



REPUBLIC OF KENYA

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

Civil Case 366 of 2006

CONSOLIDATED BANK OF KENYA LTD.....PLAINTIFF

VERSUS

TRIPEC BUILDERS LIMITED.....1ST DEFENDANT

DAVIES N. K. KIBAKI2ND DEFENDANT

KURIA MUCHOHI GIKONYO3RD DEFENDANT

ROBINSON MWANGI KARIGUH4TH DEFENDANT

JUDGEMENT

Through a letter dated 1st July 2005 the 1st defendant applied and/or requested for an overdraft facility for the sum of Kshs.10 million from the plaintiff. The facility was to be in place for a period of 12 months to facilitate construction activities that were carried out by the 1st defendant. The 1st defendant offered a cash collateral for Kshs.10 million over fixed deposit held by the plaintiff. Through a letter dated 13th July, 2005 the bank accepted the plaintiff's request but reduced amount to Kshs.10 million and it was described as a temporary overdraft facility for a period of 3 months. The securities for the facility were to be;

- (1) Lien on Cash collateral for Kshs.8,000,000= over funds in a Fixed Deposit account with a balance of Kshs.10,000,000= in the name of Tripec builders Ltd.
- (2) Board Resolution to borrow Kshs.8,000,000.
- (3) Personal Guarantee for Ksh.8,000,000 by each Director.
- (4) Letter of Set Off.
- (5) Letter of Deposit.

The letter of offer was signed by the defendants and as also required the 2nd to 4th defendants signed a guarantee and/or indemnity guaranteeing the payment of the loan advanced to the 1st defendant. It is also clear that the request to borrow was preceded by a board resolution held on 1st July, 2005 at the office of the 1st defendant.

As the facility was to expire by the end of October, 2005 the 1st defendant fell into arrears and made several promises to pay the debt which was outstanding. It appears the bank wrote several letters demanding the 1st defendant to regularize the account and ensure that the outstanding amount is cleared. The defendant failed to comply with the demands made by the bank resulting in the bank instructing **M/S Kamunyori & co.** Advocates through a letter dated 22nd March, 2006. The demand was also to be made to the directors of the 1st defendant as a result of signing or giving out guarantee to repay the debt in case a default has been committed by the 1st defendant. As a result a demand was made to all the defendants asking them to settle the outstanding debt. Upon receipt of the said letter the 1st defendant wrote a letter dated 24th May 2006 stating as follows:

CURRENT ACCOUNT NO.0120050379300-

OUTSTANDING BALANCE OF KSHS.2,499,184.20/=

We are in receipt of your letter of 24th April 2006 whose contents we have noted.

We regret the delay in replying to your said letter, which delay has been occasioned by our directors making effort to recover monies owed to Tripec Builders. This has occasioned having to make trips both out of Nairobi and out of the country for that matter. Having done so we are confident that one of our debtors will be making a substantial payment in the course of next one month.

We are therefore hopeful that the writer will be able to revert to you in the course of the next thirty (30) days with a concrete proposal for the settlement of the outstanding monies. It is our intention that the payment by installments will not be less than Kshs.100,000/= per month until payment in full. We would propose that the monthly payment commence from 30th June 2006 and continue until payment in full.

We of course, wish to maintain our goodwill and therefore continue to make every endeavour to fulfill our obligations under the agreement with your client bank. We would be pleased to receive your written confirmation that you will withhold taking any further action against Tripec builders in this matter.

May we also have your confirmation as to the applicable rate of interest, as the rate given in your said demand letter appears excessive and at variance with the percentage given in the Bank's Letter of Offer.

Thereafter nothing came out from the promises made by the defendants to the bank necessitating the filing of this suit. According to the plaint the plaintiff prays for judgement against the defendants jointly and severally for Kshs.2,585,260.65 with interest at 32% from 1st June, 2006 till the date of payment in full. The parties thereafter set out the suit for hearing and at the date of hearing the defendants were not represented. And based on the return of service by the plaintiff the matter proceeded *ex parte* before me. The plaintiff called 1 witness in support of its case.

The evidence of the plaintiff is that the 1st defendant approached the bank sometimes in 2005 asking for financial accommodation which was granted. The facility was then made available to the 1st defendant. It was in nature of overdraft facility for a period of 3 months. The 1st defendant consumed and or used the facility but failed to repay the same as agreed with the bank. From the evidence tendered by the plaintiff I am satisfied the case has been proved against the defendants. The defendants have admitted the existence of the debt but made no efforts in settling the same. I am therefore in agreement with the plaintiff's advocate that monies advanced to the 1st defendant is owing and has to be repaid. It is clear that the 1st defendant made use of the facility but did not make any efforts to repay the monies advanced. In the premises the bank had no alternative but to commence this suit in order to get back what it advanced to the 1st defendant.

In conclusion it is my judgement that the plaintiff has proved its case and judgement is hereby entered in favour of the plaintiff for a sum of Kshs.2,585,260.65 plus interest at court rate till payment in full.

Dated, signed and delivered at Nairobi this 5th day of June, 2008.

M. A. WARSAME

JUDGE