REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 277 of 2008

NIC BANK LIMITED……..……PLAINTIFF

VERSUS

NEXT TECHNOLOGY……..……1ST DEFENDANT

JOHN HURST ……..2ND DEFENDANT

HANNAH WANJIRU MWANGI……..3RD DEFENDANT

R U L I N G

The 1st Defendant is the principal debtor, while the 2nd and 3rd Defendants are the guarantors to the 1st Defendant. The Plaintiff has by Notice of Motion dated 23rd December, 2008 sought summary judgment against the Defendants in the sum of Kshs.3,483,618.61 as prayed in the plaint. The grounds for the application are cited on the face of the application namely:

1. THAT there is no defence to this suit nor are there any triable issues.

2. THAT the Defendants are truly and justly indebted to the Plaintiff as prayed in the plaint and were so indebted at the commencement of this suit.

3. THAT it is in the interest of justice that this application be allowed.

The application is supported by the affidavit of Henry Maina, the Legal Manager in the Plaintiff Bank's Debt Management Unit. I have considered the affidavit together with the annextures thereto.

The application is opposed. The Defendants have filed grounds of opposition dated 17th March, 2009 in which the following grounds are raised.

1. THAT the Plaintiff/Applicant's application dated 23rd December, 2008 contravenes the clear provisions of section 44A of Banking Act Cap 488 of the Laws of Kenya.

2. THAT the Applicant has failed to exhibit the total amount owing as principal and interest as against the Defendants consequently denying the court the basis to exercise its discretion in terms of order XXXV Rules 1(1) a, (2) of the Civil Procedure Rules in granting the orders sought.

3. THAT the Applicant's application contravenes the clear principles of commercial law in relation to Principal Debtor–Guarantor relationship and as such the instant application is

pre-mature and misconceived.

4. THAT the Respondents have filed a joint statement of defence that raises serious and viable triable issues hence this instant application should be struck out with costs.

5. THAT the Application is vague, speculative and devoid of material particulars, and therefore the court lacks any factual basis to exercise its discretion in the Plaintiff's favour.

Ms. Waitere for the Plaintiff submitted that the 1st Defendant applied for an additional loan on the 11th July 2005. That the Plaintiff granted it an overdraft facility in the tune of Kshs.1 million and a loan of Kshs.5,431,000/- on account numbers CAI-100-000061 and CLI-4-100-000310 respectively held at the Plaintiff's Bank in its name. The letter of offer and acceptance is annexure 1 while the 1st Defendant's Resolution to borrow is annexure 2. The 2nd and 3rd Defendants executed guarantees which are annexture 3(a) and (b) respectively.

Ms. Waitere submitted that the 1st Defendant failed to pay and demand for payment was made to all three Defendants as evidenced by annextures 12(a), (b) and (c). Ms. Waitere relied on annextures 5 to 11, correspondences from the 1st Defendant to the Plaintiff admitting its indebtedness to the Plaintiff. Ms. Waitere urged the Court to find that facts deponed to in Mr. Maina's affidavit have not been controverted as no replying affidavit was filed.

Regarding the Defendant's joint statement of defence, Ms. Waitere submitted that no triable issues were raised.

Ms. Kamau argued the application on behalf of the Defendants. Counsel submitted that the Defendants' position is that the application is premature, speculative and void of material particulars to enable the court have a basis to grant it.

Ms. Kamau submitted that the joint defence raises triable issues particularly in paragraphs 9 and 10 where the issue of exorbitant interest rate and contravention of the provisions of the Banking Act are raised. Counsel submitted that as deponed to in the supporting affidavit of Mr. Maina the Bank applied interest rate of 26% p.a. in account No. 000061 and 19% p.a. in account No. 0003110. Counsel submitted that no document has been placed before the court to show how 26% p.a. was arrived at.

Ms. Kamau also urged that clause 3 of the Contract between the Plaintiff and the 1st Defendant was contrary to section 44 of the Banking Act as it gave the Bank power to vary interest rates, while the law provided that such variance must be approved by the Minister. Counsel submitted that interest rate was a triable issue.

Regarding the argument raised under section 44 of the Banking Act, Ms. Kamau's argument is misplaced as the said provision of the law has since been repealed and replaced by Section 44A of the Act which stipulates:

"***44A (1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).***

(2) The maximum amount referred to in subsection (1) is the sum of the following –

(a) the principal owing when the loan becomes non-performing.

