



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 52 OF 2014

MIDDLE EAST BANK KENYA LTD. ::::::::::::::: PLAINTIFF

- VERSUS -

PRISKO PETROLEUM NETWORK LTD. :::::::::::::::1ST DEFENDANT

CHARLES WATHAKA KING'ORI ::::::::::::::: 2ND DEFENDANT

SHADRACK NDAMBUKI KOMBO ::::::::::::::: 3RD DEFENDANT

ELIJAH JOHN MWANGI KINYANJUI ::::::::::::::: 4TH DEFENDANT

NAPHTALI MUNGAI MUREITHI ::::::::::::::: 5TH DEFENDANT

CHRIS NYAKUNDI ::::::::::::::: 6TH DEFENDANT

RULING

1. The Notice of Motion application before the court is dated **20th June 2014** by the Plaintiff. It is filed under Order 13 Rule 2 and Order 51 of the Civil Procedure Rules and Sections 1A, 1B, 3 & 3A of the Civil Procedure Act.
2. The Applicant seeks the following prayers:-
 1. ***That Judgment on admission be entered for the Plaintiff against the Defendants in the sum of Kshs.39,544,065.91 as at 1st August 2013 plus contractual interest thereon up to date of payment.***
 2. ***That the costs of this application and the suit be awarded to the Plaintiff.***
3. The application is premised on the grounds stated therein and is supported by affidavit of Elizabeth Ong'are dated 12th June 2014. The application is not opposed.
4. The application came up for hearing on 28th July 2014 but the court was not satisfied that it was served and was then adjourned to 14 October 2014 when, upon proof of service vide affidavit of service filed in court on 14th October 2014, I allowed Mr. Onyambu to proceed with highlighting his submission which he had sought the leave of court to file on 10th October 2014.
5. The brief history of the application is that on diverse dates as indicated herein, the Defendant sought, either as borrowers or as guarantors, and were granted various financial accommodation repayable under the terms and conditions which the Defendants have now failed to comply with.

Pursuant to such non-compliance the Defendants made various unfulfilled promises to pay the said moneys. Those promises, the Plaintiff now claim have amounted to admission of debt, and hence this application for entry of judgment on admission. The said financial facilities are:-

- a. **Facilities letter dated 26th March 2011 – (shown as annexure “E.O.1” – Page 6 of the supporting affidavit and page 10 of the Plaintiff’s bundle of documents.) This facility was in the nature of a short term loan for Kshs.17,000,000/= initially at the rate of 15.75% per annum subject to a further interest at 6% per annum in event of default (see schedule of particulars at page 25 of the supporting affidavit). The facility dated 25th March 2011 was disbursed through the 1st Defendant’s bank account 8250479009.**
- b. **Facility letter dated 15th June 2011 (shown as annexure “E.O.2 page 32 of the Supporting Affidavit). This facility was requested as an additional facility to the existing short term loan. The facility of 15th June 2011 was in the nature of an overdraft facility for the sum of Kshs.3,500,000/=. This facility was requested for as an “addition to” the existing short term loan (see paragraph 1 at page 32, of the supporting affidavit). the same securities provided by the Defendants company for the short term loan facility were to be used for this facility and save as specifically provided in the facility letter. It was agreed that “all the other terms and conditions as per letter of offer REF: ML/ADV/111/2011 and ML/ADV/116/2011 dated 25th March 2011 respectively remain unchanged.” The Defendants duly executed acceptance notes for the overdraft facility.**
- c. **US Dollar Current Account A/C No. 0255479026**

The Defendants also opened and operated a US Dollar current account which went into overdraft to the extent of USD 148/43 on account of bank charges.

The above facilities were secured by the personal guarantees of the directors i.e. the 2nd – 6th Defendants:-

- a. **The 2nd Defendant – Charles Waithak Kingori signed acceptance of facilities and personal guarantee.**
- b. **3rd Defendant – Shadrack Ndambuki Kombo signed acceptance of facilities and personal guarantee.**
- c. **4th Defendant – Elijah Johm Mwangi Kinyanjui signed acceptance of facilities and personal guarantee.**
- d. **5th Defendant – Naphtali Mungai Mureithi signed acceptance of facilities and personal guarantee**
- e. **6th Defendant – Chris Nyakundi signed acceptance of facilities and personal guarantee.**

