



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 924 OF 2009

NIC BANK LIMITED.....PLAINTIFF

-VERSUS-

ARCHEN COMPANY LIMITED.....1ST DEFENDANT

LAZARUS OKELLO.....2ND DEFENDANT

FREDRICK GICHUHI.....3RD DEFENDANT

J U D G E M E N T

1. The suit herein was instituted by way of a Plaint dated **7th December 2009** and filed in Court on **18th December 2009**. The suit is for the claim of:-
 - a. *Kshs. 2,531,469.92.*
 - b. *Interest thereon at 9% per annum with effect from the 1st day of August 2009 until payment in full.*
 - c. *Such further or other charges and expenses as may hereafter accrue.*
 - d. *Costs of this suit and interest thereon*
2. The facts of the case are that on or about **8th April 2008** and at the 1st Defendant's request and instance, the Plaintiff by a letter of offer of the same date advanced to the 1st Defendant the sum of **USD 30,000** by way of overdraft facility and for purposes of working capital finance. The said sum was to attract interest at the rate of 8% per annum and an excess rate of a further 1% per annum for any amount above the overdraft limit or such other rate as may be determined by the Plaintiff from time to time. In addition, a flat fee of **US \$ 500** was to be charged annually and was recoverable upfront.
3. It was an express term of the lending contract contained in the letter of offer that the financed amount would be due for repayment on a fluctuating basis from cash flow or on demand from the Plaintiff. It was also an express term of the said Contract that the 2nd and 3rd Defendants, as directors of the 1st Defendant, would provide further security by way of Director's personal guarantees and indemnities as well as joint registration over ownership of Motor Vehicle registration numbers KAL 617 K and KAQ 371 W.
4. It is the Plaintiff's case that the Defendants accepted the terms of the offer, drew down the

overdraft sum of USD 30,000 or its equivalent in account number CA2-1-200-001544. The Defendants thereafter became bound to repay the aforesaid sum under the terms of the Letter of Offer. The 2nd Defendant executed a Guarantee and indemnity on or about 16th April 2008 in favour of the Plaintiff undertaking to pay the Plaintiff a sum of **USD 30,000** together with interest and costs in the event the 1st Defendant defaulted in repayment of the overdraft facility. It is averred that as at **31st July 2009**, the 1st Defendant owed the Plaintiff **Kshs. 2,531,469.92**. The Plaintiff now claims this sum together with interest and costs.

5. The Defendants controverted the claim by filing their Defence on **8th April 2010**. In the said Defence, the Defendants essentially denied the Plaintiff's claim in its entirety.
6. The 1st Defendant was sued as the principal debtor while the 2nd and 3rd Defendants were sued as guarantors. The Plaintiff later on withdrew the suit as against the 3rd Defendant because the guarantee being relied on was not executed by the 3rd Defendant.
7. The hearing of the suit commenced on **4th October 2012** with Mr. Henry Maina, the Legal manager of the Plaintiff, testifying as PW 1. He reiterated the facts of the case as per the Plaintiff and confirmed that the 1st Defendant had taken an overdraft facility of USD 30,000 to be repaid in twelve (12) months. He produced the original offer letter dated **8th April 2008**. It is PW 1's testimony that the 1st Defendant did not repay the facility as agreed. Upon default, the Plaintiff demanded for repayment vide the demand letter dated 14th August 2009. It is further his testimony that the outstanding sum as at the time of coming to Court was Kshs. 2, 531, 469.92/=. As at 31st March 2012, the outstanding amount was at Kshs. 5,749,360/=.
8. In terms of recovering the sums owed, it was PW 1's testimony that the Plaintiff was unable to sell the two vehicles registration numbers KAL 617 K and KAQ 371 W. This is because they could not trace the said vehicles. However, the Plaintiff was still in possession of the log books.
9. On cross-examination, PW 1 confirmed that they were not able to trace the motor vehicles, which had been jointly registered in the name of the Bank and the 1st Defendant. He went on to testify that as per the Statements of Accounts on 31st August 2008, the balance due was **Kshs. 2,590,595.34/=**. The interest charged was **Kshs. 59,125.42/=**. He could not explain how the Plaintiff arrived at the said interest but it was his testimony that it was based on the applicable rate of 4% above the United States base rate, which was 4% at that time.
10. On re-examination, PW 1 clarified that the interest rate computation per month would include the changes in the base rate, plus 4% as well as 1%, default interest.
11. The Defence case commenced on **28th July 2014** with the 2nd Defendant giving testimony as DW 1. He introduced himself as one of the managing directors of the 1st Defendant. He testified that the Plaintiff had the logbooks for the Lorries, registration numbers KAL 617 K and KAQ 371 W belonging to the Defendants. It was also his testimony that they had given an undertaking of up to USD 30,000. He went on to testify that the Plaintiff never wrote to them asking for payment of the said money.
12. It was DW 1's testimony that the Defendants secured the loan at an interest rate of 8% per annum. It was his testimony that according to the Statement of Accounts dated 31st January 2009, the interest charged was USD 214.64 which was higher than 8%. It was also his testimony that since the Plaintiff had the Logbooks, they should have recovered the sums due by selling the Lorries. He confirmed that the Lorries were in Sudan. He further testified that the Plaintiff should have first sued the 1st Defendant before suing him. He went ahead to state that the defendants have since paid Kshs. 500,000/=.

