REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 1848 of 1997

TRADE BANK LTD. (in liquidation) :: **1ST PLAINTIFF**

TRADE FINANCE LTD. (in liquidation) :: **2ND PLAINTIFF**

- VERSUS -

ELYSIUM LTD. ::: **1ST DEFENDANT**

NITIN P. DAWDA ::: **2ND DEFENDANT**

HASMUKH P. DAWDA :: **3RD DEFENDANT**

J U D G E M E N T

The Plaintiff (Trade Bank Limited - in liquidation) filed the suit on 23rd July 1997 against the 1st, 2nd and 3rd Defendants claiming Kshs.11.589,911.70 together with interest at 18% as from 1st August 1996 till full repayment, costs and other relief. The suit is based on the allegation that the 1st Defendant, a limited liability company was a customer of the Plaintiff and was advanced the above said sum of money in installments of Kshs.3,000,000/= and that the 2nd and 3rd Defendants, being directors of the 1st Defendant agreed to and guaranteed the repayment of the said sum but defaulted or refused to do so hence this suit.

The Defendants filed a joint defence on 1st September 1997 in which, while admitting the description of the parties and that the 1st Defendant was a customer to the Plaintiff, they nonetheless denied that the Defendants were liable to the Plaintiff under any written agreement or guarantee as alleged in the Plaint and they put the Plaintiff to the strict proof thereof. The Defendants further denied that the 1st Defendant operated an account with the Plaintiff at their Valley Road Branch as alleged. The Defendants further stated that the Plaintiff's claim was time barred.

The Plaintiff sometimes in June 2000 amended the Plaint. This amendment brought in Trade Finance Limited (in liquidation) as 2nd Plaintiff, among other amendments. The Defendant also on 10th July 2000 filed a joint statement of defence to the Amended Plaint which also had a counter-claim against the 1st Plaintiff. The counter-claim alleged that 1st Plaintiff in reckless and negligent exercise of its statutory power of sale sold by Private Treaty the 1st Defendant's property L.R. Number 209/10324 at a throw away price of Kshs.7,500,000/=. The counter-claim sought a declaration that the sale of the 1st Defendant's property was illegal and wrongful, general damages, and an account for the charge debt. On 1st December 2011 the Defendants filed a joint amended statement of defence to the Amended Plaint. The amendment brought in, among other things a claim of special damages in the sum of kshs.11,000,000 and a claim on interest at 25% p.a. from 1st August 1996..

The Defendants filed their list of documents in court on 3rd April 2002 while the Plaintiff did the same on 20th January 2012.

There is no evidence that parties agreed on issues. Neither is there any evidence that parties filed separate issues.

On 23rd January 2012 the hearing of the suit commenced with the evidence of P.W. 1 ZACK KIPLAGAT RONO who testified that he is the liquidation agent of the Trade Bank Limited in liquidation. He said that the 1st Defendant was a customer with the 1st Plaintiff and contracted to borrow Kshs.10,000,000/= in 1991. The borrowing was secured by charge over L.R. No 209/10324 and the charge was registered on 28th November 1991. By1993, the 1st Defendant was in default and the Plaintiff demanded what was then outstanding being Kshs.8,083,848/45 (as per letter dated 16th March 1993 page 4 of Plaintiff's bundle). This demand was not met but the 1st Defendant's advocate replied with a proposal which admitted that the 1st Defendant owned the 1st Plaintiff some money the exact amount of which could only be determined by a provision of full statement of account. The advocate further proposed mode of payment of the amount found due. These proposals were rejected by the 1st Plaintiff. The witness referred the court to pages 42 – 63 of the Plaintiff's bundle of documents. Due to the failure of any negotiations the 1st Plaintiff then proceeded to issue a statutory notice of sale of the security. They valued the property. The valuation on 24th November 1994 returned an open market value of Kshs.7,800,000/= and a forced sale value of Kshs.7,400,000. The Plaintiff attempted on unsuccessful public auction of the property where the highest bid was Kshs.2,500,000. The Plaintiff then sold the property by private treaty at Kshs.7,500,000/= on 2nd August 1995. After crediting the loan account there was still short fall of Kshs.11,589,811/70. That is the claim in this suit. The witness produced the valuation report dated 24th November 1994 by Mwaka Musau Consultants (page 65 of Plaintiff's bundle). He also produced the Plaintiff's Bundle as exhibit number 1.

On cross-examination the witness confirmed that he was giving evidence on behalf of the 1st Plaintiff only as the 2nd Plaintiff no longer existed. He testified on the strength of the records as he was not in the employment of the 1st Plaintiff during the relevant period. He said that he was appointed by the Deposit protection Fund Board of Kenya. He confirmed that the 1st Defendant had an account at the Valley Road Branch of the Plaintiff and was not aware of the account at International House Branch. He affirmed that the 1st Defendant borrowed Kshs10,000,000/= and not Kshs.3,000,000/=. The guarantees given were those noted at pages 4 – 11 of the Plaintiff's Bundle of Documents. He conceded that the documents before the court had not been duly stamped.

