representation, and knew the import and purport of their actions. They cannot say that they were misled into signing the personal and joint guarantees.

I have noted that during cross examination of the plaintiff's witness PW1, Advocate for the Defendants never dealt with the above issues. The defendants did not testify leaving the plaintiff's evidence uncontroverted and unchallenged.

11. In the case **MRAO Ltd -vs- First American Bank of Kenya Ltd and 2 other (2003) KLR**, the Judges of Appeal, faced with issues similar to the issues in this case that the bank had failed to inform them of their obligations under the charge/debenture, they held, that on the face of the security documents, they could see no default and declared them valid. They went ahead to state that having taken the money from the bank, on the strength of the securities, they cannot come to court to say they were invalid, and that their intention was never to pay the same, an altitude the court condemned strongly. The Judges continued to state that before appending signatures to documents securing large sums of money, the parties ought to have sought legal advice to understand their obligations under the documents. They proceeded to state that if all parties went to court to challenge contractual interest rates, banks would be crippled if not driven out of business.

12. In the same manner, the parties hereof came to court to challenge their contractual obligations under the instruments they executed knowingly and under no duress. They had legal representation all along.

In the case **Al-Jalal Enterprises Ltd -vs- Gulf African Bank Ltd (2014) KLR**, it was observed that at no time during the time of hearing of the case did the defendants indicate when the invalidity of the guarantees came to their knowledge. In this case, the learned Judge, Hon. Ogola reiterated the sediments expressed in the **MRAO CASE (Supra)**.

13. The fixed and floating Debenture executed by the 1st Defendant on the 1st November 1996 provided:

(a) That the bank shall not be required to advice the company prior to any change in the rate of interest so payable nor shall any failure by the bank to advise the company as aforesaid prejudice in any way the recovery by the bank of interest so charged subsequent to any such change.

(b) That such interest shall in no event be charged at a rate exceeding 30% per annum without the company's consent which consent may be signified by any Director of the company and once given shall be irrevocable.

14. In Margaret **Njeri Muiruri -vs- Bank of Baroda, Court of Appeal at Nyeri No. 282 of 2014**, faced with issues touching on interest rates held that when such interest is not agreed by parties in their security instruments, the court would be the right forum to fix reasonable rates for the material time.

In the present case, the matter of interest rates is settled as shown in paragraphs (a) and (b) reproduced from the Debenture. The interest rates are fixed at 30%. No consent by the 1st defendants directors have been provided – to vary the rates as stated.(See (b) above). The plaintiff has pleaded interest at 32% from date of filing suit until payment in full. This court will not rewrite or vary the terms of the contract between the parties, but will instead give effect to the said contracts. See J**iwaji -vs- Jiwaji (1968)EA**. The applicable interest rates in this matter would therefore be 30% per annum as provided and agreed to in the Debenture.

15. The issues as framed in Paragraph 9 above have been dealt with exhaustively and collectively as seen in the body of this judgment.

Having analysed the evidence as tendered, and there having been no serious challenge in cross examination of the plaintiffs case by the defence Advocate, it is my finding that the defendants defences as filed are but mere denials and were only made to delay the realization of the advances made to the 1st defendant by the plaintiff and secured by the Debenture and personal guarantees by the 2nd and 3rd Defendants voluntarily and without duress, and knowingly executed the personal guarantees to guarantee the payment of Kshs.6 Million and any other amount that may become due from the date of the execution and registration on the 15th January 1997. The plaintiff's case having been uncontroverted and unchallenged, it must succeed.

16. The court is satisfied that the plaintiff has proved its case against all the defendants on a balance of probability. Accordingly, judgment is entered for the plaintiff against all the defendants jointly and severally in the sum of Kshs.5,557,872.70 plus interest at 30% per annum from the date of filing the suit until payment in full. The plaintiff shall have costs of the suit.

Dated, signed and delivered in open court this 19th day of November 2015

JANET MULWA

JUDGE