



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

**Civil Case 1194 of 2001**

**NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**EBENEZER ELECTRONICS &**

**COMMUNICATIONS LIMITED.....1<sup>ST</sup> DEFENDANT**

**HENRY NYANG'AU .....2<sup>ND</sup> DEFENDANT**

**JOYCE ONSONGO NYANG'AU.....3<sup>RD</sup> DEFENDANT**

**SILAS OLTIMBAU KISOSO.....4<sup>TH</sup>  
DEFENDANT**

**J U D G M E N T**

The Plaintiff's case against the 1<sup>st</sup> Defendant was heard in court *ex parte* on the 23<sup>rd</sup> October, 2008. The 1<sup>st</sup> Defendant was duly served with a hearing notice. However, neither its counsel nor a representative was present in court for the hearing. The Plaintiff called one witness, the Account Manager with the Plaintiff's bank for the last 12 years one JOHN KIBET TARUS. His evidence was that the 1<sup>st</sup> Defendant was a customer of the bank operating a current account No. 021094780. On 4<sup>th</sup> April 1998 the 1<sup>st</sup> Defendant sought and was granted an overdraft facility with the Plaintiff Bank of Kshs.600,000 and a loan of Kshs.600,000. The letter of offer and acceptance are page 1 and 7 of the Plaintiff's bundle of documents. The term loan of Kshs.600,000/= was granted with an interest rate of 32% while the overdraft granted was for a limit of Kshs.400,000/= with interest at the rate of 33%. The two facilities were secured by a charge over the properties L.R. No. Ngong/Ngong/18940 and Ngong/Ngong/18938.

The Plaintiff's case is that the 1<sup>st</sup> Defendant overdraw its account. Page 29 of the Plaintiff's exhibit is a demand letter addressed to the directors of the 1<sup>st</sup> Defendant notifying them that the account was overdrawn by a sum of Kshs.923,117.15/=, above the authorized limit of Kshs.400,000/=. There are several other demand letters to the 1<sup>st</sup> Defendant from the Plaintiff requesting the 1<sup>st</sup> Defendant to regularize its account. It is the Plaintiff's case that the 1<sup>st</sup> Defendant failed to regularize those accounts. The Plaintiff issued it with statutory notice on the 5<sup>th</sup> April, 2000. That notice was issued to the owner of the suit property who was the 4<sup>th</sup> Defendant in the suit. Despite the notice the accounts were not regularized.

The Plaintiff through its agent managed to sell L.R. No. Ngong/Ngong 18940 for the sum of Kshs.350,000/=, on the 12<sup>th</sup> April, 2005. The Plaintiff was unable to sell the second charge property. It has produced a printout of the loan and the overdrafts accounts of the 1<sup>st</sup> Defendant as exhibit 2. These accounts show that as of 1<sup>st</sup> September, 2005 the outstanding amount in both accounts was Kshs.2,879,048.20. The Plaintiff now seeks judgment as per its amended plaint filed in court on 24<sup>th</sup> October, 2005 in the sum aforesaid together with interest at the rate of 22% from 1<sup>st</sup> September, 2005 until payment in full, together with the costs of the suit.

I have considered the submissions by Mrs. Were for the Plaintiff. Even though the 1<sup>st</sup> Defendant did not defend the suit, I have also considered its filed statement of defence filed on 26<sup>th</sup> April, 2002. The 1<sup>st</sup> Defendant denies executing the letter of offer dated 8<sup>th</sup> April, 1998. It also denies that the charge property, LR. No. Ngong/Ngong/18938 and LR. Ngong/Ngong/18490 was not charged to secure the facility, the subject matter of this suit. The 1<sup>st</sup> Defendant also denies receiving any demand for the repayment of any monies and also denies being indebted to the Plaintiff as claimed.

I agree with Mrs. Were that it is trite that averments in a written statement of defence are not evidence but are mere allegations, the truth of which should be proved in evidence. Mrs. Were relied on the case of **Economic Housing Group Limited vs. David Kamau Githinji, HCCC (Nai) 1094 of 1996** for that proposition. I agree with that proposition.

The 1<sup>st</sup> Defendant did not adduce any evidence to substantiate its statement of defence. The Statement of defence remained mere allegations without proof. In any event, they cannot withstand the Plaintiff's case. The Plaintiff has produced evidence to show that the 1<sup>st</sup> Defendant applied for the loan and the overdraft facilities as per his letter at page 1 of the Plaintiff's exhibit. The application is duly signed on behalf of the 1<sup>st</sup> Defendant. The application was accepted as per the Plaintiff's exhibit at page 7. The Plaintiff has shown that the two facilities were secured by a charge over the two suit properties and the charges are exhibited. The Plaintiff has also shown that before filing this suit, a demand for the payment of the amounts due was made to the 1<sup>st</sup> Defendant. The Plaintiff has also shown that before filing the suit it made attempts to exercise its Statutory Power of Sale over the two charge properties and succeeded in disposing only one of them. The 1<sup>st</sup> Defendant's defence is therefore a mere denial and it is also sham in the face of the Plaintiff's case.

Having considered this case, I am satisfied that the Plaintiff has proved that it advanced a loan and an overdraft facility to the 1<sup>st</sup> Defendant on its request. The Plaintiff has shown that the 1<sup>st</sup> Defendant defaulted in the payment of both facilities leading to the outstanding amount now claimed in this suit. In addition, I am satisfied that the 1<sup>st</sup> Defendant admitted its indebtedness to the Plaintiff in writing and made proposals for the repayment of the debt as evidenced at page 38 of the Plaintiff's bundle.

The Plaintiff's case is unchallenged and uncontroverted. I am satisfied that the Plaintiff has discharged its burden of proof in this matter and that it has proved its case on a balance of probabilities. Accordingly, I enter judgment as follows:

- 1. Judgment be and is hereby entered for the Plaintiff against the Defendant sum of Kshs.2,879,048.20 with interest at 22% per annum from the 1<sup>st</sup> September, 2005 until payment in full.**
- 2. The Plaintiff will also get the cost of the suit.**

**Dated at Nairobi, this 28<sup>th</sup> day of November, 2008.**

**LESIT, J.**

JUDGE

***Read, signed and delivered, in the presence of:***

N/A for Mrs. Were for the Applicant

N/A for the Respondent

**LESITT, J.**

JUDGE