Statutory Notice (page 71) was issued to the 2nd Defendant.

The witness conceded that they did not seek the 1st Defendant's authority to sell the property by private treaty put pointed out that there is such power under the Transfer of Property Act 1882.

On re-examination the witness testified that statutory notices were issued and served. He referred the

court to pages 71 – 74 of the Plaintiff's Bundle. The witness concluded his testimony by reference to pages 42 – 49 which he said testified that the 1st Defendant had acknowledged the debt and sought or negotiated how to repay the same.

The Defendants called one witness MR. NITIN P. DAWDA who testified that he is a director in the 1st Defendant's company and that the 3rd Defendant is his elder brother. He recalled the transaction. They borrowed only Kshs.3,000,000/= and executed a charge document for a maximum sum of Kshs.10,000,000/= and they also offered a guarantee to the 2nd Plaintiff for Kshs.3,000,000/=. The 1st Defendant operated an account at the Institutional House Branch. The 1st Defendant fell into areas, the security was sold by the bank but no accounts were rendered to the 1st Defendant. The witness denied owing the claim. He testified that the property was sold at a gross under value. The 1st Defendant carried out two separate valuation of the property. One is dated 17th December 1997 by Ryden Meghraj International Limited which returned a value of Kshs.17,000,000/=. The second valuation is (as at January 1996) by M/s Lloyd Masika Limited returned a value of Kshs.18,500,000/=. Both reports were produced as defence exhibits 1 and 2 respectively.

On cross-examination the witness denied giving a guarantee to the 1st Plaintiff but admitted giving one to the 2nd Plaintiff. He denied receipt of any notices.

Asked why in their advocates letter dated 14th June 1995 (page 88 of the Plaintiff's bundle) the advocate quoted the value of the property at Kshs.10,000,000/=, the witness said that that was the advocates own opinion.

The foregoing is the summary of the parties' testimonies regarding this claim. The parties filed written submissions. The Plaintiff filed its submission on 26th March 2012 while the Defendant did the same on 6th April 2012.

As I observed earlier, no party filed issues in this matter. I will therefore adopt the issues raised by the Defendants in their submissions. These are:-

1. *Whether the Plaintiff had the capacity to file this suit.*

2. *Whether the Defendants entered into a contract with the Plaintiff's for borrowing and/or guarantee, and whether the documents of guarantee produced in evidence are admissible in law or are enforceable.*

3. *Whether the Plaintiff suit is statute barred.*

4. *Whether the Defendants counter-claim is merited.*

5. *Whether the Plaintiff's claim is merited.*

6. *Who pays the costs of the suit?*

On the first issue the Defendant has submitted that the suit herein is brought by two entities. Trade Bank Limited (in liquidation) and Trade Finance Limited (in liquidation). The said companies are under liquidation. In this regard the Defendants submitted that the Plaintiff have no capacity to institute or maintain the current proceedings without the leave of the court, and that no leave prior to the institution of this suit was obtained and no evidence of the same has been provided.

Section 235 (1) of Banking act states:-

"If an institution becomes insolvent, the Central Bank may appoint the Board (Deposit Protection Fund Board) . . . to be a liquidator of the institution, and the appointment shall have the same effect as the appointment of a liquidator by the court under the provisions of Part VI of the Companies

Act. . .”

Part VI of the Companies Act deals with the procedures of Winding Up a company. Once a liquidator or an interim liquidator has been appointed under Section 235 his powers are restricted by that appointment under Section 228 of the Act, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.

Section 241 (1) states:-

“The liquidator in a winding up by the court shall have power, with the sanction either of the court or of the committee of inspection –

(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company.”

Although the current Liquidator was not appointed by the court, his appointment is under Sections 35 and 36 of the Banking Act which makes references to Part VI of the Companies Act.

The Liquidator in this matter has not provided any evidence to this court to show or prove that he secured the leave of the court to commence or to continue with these proceedings in the name of the company. That being so, in my view, and being supported by the provisions of the law I have cited above, the Plaintiff lacked the capacity to bring this suit.

In support of this position I cite the case of **JOHNSON MBUGUA MUGO & 2 OTHERS – VS – DOMINIC KINUTHIA & ANOTHER [2004] e KLR**, where the court, faced with a similar objection, struck out documents filed by a company under liquidation without leave of the court.