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

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

(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing"

Ms. Kamau also urged that the Plaintiff had shown that it provided overdraft facilities to the 1st Defendant whose closing balance as of 27th July 2007 stood at Kshs.2,477,585/42. That regarding loan account the principle sum advanced was Kshs.3,483,618/61. Ms. Kamau submitted that no account was exhibited to show the credit advanced to the 1st Defendant and therefore demonstrate how the sum claimed was arrived at.

Ms. Kamau drew the court's attention to annexure 3A, the guarantee by the 3rd Defendant, and in particular clause 6 that the Bank even if guarantors realized the amount due, the Bank had the right to receive money conditions. I did not understand counsel's argument. Clause 6 of the guarantee and indemnity provides for currency clauses.

Finally Ms. Kamau submitted that the Bank was obligated to exhaust fully all avenues open to it to recover the debt from the principle debtor, the 1st Defendant, before pursuing the guarantors. Counsel submitted that the Plaintiff in its affidavit had admitted that the 1st Defendant company was operational and had tangible assets and that therefore no reason is shown why it has failed to recover the debt from it.

Counsel relied on the case of **Five Continents Limited vs. Mpata Investments Limited [2003] 1 EA 65 at page 67** where the learned judges of appeal cited with approval from **Dhanjal Investment Limited vs. Shabaha Investment Limited [1997] LLR 169** as follows:

"***The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandalal Restaurant v. Devshi and Company [1952] EACA 77 and followed by the Court of Appeal for Eastern African in the case of Sonza Figuerido and Company Limited v Mooring Hotel Limited [1952] EA 425 that, if the defendant shows a bona fide issue he must be allowed to defend without conditions…"***

Counsel also relied on the case of **Kirinyaga County Council v. Kimmi Housing Co-operative Society Limited, CA NAI 151 of 2002** for the preposition that where triable issues are raised, the Defendant should be granted leave to defend the suit.

I have considered this application, the grounds of opposition raised and submissions by both counsels.

The application for summary judgment can be made after the Defendant has appeared and can be made before or after the Defendant has filed a Defence. Order XXXV rule 1 of the Civil Procedure stipulates:

"***1(1) in all suits where a plaintiff seeks judgment for-***

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits."

The application was made after the Defendants had filed their defence which is on record. In an application for summary judgment the Applicant is required to show that the Respondent is fully liable to compensate the Applicant in the sum claimed and that the defence does not raise any genuine issues which should go to trial. The Respondents on their part are required to show that they should have leave to defend the suit as provided under rule 2(1) of Order XXXV. It is trite that even one triable issue if bona fide, would entitle the Defendants to have unconditional leave to defend. See **UAP Provincial**

Insurance Limited v Kivuti [1996] LLR 473 and **Dhanjal Investments Limited v. Shabaha Investments Limited [1997] LLR 618**.

The Plaintiff has shown that the 1st Defendant applied for additional loan from the Plaintiff on 11th July, 2005. It has annexed a company resolution passed by the 2nd and 3rd Defendants as directors of the 1st Defendant in which a formal Resolution to borrow the monies from the Plaintiff was passed on 20th June, 2005. The two Defendants/directors also executed the Letter of Offer/Acceptance of the banking facilities. The letter of offer as annexure 1. The two directors also personally executed personal guarantors each, produced as annexures 3A and B. The Plaintiff also produced bank statements, annexure 4, indicating that the facility was advanced to the 1st Defendant and that the said Defendant is indebted to the Plaintiff in the sums claimed. In addition the Plaintiff has produced correspondences by the 1st Defendant in which the indebtedness is acknowledged and indulgence is sought for the default of payment and in which undertaking to repay the debt was given. These correspondences are annexures 5 to 11.

The Defendants defence at paragraph 3 and 4 denies paragraph 3 and 4 of the plaint where the Plaintiff sets out its claim against the 1st Defendant and facts of how the claim arose. That means the Defendants denied that any loan or overdrafts facility was advanced to the 1st Defendant that the 2nd and 3rd Defendants covenanted to indemnify the Plaintiff and or that any sum is owing to the Plaintiff as a result of the said advancement. That is not a tenable defence in light of the letter of offer and acceptance and the personal guarantees signed by the 2nd and 3rd Defendants and passed by the two directors/Defendants as evidenced in the documents annexed to the Plaintiff's application.

