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

Civil Case 4054 of 1993

PAN AFRICAN BANK LIMITED……..…….PLAINTIFF

VERSUS

NICHU INVESTMENTS …….…….1ST DEFENDANT

RAJNIKANT SHAH ……..…….2ND DEFENDANT

HASMUKH DEVCHAND SUMARIA ……..…..…..3RD DEFENDANT

RATILAL K. SHAH …….……..4TH DEFENDANT

JUDGEMENT

The plaintiff's claim as set down in the amended plaint filed in court on 16th March 1994 is for;

(1) As against the 1st defendant a sum of Kshs.14,998,126/= together with interest at 32% per annum from 1st July 1993 until payment in full.

(2) As against the 2nd defendant Kshs.1243181/10 with interest thereon at 32% per annum from 1st July 1993 until payment in full

(3) As against the 3rd defendant, Kshs.6837497/05 with interest thereon at the rate of 32% per annum from 1st July 1993 until payment in full.

(4) As against the 4th defendant Kshs.5,594,315/95 with interest at 32% per annum from 1st July 1993 till payment in full.

It is stated that the 1st defendant enjoyed certain financial facilities given by the plaintiff at its own request. The claim against the 2nd to 4th defendants is based on a guarantee document signed by them for monies availed by the plaintiff to the 1st defendant company. The first document signed by the 2nd and 3rd defendants is dated 14th December 1982 and was a continuing guarantee for a sum of Kshs. 1 million plus interest on that sum and other banking charges as might accrue to the plaintiff before the date of demand for payment.

The second document was signed by the 3rd and 4th defendants for a sum of Kshs.4.5 million and it is dated 12th September 1985. It is alleged that as at 30th November 1992, the sums outstanding against the

1st defendant in respect of advances, loans, monies paid and interest was a total sum of Kshs.8,253,017/50.

The plaintiff called one witness to give evidence in support of the allegations, contained in the plaint. The evidence of **Mr. Hannington Taabu Eli** is as follows: That he works with the deposit protection fund, in **Central Bank** but at the time of the transaction subject of this suit, he worked with **Pan African Bank Ltd** from 1982 and 1992 before it went under. He says that he knows the defendants as customers of the Bank with several current accounts. And the 2nd, 3rd and 4th defendants were directors of the 1st defendant. He then produced the agreement dated 14/12/1982 and the guarantee executed by the defendants as exhibits before court.

According to the witness money was given to the 1st defendant from time to time through its account held with the Bank. He also stated that the defendants made some payments into the account in reducing their balances or debts. In summary he stated that the defendants did not pay back the sums advanced to the 1st defendant. On whether the defendants had settled the amounts advanced, he said he had no knowledge of any settlement made by the defendants concerning the debt.

The witness was then shown a letter dated 6th October 1987 between the plaintiff and 1st defendant. And he stated that at the time the chairman and Managing Director of the plaintiff Bank was **Mr. Mohamed Aslam** now deceased. The letter was written by the Plaintiff to **M/S A. L. R. Shah Advocate** for the plaintiff. The witness said that he did not know why the Managing director of the Bank wrote the said letter and that he did not need to consult him in such circumstances.

The witness also stated the 1st defendant had one account with the plaintiff Bank, while the 2nd, 3rd and 4th defendants had various accounts with the Bank. And that the relationship between the plaintiff and defendants was very cordial as the defendants were good customers of the Bank. He further stated that in his position at the Bank, he did not understand much about the transactions between the Plaintiff and the defendants. And he came to testify on the basis of the documents he read on the transaction involving the parties herein.

The defendants filed a common defence and called two witnesses in support of their defence. The first witness **Mr. Kumar** was an employee of the plaintiff bank and described the 2nd, 3rd and 4th defendants as persons very close to the chairman of the plaintiff Bank Mr. Mohamed Aslam, now deceased. And that most of their transactions were directed through the chairman's office. He also stated that most of the transactions involving the defendants was carried out through instructions which came from the chairman of the Bank, which was on phone. He stated that he gave some of the personal guarantee documents to PW1 who was his assistant with instructions to take to any of the directors of the 1st defendant. He further stated that the said documents were in blank form and that he would not know who filled the particulars of the lending before the form was signed.

The other witness who gave evidence is the 2nd defendant who stated that he is the director of several companies, including the 1st defendant herein. The 1st defendant used to have financial accommodation in the form of overdraft facility from the plaintiff Bank, which was fully settled. It is the evidence of witness that the Bank at times used to borrow monies from the accounts of the defendants as a loan. He also asserted that the 2nd to 4th defendants signed a blank documents and returned the same to the Bank. The principal sum and interest was not filled but later inserted by the Bank. And that all the accounts between the Bank and defendants were amicably settled sometimes in 1987 with the chairman of the Bank.

The Bank wrote a letter dated 6th October 1987 indicating that the matter had been amicably settled and after that letter the defendants assumed all liabilities have been settled.