The consequence is that this suit is bad in law and the acts of the liquidator are in vain, null and void. Having reached this decision the other issue is the position of the counter-claim in this matter. In my considered view, the counter-claim is a suit on its own. Section 228 and 241 of the Companies Act apply *mutatis mutandis*. The Defendant must seek the leave of court to sue or continue any proceedings which involve a company under liquidation. To bring this point home, the leave which the Plaintiff ought to have sought is required to be sought not in this cause but in the cause of the company proceedings which appointed the Liquidator. That meant that it is not even open to any of the parties to apply for such leave within this cause. The Defendant would probably submit that because the Plaintiff opened itself to judicial proceedings by coming to court, the counter-claim should stand. This reasoning would be against the direct provision of the law which I have cited in this matter. In view of the foregoing the counter-claim cannot stand without the suit.

I will, for the foregoing reasons, not determine the issue as to whether or not the suit is statue barred.

At this stage I may also comment about the counter-claim. Although the 1st Defendant amended the defence and made a counter-claim, no adequate effort was made by the Defendants to prove the elements of the counter-claim. The Defendant’s witness produced two valuation reports of the property, one by Llyod Masika Limited dated January 1996 for Kshs.18,500,000/= and another by Ryden Meghraj International Limited dated 17th December 1997 for Kshs.17,000,000/=. The Defendant’s witness then alleged that since the Plaintiffs’ property was sold at Kshs.7,500,000 the Defendant was entitled to the difference of Kshs.11,000,000/=. However, there was no serious attempt to prove that the valuation carried out by the Plaintiff prior to the sale by private treaty had serious inaccuracies or was doctored to meet particular circumstances. That valuation was done by Mwaka Musau Consultants on 24th November 1994, two years before the Defendant’s first valuation. In property market, two years is a long enough period to return a completely different valuation. I am not convinced that the differences in the valuation showed that the Plaintiff’s valuation was fraudulently done. In any event, the Defendant’s two valuations were carried out by the Defendant who was interested in a particular return of valuation. It can hardly have been independent. No evidence was led, and no witnesses were called by the Defendants to specifically prove the contents of these valuation reports. Further, the Defendant’s advocates in their letter

dated 14th June 1995 (at page 88 of the Plaintiff's Bundle) had conceded that the value of the property was around Kshs.10,000,000/=. In my judgement the counter-claim was not prove to the degree required by law, and I would still have dismissed it even if I did not strike out the Plaint.

The second issue is whether the 1st Defendant entered into a contract with the Plaintiff for the borrowing and/or guarantee. From the witness of P.W. 1 and D.W. 1 and on the strength of the documents filed in court I have reached the conclusion that the 1st Defendant was a customer of the 2nd Plaintiff. There was a contract of lending of Kshs.3,000,000/= which was secured by the two separate guarantees provided by the 2nd and 3rd Defendants. There was an issue as to whether the said guarantees were admissible and enforceable at law, given that the copies provided were not stamped with duty as required under the law. The Defendants' counsel submitted extensively why this court should refuse the admissibility of these guarantees. In my view, however, any submissions that the said guarantees are not enforceable cannot stand when the 1st Defendant has in several correspondences produced before this court, admitted liability. Even if the said guarantees were to be excluded – which I have not, the claim secured by the said guarantees, having been acknowledged in many correspondences would still be recoverable as debt due on admission. I therefore find as a fact that there existed a valid contract between the Plaintiffs and the 1st Defendant under which the 2nd and 3rd Defendants gave each a guarantee which this court, having regard to subsequent developments, communications and negotiations between the parties, is able to enforce.

The other issue I wish to address is the amount of liability of money which would be payable under the said loan and guarantee.

The Plaintiff's claim can be categorized as a non performing loan. Under Section 44 A of the Banking Act Cap 488, an institution is limited in what it may recover from a debtor with respect to a non-performing loan to a maximum amount.

Under Section 44 A (6) which addresses the maximum amount where the loan becomes non performing before the Section came into operation, and which is applicable in this case, the maximum amount payable is:-

(a) *the principal and interest owing on the day this section came into operation,*

(b) *interest at agreed rate, accruing after the day this section came into operation, not exceeding the principal and interest owing on the day this section came into operation; and*

(c) *expenses incurred in the recovery of any amounts owed by the debtor.*

So, if I did not strike out the suit, the maximum amount payable to the Plaintiffs' would be determinable under Section 44 A (6) of the Banking Act.

For the foregoing reasons I herewith strike out the Plaintiff's Amended Plaint herein. I also strike out the Defendant's counter-claim herein.

Each party shall bear own costs of the suit.

This is the Judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI

THIS 18TH DAY OF JUNE 2012.

E. K. O. OGOLA
JUDGE
PRESENT:
Mc Count for the Plaintiffs

Mutugua for the Defendants
Teresia – Court clerk