In paragraph 5 denies the plaint in its entirety. Paragraph 6 of plaint the Plaintiff avers that the 2nd and 3rd Defendants executed personal guarantees thus covenanting to indemnity the Plaintiff of any sums due and owing to it by the 1st Defendant. That is a sham defence in light of the guarantees annexed to the Plaintiff's application which the 2nd and 3rd Defendants duly executed. There is no allegation that these documents are not genuine, neither have the Defendants denied executing them. In paragraph 7 of the Defence, paragraph 7 of the plaint is denied. In paragraph 7 the Plaintiff avers that demand and notice of intention to sue was given to the Defendants. The Plaintiff has annexed demand letters dated 22nd June 2007, 13th November, 2007 and 22nd January, 2008. Again the Defendants have not controverted this fact as no replying affidavit was filed by them. That defence is also untenable in the circumstances.

The Defendants have in paragraph 9, 10 and 11 of the joint defence pleaded in the alternative that the Plaintiff should pursue its claim against the 1st Defendant alone before claiming any indemnity from the 2nd and 3rd Defendants. It is also pleaded that the entire transaction was tainted by exorbitant interest rates and illegal bank charges contrary to the Banking Act. These latter averments are the subject of grounds Nos. 1 and 3 of the grounds of opposition.

Regarding indemnity, **Halsbury's Laws of England Vol. 20** page 305, states as follows regarding the nature and creation of rights of indemnity.

"***Indemnity as used to denote a contract by which the promisor undertakes an original and independent obligation to indemnify as distinct from collateral contract in the nature of a guarantee by which the promisor undertakes to answer the default of another for the default of another person who is to be primarily liable to the promise."***

Regarding enforcement of indemnity at Law and Contract, **Halsburys Laws of England, 4th Edn.** paragraph 318 stated as follows:

"***Enforcement of indemnity at law and in equity. In law an action on a contract of indemnity does not normally lie until the promisee has paid the third person's claim. Where he has paid, the amount so paid constitutes a debt due to him from the promisor which, save in certain exceptional***

circumstances, he may recover with interest in an action. But a contract may include a special provision in consequence which the right may be enforced at law before payment has been made. Moreover, unless the terms of the contract expressly forbid it, and except in the kind of exceptional circumstances already referred to, the former rules of equity, now prevailing in all courts, enable a person entitled to an indemnity to obtain relief as soon as his liability to the third person has arisen and before he has made payment. He may therefore where appropriate, obtain an order compelling the person giving the indemnity to set aside a fund out of which liability may be met or to pay the amount due directly to the third person or even, where the giver of the indemnity is under no liability to the third person, to himself. But the equitable right to enforce an indemnity does not constitute a debt. An indemnified person is not precluded from obtaining relief by the fact that his liability to the third person cannot effectively b e enforced against him.

In the absence of a contractual term to the contrary, time runs against a person seeking to enforce an indemnity from the date when he is called upon to pay, not from the date of the event giving rise to his liability to do so."

The terms of the Personal Guarantees signed by the Defendants in this case are on record. I see no special provisions in which the parties agreed that the 2nd and 3rd Defendants liability could only crystallize after the Plaintiff has and or demonstrated an attempt to recover from the principal debtor, the 1st Defendant. Clause 1 is the relevant one. It stipulates:

"***In consideration of the Bank making or continuing banking facilities or other accommodation for so long as it may think fit to NEXT TECHNOLOGY LIMITED ("the Principal") the Guarantor hereby guarantees on demand to pay to the Bank all moneys and discharge all obligations and liabilities whether actual or contingent now or at any time hereafter due owing or incurred to the Bank by the Principal in whatever currency denominated whether on any current or other account…"***

The 2nd and 3rd Defendants covenanted and bound themselves to pay to the Plaintiff on demand at any time all moneys, obligations and liabilities due to the Plaintiff by the 1st Defendant. The Defendant's defence in their circumstances is untenable and a sham.