He further asserted that sometimes in 1992 the defendants got demand letters from the lawyers of the bank demanding a sum of Kshs.8253017/50. And in reply the defendants informed the Bank lawyers that

the matter had been amicably settled.

After the close of the respective case of each side the parties made written and oral submission in support of their respective position.

Miss Kirimi learned counsel for the Plaintiff submitted that it is not denied that the 1st defendant enjoyed an overdraft facility where a debt was incurred as claimed by the plaintiff herein. The 2nd and 3rd defendants as directors of the 1st defendant undertook to guarantee the payments of the sums advanced to the Company.

On the contention that the interest rate was not set out in the guarantee document, **Miss Kirimi** Advocate submitted that such a contention does not lie for three reasons namely;

(1) The application with respect to the first guarantee signed by the 2nd and 3rd defendants stated very clearly that the rate of interest would be subject to a minimum rate of 16% per annum.

(2) The guarantees themselves stated at clause 2(1) and (11) that the rate of interest shall be calculated with the usual rests and at the ruling rate from time to time for bank advances in the territory in which the liability of the principal is incurred.

(3) The defendants were aware that the rate was not fixed. They were also aware that the plaintiff was under no obligation to inform them of the change in the interest rate.

She also contended that by reason of the above the maximum rate could not be set out in the application document. And that there was no requirement to set out the rate of interest in the guarantee document allegedly signed by the defendants herein.

It was also the submission of the plaintiff's advocate that the contention that the claim was settled has not been proved, since the 2nd defendant could not produce any evidence to support his contention that the accounts had been settled. And if indeed the matter had been settled, why did the defendants not pursue the matter with the plaintiff so that the position could be reflected in the accounts and to obtain a discharge of the guarantee.

According to **Miss Kirimi** Advocate the reason why the defendants did not seek a declaration as far back as in 1987 for an order that the debt had been paid in full is because the defendant knew the debt remained due and payable.

On the issue whether the claim is time barred, the plaintiff's position is that the claim is based on an overdraft facility on an account that continues to run to date. The guarantees were continuing and enforceable for as long as the debt continues to run. And that time begun to run from the date the guarantees were called up and this would be from March 1993. In the premises the claim was filed in time and is not statute barred.

In conclusion, **Miss Kirimi** Advocate submitted that from the evidence adduced the plaintiff has proved its claim against the defendants and is therefore entitled to judgement as prayed in the plaint.

The submission of the defendants is as follows: that the purported guarantees were signed by the 2nd, 3rd and 4th defendants in blank which is contrary to the known practice. Secondly the contemporaneous and/or simultaneous demands dated 24th December 1992 sent to the defendants were premature and bad in law as the liability of the other defendants could only arise after the 1st defendant defaulted to play within the 15 days given in the demand to it. Thirdly that the suit is barred by limitation. Fourthly that the interest charged on to the account was not agreed between the parties herein, hence the plaintiff acted in a unilateral manner with a view to put the defendants in a hardship financial condition. And lastly the claim was amicably settled in 1987 and the 1st defendant was discharged from its liability, which

consequently discharged the 2nd, 3rd and 4th defendants under the purported guarantees.

On my part, I have taken into consideration all the relevant submissions made by the parties. I have also considered the respective pleadings filed by the parties and the question is whether the plaintiff has proved the prayers sought in the plaint.

The first issue for my determination is the issue of limitation as pleaded in paragraph 4, 8, 9 and 10 of the defence dated 18th October 1993. The basis of the plaintiff claim is some advances made to the 1st defendant but guaranteed by the 2nd, 3rd and 4th defendants. The limits revealed in the guarantee documents was exceeded by the 1st defendant. And from the statements of accounts of the 1st defendant, the account exceeded the limit of Kshs.5.5 million on 31.3.1987. According to the defendant that is the time when the cause of action accrued to the plaintiff. No doubt the suit was filed on 19th August 1993. **Miss Kirimi** Advocate for the plaintiff submitted that liability attached upon demand made by the plaintiff to the defendants. And since demands were made in March 1993, then 6 years begun to run from March 1993 when demand was made by the plaintiff.

There is no doubt the cause of action of the plaintiff is governed by section 4 of Cap 22 with a limitation period of 6 years from the date which the cause of action accrued. The question here is when was the first demand made by the plaintiff concerning the state of affairs of the account of the 1st defendant. It is clear from the statements of account produced by the plaintiff that the account belonging to the 1st defendant and guaranteed by the other defendants was overdrawn and exceeded the authorized limit of Kshs.5.5 million as at 31st March 1987. and as a result the Bank wrote a demand letter dated 24th September 1987 regarding the status of the accounts held by **Sweata Investments Ltd**, **Nichu Investments Limited** and **Plaza Investments Ltd**.

Again in a letter dated 6th October 1987 the plaintiff's chairman and Managing director indicated to the Bank's Advocates that the demand contained its letter dated 24th September 1987 has been resolved because the matter has been amicably settled between the parties and the bank. According to Miss Kirimi Advocate, liability attached upon demand made by the plaintiff to the defendants. And according to her demand was made in March 1993.

