



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS AND TAX DIVISION

CIVIL CASE NO. 635 OF 1999

**RELIANCE BANK LIMITED (UNDER CENTRAL BANK OF KENYA
MANAGEMENT).....PLAINTIFF**

VERSUS

**METALLICA ENGINEERIGN INDUSTRIES
LIMITED.....1ST DEFENDANT**

RAJNIKANT BABUBHAI

PATEL.....2ND DEFENDANT

JITENDRA JASHBHAI

PATEL.....3RD DEFENDANT

PINAKIRAI RAMBHAI

PATEL.....4TH DEFENDANT

JUDGMENT

1. The Plaintiff's case as pleaded in the plaint is that on or about 15th September 1997 the 1st Defendant requested the Plaintiff for banking facilities which were granted. The Defendant did not honor the obligation of repaying the facility and as at 31st March 1999 a sum of Kshs. 75,570,184.85 was due

and owing with interest at the rate of 21% per annum. As security for that facility the 2nd Defendant, 3rd and 4th Defendants executed a guarantee in favour of the Plaintiff. A notice was duly issued to the 2nd, 3rd and 4th defendants to honor the obligation under the guarantee and due to their default the guarantee crystallized and thus they assumed jointly and severally the liability with the 1st Defendant.

2. The Defendants in their statement of defence denied liability generally and specifically that they applied for the loan or obtained any facility from the Plaintiff. The Defendants did not authorize any withdrawal of funds to be disbursed in a company based in Tanzania. The 3rd Defendant denied having signed any personal guarantee and the 2nd and 4th Defendants contend that they signed blank forms availed to them by the Plaintiff's directors on understanding that no liability will arise there from. The Defendants were never informed that funds were disbursed to a company owned by the Plaintiff's directors in Tanzania.

3. The Plaintiff's case was presented by Yasmin Roshen Kaka (PW1) who works with the deposit protection fund under the Central Bank of Kenya. She is the assistant liquidation agent for the Plaintiff bank which is under receivership. She testified that the claim by the Plaintiff arises from a loan and overdraft facility which was granted to the 1st Defendant while the Bank was operating. According to the Plaintiff, the 1st Defendant wrote an application letter seeking for a loan of Kshs. 50 million on 20th May 1996. The application letter was signed by P. R. Patel and R. B. Patel who are the 2nd and 3rd Defendants.

4. PW1 also referred to a letter dated 15th September 1997 which was written by the 1st defendant asking for a transfer of kshs. 14,019,387.20 from the overdraft account to a loan account. The overdraft was thus adjusted and the sum was transferred as requested. According to PW1 this was an acknowledgment of a debt. On 15th September 1997 the bank offered the 1st Defendant the loan of Kshs. 14,019,380.00 which was to be paid in six equal installments. The letter of offer was signed on behalf of the 1st Defendant. As security for the borrowing the 2nd and 3rd Defendants executed a guarantee as security for the borrowing. The witness also produced statements from June 2001 to February 2009 in respect of the loan account.

5. The outstanding balance is Kshs. 62,076,053.45, this witness also produced another statement for another account with a closing balance of kshs.154,870,731.55. During cross-examination PW1 admitted that both accounts were current accounts which ordinarily are operated through cheques, she confirmed that no cheque book was ever issued to the 1st Defendant. The witness was also put to task to prove the existence of a mandate that was given by the directors of the 1st defendant to authorize the Plaintiff pay out a sum of Kshs. 47,925,449.00 which was paid through voucher to another company. Also the sum of Kshs. 12,537,873.00 was paid by cash to the Plaintiff's director without authorization.

6. The defence case was supported by the evidence of Rajnikant Bhabubhai Patel (DW1) one of the directors of the 1st Defendants. He testified that on 15th September 1999 no advance of 14 million was paid by the Plaintiff to the 1st Defendant. He referred to the letter dated 15th September 1997 and said he recognized the first signature on the letter of offer by the Plaintiff. He however denied that the loan was availed to the 1st Defendant. He also denied a loan of Kshs. 50 million was advanced to the Defendants. He denied having signed the guarantee or receiving a demand letter from the Plaintiff regarding the guarantee. During cross-examination, DW1 stated that the loan account should have been operated through a current account. No cheque book was ever issued this is also borne out of statements of account which only show two debits. The rest of the debits are interest and penalties. The Defendants denied having borrowed any money from the Plaintiff.

7. Parties filed written submissions in support of their respective cases. The main issue for determination is whether the Plaintiff proved on a balance of probability that the Defendants were advanced the sum claimed in the Plaintiff on or about 15th September 1997. The Plaintiff relied on an

application dated 20th May 1996 and a letter dated 15th September 1997. The Defendants have denied having received the loan of Kshs.50 million and what appears probable from the evidence is that the sum of Kshs. 14,019,387.20 was transferred from an existing overdraft to a separate loan account. Clearly the Plaintiff's case is jumbled up, the letter of offer dated 15th September 1997 offers the 1st Defendant a loan of Kshs.14,019,380.00. There is no evidence this money was availed to the Defendants. The statements of account show two debits where a sum of Kshs. 47,924,449.30 was paid out to an entity known as **Norlake Investment Limited**. It is common ground that this was a company which was associated with the Plaintiffs. The other sum of Kshs. 12,537,873.90 was a cash payment to one **Dipark Shah** who is not a Defendant in this suit but an associate of the directors of the Plaintiff.

8. It was also admitted by PW1 that the proceeds of the loan should have been availed through a current account operated by the 1st Defendant's Directors. No evidence was brought out to show the court the mandate by which huge sums of money was moved from the 1st Defendant's account. The Plaintiff's evidence was short of any explanation of how a term loan of kshs.50 million was given to the 1st Defendant. The other curious thing about the statements produced in evidence, is that a loan account Number 0102890-000 commenced on 8th July 1996 when the account was opened with Kshs. 5,000.00 and, on 20th August 1996 it was debited with a sum of Kshs. 47,924,449.30.

9. This is obviously a sharp contrast with the Plaintiff's pleadings in which it is alleged that the loan was advanced or applied for on or about 15th September 1997. How was the loan disbursed before it was applied for? It is now a settled principle that parties to a suit are bound by their own pleadings and the court has to pronounce judgment based on the matters pleaded. As regards the guarantee executed by the 2nd 3rd and 4th defendants, they all denied having executed the guarantee. Moreover the guarantee document is not dated. The Plaintiff's witness confirmed that she had no idea how the guarantee document was signed. It is also doubtful and the Plaintiff did not adduce evidence to prove that a formal notice was issued upon the guarantors to pay the Plaintiff on demand as stated in the guarantee.

10. The upshot of the above analysis is that the Plaintiffs failed to prove on a balance of probability that the sum claimed in the plaint was loaned and disbursed to the defendants. In the result, the Plaintiff's suit fails in entirety; it is hereby dismissed with costs to the 1st and 2nd Defendants, since the other defendants did not attend court they will bear their own costs.

JUDGMENT READ AND SIGNED ON THIS 22ND DAY OF OCTOBER, 2010.

**M. K. KOOME
JUDGE**