Regarding interest charged, ground 1 of grounds of opposition relates to it. In regard to interest the parties covenanted as follows. The letter of Offer and Acceptance between the 1st Defendant and the Bank provided the terms and conditions of the contract between the parties for the banking facilities advanced to the 1st Defendant. These terms were 'Base Rate' it was provided as follows:

"***3. 'Base Rate' means the Bank's Base Lending Rate as published in the Daily Press from time to time currently 14% per annum. In the event that the Bank ceases to have a Base Rate, Base Rate means the rate of interest that the Bank shall at its sole discretion from time to time change within the limits permitted by law."***

Regarding interest, the following terms applied:

"***<u>Interest</u>***

This will be charged at 5% above Base Rate. The Base Rate is currently 14%. Therefore interest will be currently charged at 19% per annum.

Interest will be calculated on the basis of the actual days lapsed over a 365 (366 incase of a leap year) day year and will be payable monthly by debit to the current account in accordance with the usual practice of the lender.

<u>Note</u>

A rate of 1% per month above the Base Rate applicable will apply for any amount in excess of the limit

or in default.

The Bank reserves the right to review/amend interest and excess interest rates from time to time at its sole discretion."

The Defendants contention is that these terms contradicted the provisions of Section 44 A of the Banking Act. Section 44A of the Banking Act stipulates:

"***44A (1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).***

(2) The maximum amount referred to in subsection (1) is the sum of the following –

(a) the principal owing when the loan becomes non-performing.

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

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

(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing"

(4) This section shall not apply to limit any interest under a court order accruing after the order is made.

(5) in this section

(a) "debtor" includes a person who becomes indebted to an institution because of a guarantee made with respect to the repayment of an amount owed by another person;

(b) "loan" includes any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person; and

(c) a loan becomes non-performing in such manner as may, from time to time, be stipulated in guidelines prescribed by the Central Bank.

(6) This section shall apply with respect to loans made before this section comes into operations, including loans that have become non-performing before this section comes into operation.

Provided that where loans became non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following –

(a) the principal and interest owing on the day this section comes into operation; and

(b) interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and

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

As is clear from the provisions of this section, the section has nothing to do with interest rates. The section limits what can be recovered from a debtor. If the Defendants intended to challenge interest, they needed to file an affidavit specifically pointing out to any error in the Bank statements regarding the

charging and computation of interest. See **Ng'ayo Traders Limited v. Savings and Loans (K) Ltd. CA No. 165 of 2005 (UR 99/05**). A copy of the entry in the Bank Book is *prima facie* evidence of such entry of matters, transactions and accounts therein recorded. See **Section 176 of the Evidence Act**. Having failed to file one, it is presumed that the facts deponed to in the supporting affidavit are admitted. The contractual documents between the parties are before the court and they clearly show that the Plaintiff had reserved for itself the right to vary interest rates at its sole discretion. Those contractual terms cannot be impeached merely on the basis of the Defendants' contention that they were tainted for being exorbitant. The interest rates applied by the Plaintiff the two banking facilities are not oppressive or exorbitant.

The Plaintiff has placed before the court the 1st Defendant's Statements of Accounts for the two banking facilities with the Plaintiff. These statements clearly show that the 1st Defendant was in debit and owed the Plaintiff money. The Defendants had a burden to show that the sum claimed cannot be paid either on account of it having been paid or on account of it not being payable for some reason. No such evidence has been placed before the court.

The Plaintiff has satisfied the court that the 1st Defendant is truly indebted to the Plaintiff in the sum claimed and that the 2nd and 3rd Defendants bound themselves by legally binding contracts of Guarantee and Indemnity to indemnify the Plaintiff for all sums due to it from the 1st Defendant.

I am satisfied that the Defendants have not raised any triable issue in their joint statement of defence. The defence has not therefore raised any issue worthy to go to trial or worthy to warrant the Defendants leave to defend the suit.

In conclusion, I allow the Plaintiff's application dated 23rd December, 2008 and enter summary judgment under Order XXXV rule 1 of the Civil Procedure Rules as prayed for in the plaint. The Plaintiff will get costs of this application.

Dated at Nairobi this 30th day of April 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Ms. Waitere for the Plaintiff

Mr. Wachira holding brief Ms. Kamau for the Defendant

LESIIT, J.

JUDGE