In my humble view the liability of the defendants crystallized when a demand for the funds due was made by the Bank's Advocates in their letter dated 24th September 1987. Let me say that a cause of action is a fact or facts that enables a party to bring an action against another for a right infringed or about to be infringed. It means it is a matter to be resolved in a court of law because the party believes or thinks that there is a liability to be paid by the opposite party. In my understanding the action that gave rise or the condition for proceeding against the defendants arose when the 1st defendant exceeded the credit limit agreed with the plaintiff Bank. That was on 31.3.1987 when the account of the 1st defendant was overdrawn.

The legal and beneficial right of the plaintiff therefore accrued way back in 1987. That is why the bank through its then Advocates M/S A. L. R. Shah Advocates wrote demand letters to the defendants through a letter dated 24th September 1987. I therefore think the cause of action arose on 24th September 1987 when the bank sent demand notices to the defendants and others connected to this matter. In all honesty, I conclude that the cause of action of the plaintiff is time barred by virtue of section 4 of the Limitation of Action Act Cap 22 laws of Kenya. In the premises, I am in agreement with **Mr. Isindu** Advocate that the suit of the plaintiff was filed out of time and is therefore barred by limitation as pleaded in the defence. In my opinion that is a point of law that disposes the whole claim of the plaintiff. On that line, I would dismiss the suit on the strength of being contrary to the limitation of action Act.

Another point that would make this suit to fail is the adjustments made on the 1st defendant's account No.01-2-0140 from the sale of the 1st defendant's property title No. LR. 209/21/3 and 4 **Masari road**, **Highridge** Shopping centre **Parklands** Nairobi. This is well manifested in a document produced by the plaintiff appearing at page 23 of its bundle of documents. The said document concerns the account of the

1st defendant, personal guarantees of the 2nd and 3rd defendants. And according to remarks by the bank;

"**The outstanding is expected to be fully adjusted from the sale of property Ref. L.R. No.209/21/3 & 4 situated at Masari Road – Highridge shopping centre Nairobi…..The expected sale price of the mentioned property in view of the property prices going up should be adequate to clear the debt".**

It is pertinent to note that no word was altered by the plaintiff's witness as to the proceeds from the sale of that property. It is not clear how much it was worth and how much it was sold for. The only assumption is that since it was charged to the Bank, it must have been sold to recover any outstanding amounts on the accounts of the defendants.

As indicated earlier the plaintiff's then Advocates **M/S A. L. R. Shah** wrote a demand notices to the defendants herein through a letter dated 24th September 1987. The instructions to write demand came from the bank according to the reply in the letter dated 6th October 1987. The letter dated 6th October 1987 was allegedly written by Mr. Mohamed Aslam chairman and Managing director of the Plaintiff bank. In part the letter states;

"**Please refer your letter of 24th September 1987 regarding the demand notes on Sweata Investments Ltd, Nichu Investments Ltd and Plaza Investments. The matter has been amicably settled between the parties and the Bank is not proceeding legally against Sweata Ltd and others. The arrangements have been made to adjust the outstandings on various accounts amicably".**

The Bank now says that the said letter does not in any way constitute a discharge. But merely sets out that arrangements were being made for the defendants to clear the outstanding debts on their accounts. I think that is not the correct position.

Having taken into consideration the evidence of the plaintiff and that given on behalf of the defendants, I am minded to believe that the plaintiff had agreed to amicably settle the matter with the defendants in its letter dated 6th October 1987. It is clear in my mind that the said letter reinforces what is contained in the document appearing at page 23 of the plaintiff's bundle of documents. My understanding of the letter dated 6th October 1987 is that the plaintiff through its chairman and managing Director had fully and finally discharged the defendants herein. I therefore refuse to be persuaded by the brilliant submissions of **Miss Kirimi** Advocate on that line, that the letter talked of arrangements being made in future to adjust the various accounts. My view is that the matter had been properly and amicably settled between the defendants and a person with an executive authority to bind the company. I think the belated attempt by the plaintiff must fail.

All in all and having considered the whole evidence by the plaintiff, I am satisfied that the plaintiff has failed to prove its case on the standard applicable which is balance of probabilities. All indications are that the case of the plaintiff is below the standard test applicable under such circumstances. I therefore conclude that the case of the plaintiff is disjointed and full of contradictions. It has to fail for the reasons stated hereinabove. The plaintiff's suit is therefore dismissed with no orders as to costs.

As stated the plaintiff bank was placed under liquidation on 22nd August, 1994 and the present suit was filed first before the bank was placed under liquidation. It was subsequently taken over by the deposit protection fund in Central Bank. In the circumstances of this case, I do not think, I should award costs against a public body like the deposit protection fund for something initially instigated by the Bank after the death of its chairman and managing director.

Order: **The plaintiff's suit is dismissed with no orders as to costs.**

Dated and delivered at Nairobi this 9th day of November 2007.

M. A. WARSAME

JUDGE