



REPUBLIC OF KENYA

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

Civil Case 1584 of 2000

GIRO COMMERCIAL BANK.....PLAINTIFF

VERSUS

SUPERFOSS LIMITED.....1ST DEFENDANT

PANKAJ MOHANLAL LAKHANI.....2ND DEFENDANT

DILIP MOHANLAL LAKHANI.....3RD

DEFENDANT

JUDGMENT

The Plaintiffs by Deed of Assignment dated 10.12.1998 between the Plaintiff and “Commerce Bank Ltd” the Plaintiff acquire all business of commercial Bank Ltd. assets and liabilities including all its rights in respect of agreement. Further agreement, the guarantee and the further guarantee and the loans advanced to the first Defendant thereunder to the Plaintiff which was then known as Giro Bank Ltd. There was a change of name Number Cs1957 dated 11.01.1999.

The agreement, further agreement, Guarantee and the further agreement and the loans advanced are pleaded under paragraph 4, 5, 6, 9 and 9 of the plaint.

It is also pleaded that the 1st and 2nd and 3rd Defendant are in breach of their respective undertaking under the agreement further guarantee and have failed to pay the principal sums advanced to the 1st Defendant and have further failed to pay agreed interest at the rate of 35% per annum from 1st January 1999.

The Plaintiff claims Kshs.6,668,283.63 inclusive of agreement interest up to 31st December 1998 together with interest at the rate of 35 % per annum from 1st January 1999 Until payment in full.

The statement of all Defendants contains only denials of the Plaintiffs claims. Issues were agreed on 05.05.05 which were filed on 17.05.2006. The Defendant did not offer any oral evidence counsel saying the witnesses reside outside the country and have been unable to travel. Both parties made written submissions. The plaintiff called one witness PW1 Mr. James Nyanjui Nyingi who testified and exhibited documents in a bundle marked Exhibit 1.

A letter dated 28.04.1995 addressed to the Director of 1st Defendant is headed “letter of offer” Short Term Loan” offered to the company. The sum advanced is Kshs.7.5 million at interest rate of 25 % with right to vary the rate of interest reserved to the lender for a period of 3 months.

Security required was first legal charge on property L.R. 209/2695 Muranga road, Nairobi. By a deed of Assignment made on 10.12.1998 the Giro Bank Ltd. acquired the "Business" hitherto carried on by Commercial Bank Ltd. by a cheque dated 02.05.1995, the Superfoss Ltd 1st Defendant was paid Kshs.7,500,000 /= Credit & Commerce Finance Ltd Giro Bank Ltd. In lieu of the legal charge security offered the Plaintiff was paid Kshs.6 million which payment was received on 22.06.95 cheque was dated 19.06.95. Again there was an offer for Kshs.4.5 million for a further period of 12 months with securities. Further payment by cheque was made in the sum of Kshs.2 million dated 12.07.1995 and a further cheque for kshs.3,996,804 /= on 15.08.1995.

The 2nd Defendant signed a document of guarantee in August 1997 Limited to Kshs.12 million. On 25.11.1997 another guarantee was signed by 1st and 2nd Defendants Limited in the sum of Kshs.7 million. These guarantees are not denied. The defendant having failed to call witnesses to support its defence submitted that the guarantees photocopies did not comply with provisions of Stamp Duty Act and were not primary evidence as required under Evidence Act.

It is to be noted that these issues were not raised at the trial and the Plaintiff was not given opportunity to reply. It was an afterthought on the part of the Defendant and apart from allegations there was no proof that documents did not comply with the provisions of the act.

The documents were produced in court in the presence of counsel and no objection was raised. In the circumstances, it is my finding that the Plaintiff has proved the case on a balance of probability and I enter judgment against the Defendants jointly and severally in the sum of kshs.6,668,283.63 /= at the rate of 35% from 01.01.1999 to the date of filing suit and thereafter at the court rates to date of payment in full. The Plaintiff shall have costs of this suit.

It is so ordered.

DATED and delivered at **NAIROBI** this 16th day of February 2008.

JOYCE N. KHAMINWA

JUDGE