13. In terms of paying the sums due, it was DW 1's testimony that the Plaintiff should give the 1st Defendant time to pay after the war in Sudan is over. He concluded by urging that the suit against him should be dismissed.
14. On cross-examination, DW 1 confirmed that he had guaranteed the loan of USD 30,000 together with interest. It was however his testimony that he did not receive the demand letters addressed to the 1st Defendant upon default. On re-examination, he testified that the Plaintiff never asked them to avail the Lorries.
15. The parties filed their written submissions as directed by this Court.
16. It is not in dispute that the 1st and 2nd Defendants are indebted to the Plaintiff. It is also not in dispute that the 2nd Defendant was indeed a guarantor to the 1st Defendant. The issues arising are whether the 2nd Defendant is indebted to the Plaintiff by virtue of being a guarantor to the 1st Defendant and whether the interest rate charged by the Plaintiff was contractual.
17. In his testimony, the 2nd Defendant confirmed that the overdraft facility was secured by joint registration over the Lorries in the names of the Plaintiff and the Defendants as well as his personal guarantee. It was however submitted for the 2nd Defendant that the Plaintiff did not attempt to locate the Lorries but decided to make the 2nd and 3rd Defendants principal debtors by suing them without exhausting the avenues available.
18. On whether the Plaintiffs had exhausted the avenues available, it is the Plaintiff's testimony that they wrote a demand letter dated 14th August 2009 to the 1st Defendant as well as the directors demanding payment. (*The said letter is at page 22 of the Plaintiff's bundle of documents*). There is no indication that the 1st Defendant responded positively either by paying the sums due or making proposals for payment of the same.
19. The 2nd Defendant has testified before this Court that the Lorries are not within this Court's jurisdiction. The 2nd Defendant further testified that he was uncertain on the whereabouts of the Lorries. In summary, the Plaintiff did not have many options other than to claim the amounts due from the 2nd Defendant who had executed a guarantee undertaking to pay the overdraft facility in the event of default by the 1st Defendant. It therefore fell upon the 2nd Defendant to pay on demand the guaranteed sum.
20. On the issue of interest rate, the Defendants did not substantiate the allegation that the Plaintiff had charged them excessive interest. The 2nd Defendant confirmed that the Plaintiff was entitled to levy an excess rate of 1% per month for any amount above the overdraft facility in addition to the interest at the rate of 8% per annum. The said interest is clearly stated in the Letter of Offer dated 8th April 2008 at page 2 of the Plaintiff's bundle of documents.
21. In light of the above, I find that the Plaintiff has proved its case on a balance of probabilities. I therefore enter Judgment for the Plaintiff as against the 1st and 2nd Defendants jointly and severally in the following terms:-
 - a. ***Kshs. 2,531,469.92.***
 - b. ***Interest thereon at 9% per annum with effect from the 1st day of August 2009 until payment in full.***
 - c. ***Costs of this suit.***

That is the Judgment of the court.

READ, DELIVERED AND DATED AT NAIROBI THIS 19TH DAY OF DECEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Muthoka holding brief for Mburu for the Plaintiff

Were for the Defendant

Teresia – Court Clerk