



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 58 of 2005

INDUSTRIAL DEVELOPMENT BANK LTD. .... PLAINTIFF

VERSUS

SEVEN FOURTEEN LTD. (714) ..... DEFENDANT

JUDGMENT

By a plaint filed in Court on 1<sup>st</sup> February, 2005, the Plaintiff herein prays for judgment against the Defendant for –

- (a) *Kshs.7,780,596.10.*
- (b) *Interest on (a) above at the rate of 23% from 13<sup>th</sup> August, 2004, until payment in ful.*
- (c) *Costs of this suit and interest thereon.*

The Defendant filed a defence on 20<sup>th</sup> July, 2005 and the Plaintiff filed a reply to the defence on 16<sup>th</sup> November, 2005. Arising out of the pleadings, the parties filed 13 agreed issues as follows –

1. *What was the value of the letter of credit applied for by the Defendant and approved by the Plaintiff?*
2. *Did the Plaintiff unjustifiably delay in approving the letter of credit?*
3. *If so, is the Defendant stopped or did it waive its right to rely on the delay by its subsequent conduct?*
4. *Did the Plaintiff induce the Defendant to apply for the said facility through misrepresentation and undue influence?*
5. *If so, do the same render the letter of credit void and unenforceable?*
6. *If so, is the Defendant entitled to damages as a consequence thereof?*
7. *If so, what amount of damages is the Defendant entitled to?*
8. *Was the Plaintiff justified in declining to approve the balance of the letter of credit, if any to the Defendant in the circumstances?*
9. *Was the Plaintiff aware of the business dealings between the Defendant and Messrs. Penima Limited, Seradic*

***International Limited and Alexin Limited?***

10. ***Did the Plaintiff owe the Defendant a fiduciary duty requiring the Plaintiff to warn the Defendant of the financial position of Messrs. Penima Limited, Seradic International Limited and Alexin Limited?***
11. ***Did the Defendant breach the terms of the letter of credit?***
12. ***Has the Defendant unequivocally acknowledged its indebtedness to the Plaintiff?***
13. ***Is the Plaintiff entitled to the prayers sought in the plaint?***

Although the Defendant was served by registered post with leave of the Court, it did not attend Court at the hearing of this case. Being satisfied that they were duly served in sufficient time for them to attend Court but did not do so, the Court proceeded *ex parte*. Mr. Limo Taboi testified for the Plaintiff as PW1. He gave sworn testimony that he was a credit officer in the Plaintiff company and was aware of the issues raised in this suit.

In his testimony, he told the Court that the Defendant operated an account as a customer of the Plaintiff Bank. They asked for a letter of credit to pay for some equipment which was to be installed at Dar es Salaam Airport. The application was dated 13<sup>th</sup> March, 2005. He produced the letter of application as the Plaintiff's exhibit No.1. The Bank accordingly gave the letter of credit on 11<sup>th</sup> April, 2003 in the form of US\$60,759.00. He produced a copy of that letter as exhibit No.2. The letter of credit was accordingly utilized and drawn upon. That letter was an irrevocable letter of credit based on what the Defendant had applied for. By the terms of letter of credit, the Defendant was supposed to pay the Plaintiffs within 3 months from April, 2003. It was not repaid within the 90 days agreed upon. The Plaintiffs wrote to the Defendants severally but the latter were always requesting for more time to pay. By mid-2004, the account was overdrawn to the extent of Kshs.7,780,596.10 million.

On 17<sup>th</sup> June, 2004 the defendants proposed by a letter of that date, to pay Kshs.1.4 million between 30<sup>th</sup> June and 17<sup>th</sup> July, 2004 and requested the Plaintiff to convert the balance into a term loan whereby they would pay Kshs.300,000/= per month for 3 years to clear the whole amount. The witness produced that letter as exhibit No.5. However, the Defendants did not make the payments. The Bank agreed to convert the debt into a term loan for 27 months payable at Kshs.300,874/= per month. As at 29<sup>th</sup> June, 2004 the Defendants owed the Bank Kshs.8,254,050/=. The rate of interest was to be at 17% p.a. If they defaulted, it would attract 10% above baseline. In those circumstances, the rate would be above 20%. The agreement along those lines was embodied in a letter which was produced as exhibit No. 6.

The Defendants did not repay the money as agreed. But they continued to operate their current account. The Plaintiffs produced cheques by which the Defendants continued to withdraw money from May, 2003 to January, 2004 and the debt continued to attract an interest of 17% and 10% above baseline. After 7 months expired, the Plaintiffs demanded payment through their lawyers but the Defendants did not respond. The Plaintiffs therefore claim Kshs.7,780,596.10 as at 13<sup>th</sup> August, 2004 with interest at 23% p.a. till payment in full based on the Default Clause contained in the letter of offer. They also ask for costs of the suit. From the date the suit was filed, the Defendants did not make any payments.

As the Defendants did not attend Court, the evidence of the Plaintiff's only witness went unchallenged as he was not cross-examined. He testified on oath and impressed the Court as a witness of truth. In the circumstances, the Plaintiff's evidence establishes, on a balance of probabilities, that the Defendant indeed owes the Plaintiff the amount of money claimed in the plaint. I therefore find that the Plaintiffs have proved their case and that they are entitled to judgment as prayed.

I accordingly enter judgment for the Plaintiff against the Defendant as follows –

- (a) ***Judgment in the sum of Kshs.7,780,596.10.***
- (b) ***Interest thereon at 23% from 13<sup>th</sup> August, 2004 until payment in full.***
- (c) ***Costs of this suit and interest thereon at Court rates from the date of judgment until payment in full.***

Orders accordingly.

**Dated and delivered at Nairobi** this 3<sup>rd</sup> day of July, 2010.

**L. NJAGI**  
**JUDGE**