It was submitted that the personal guarantees joint and several and were payable on demand. The demand notices were served upon the Defendants as follows:-

- i. **Demand letter dated 8th March 2012.**
- ii. **Letter dated 14th June 2012.**
- iii. **Letter to personal guarantors (directors) dated 14th February 2013**
- iv. **Letter to guarantors dated 9th August 2013.**
- v. **Ultimately demand and notice of Intention to use sent through Registered Post.**

6. The Plaintiff has submitted that the above debts were admitted by the Defendants in various correspondences and in affidavits filed in court, as follows. In the letter dated 19th March 2010 (at page 65 of the supporting affidavit), the Defendants unequivocally confirm their debt to be Kshs.28,998,227.78/= as at 25th February 2013. In the letter dated 28th May 2013 (page 69 of the supporting affidavit) in responds to the Plaintiff letter of 24th May 2013 the Defendants admits that although they may not arrive at the exact sum, the sum of Kshs.37,119,066.78/= is acceptable as “fairly accurate given the sum borrowed, interests accrued and the time taken since disbursements.” The Defendants further undertook to have their “total indebtedness extinguished in your books within June 2013”. The last paragraph of letter refers to the undertaking to pay as a ‘negotiated position.’ The Plaintiff’s letter of 24th May 2013 referred to in the Defendant’s letter

of 28th May 2013 above said is also found at page 120 of the Plaintiff's bundle. The letter of 24th May 2013 was giving a full explanation of the balance in response to earlier queries raised in an earlier letter by the Defendants.

7. In the letter dated 22nd August 2013 page 71 – 72 of the supporting affidavit signed by the Directors of the 1st Defendant, the Defendants are responding to the various demand letters 'addressed to the guarantors' and unequivocally state:-

“The board admits the debt in your books and is trying all possible means to redeem the same.”

8. The replying affidavit filed by the Defendant is on 16th July 2012 a total contradiction of their statement of defence. At paragraphs 3 and 4 of the replying affidavit, the Defendant admit the facilities including the interest payable, a position they have totally contradicts their statement of defence. At paragraph 5 and 7 of the Defendants admit and offer to settle the debt but only to extent of Kshs.28,998,223.75/=
9. I have carefully considered the application. It is not opposed, but I have also carefully considered the defence. The defence appears to me to be a mere defence denying everything and does not explain the previous admissions of debt. It is a sham to the extent that it does not respond to the admissions contained in various correspondences and affidavit. The application shows clear case of admission of the entire claim.
10. Having said above, it is now my duty to find out what the law says on an applicator such as this. Order 13 Rules 2 of the Civil Procedure Rules states:

“Any party may at any stage, where admission of facts has been made either on the pleadings or otherwise apply to the court for such judgement or order as upon such admissions, he may be entitled to, without waiting for the determination of any other question between the parties and the court may upon such application make such order or give judgement as the court may think just.”

Order 51 Rule 1 provide for the process of approaching the court i.e. by way of Notice of Motion as herein. Section 1A and 1B of the Civil Procedure Act prescribes the overriding objectives of the Civil Procedure Act which include the facilitation of the just, expeditious, proportionate and affordable resolution of civil disputes.

11. In the case of **Choitram Vs Nazri [1982 – 88] IKAR 437**, Madan JA (as he then was) stated:-

“for the purposes of Order 12 Rule 6 admission can be express or implied either on the pleadings or otherwise in correspondence. Admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them. Without requiring a magnifying glass to ascertain their meaning . . .”

12. In **Computer Source Point Limited – Vs Lantech Limited [2004] eKLR**, the court stated:

“The law on guarantees is clear. If the guarantees are clear unqualified and unambiguous and relate to the amount claimed once default has been made by the principal debtor or once liability against the principal debtor has been established the surety is automatically liable.”

13. In the upshot, I am satisfied that the Plaintiff's application is merited, and that there are clear instances of admission for the entire claim. More importantly the application was served upon the Respondents who have decided not to defend the application. There is only one inference in the Defendants action, that is, they either do not have a response, and if they do, it is not the kind of response that will assist their case. In the upshot, the Plaintiff's application dated 20th June 2014 is herewith allowed. Costs of this application and of the suit here shall be for the Plaintiff/Applicant.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 31ST DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Onyambu for the Plaintiff/Applicant

No appearance for Defendants/ Respondents

Irene – Court Clerk