



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Civil Suit 74 of 2006**

**VIJAY MORJARIA.....PLAINTIFF**

**VERSUS**

**MOSES K. K. KABERGEY.....1<sup>ST</sup> DEFENDANT**

**JAIVIRSINGHJI N. RAOL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff filed a suit against the defendant and stated that by an agreement and guarantee dated 14<sup>th</sup> October, 2005, the defendants received from him a sum of Kshs.5,650,000/- for purposes of delivering to the plaintiff sisal twine. The defendants did not repay the said sum nor did they deliver the sisal twine. It was also a term of the said agreement that if the defendants defaulted in supplying the sisal twine they would repay the aforesaid sum by monthly installments plus a penalty of Kshs.100,000/- per month on each installment with effect from October, 2005 until payment in full. The plaintiff now claims against the defendants jointly and severally a sum of Kshs.5,650,000/-, penalty sums of Kshs.100,000/- per month as stated hereinabove plus interest and costs.

The defendants filed a joint statement of defence and denied having entered into any agreement as alleged by the plaintiff. They also denied ever receiving from the plaintiff a sum of Kshs.5,650,000/-. They further denied that they were to supply sisal twine to the plaintiff and even denied any knowledge that the plaintiff was involved in the business of buying and selling sisal twine. They added that if there was any money that had been advanced to them by the plaintiff, the same had been repaid. They further alleged that the plaintiff had no legal basis of charging any interest or penalty on any money which he may have advanced to them.

During the hearing, Dominic Mukui Kimatta, PW1, an advocate of the High Court of Kenya, testified that he knew the plaintiff and the defendants very well. Prior to the events leading to this suit, the second defendant had regularly borrowed money from the plaintiff. The first defendant was an employee of Majani Mingi Sisal Estate and had on several occasions gone to the office of PW1 to make various payments.

On 14<sup>th</sup> October, 2005, the plaintiff and the defendants went to Mr. Kimatta's office and informed him that they wanted to enter into an agreement for a friendly loan. The loan was for the purpose of enabling the defendants purchase sisal twine. He produced a document dated 14<sup>th</sup> October, 2005, (**P.Exh.1**) which was headed "**Friendly loan and purchase agreement**". In that agreement the defendants agreed to borrow from the plaintiff a sum of Kshs.5,650,000/- and they gave their personal guarantees to either supply sisal twine to the plaintiff for the value of the aforesaid sum or to repay the said sum by monthly

installments as stipulated therein. The defendants further agreed that in the event that they failed to meet any one of the monthly installments, they would be liable to pay a liquidated sum of Kshs.100,000/- per month as penalty until payment in full. The defendants further stated that they had reconciled their accounts with the plaintiff as at that date. Mr. Kimatta also prepared personal guarantees and undertakings which were executed by each of the defendants. The guarantees were produced as **P.Exh.2** and **P.Exh.3**.

PW1 further testified that the defendants handed over to him a post dated cheque for the sum of Kshs.5,650,000/-. It was dated 14<sup>th</sup> March, 2006. The cheque was to be banked if the defendants did not honour the terms of the agreement. The cheque was drawn on the account of Darpar Wholesalers, Prime Bank Ltd, Kenindia House Branch, Nairobi. The second defendant was said to be having substantial interests in the aforesaid company. The cheque was also produced as an exhibit (**P.Exh.4**).

The plaintiff testified that he had known and dealt with the defendants for many years. The second defendant had been a family friend for about 35 years, while the first defendant was known to the plaintiff for a period of nearly 10 years. The first defendant was the General Manager of Majani Mingi Sisal Estate while the second defendant was a sub-agent for distribution of Majani Mingi Sisal Estate products. The defendant used to borrow money from PW2 and would repay the same by supplying sisal twine to the plaintiff. He had advanced the defendants a total of Kshs.5,650,000/- but they had failed to supply him with sisal twine. The plaintiff testified that the defendants agreed that they would repay the aforesaid sum or supply him with sisal twine and they all agreed to proceed to Mr. Kimatta's office so that they could enter into an agreement to that effect.

The defendants also gave an undated cheque and agreed with the plaintiff that if they defaulted on the agreement of 14<sup>th</sup> October, 2005, the plaintiff would be at liberty to deposit the cheque for payment. The defendants defaulted and the plaintiff dated the cheque and banked it but it was returned unpaid.

The plaintiff clarified that no money changed hands on 14<sup>th</sup> October, 2005. Prior to the signing of the agreement, the accounts between the plaintiff and the defendants were reconciled and it was agreed that the amount of money that was due and payable by the defendants to the plaintiff was Kshs.5,650,000/-.

The first defendant agreed that they used to borrow money from the plaintiff whenever they were in short of funds. They had borrowed from the plaintiff various sums of money and they had repaid him fully together with interest. He further agreed that he had signed the agreement and the personal guarantee dated 14<sup>th</sup> October, 2005, (**P.Exh.1 and 2**) but according to him, the agreement and the guarantee were meant to enable the plaintiff advance to them the sum of Kshs.5,650,000/-. However, upon signing the agreement the plaintiff refused to advance the money as promised. He denied that they were indebted to the plaintiff prior to the signing of the said agreement.

The first defendant further agreed that the plaintiff was given an undated cheque by the second defendant as a further security.

In cross examination, the first defendant stated that he did not sign the agreement and the personal guarantee before Mr. Kimatta. He said that he had signed the same in the office of the second defendant. Although he alleged that they were not indebted to the plaintiff, the first defendant could not explain why they did not seek nullification of the guarantees if indeed the plaintiff failed to advance them the money as agreed.

It is not in dispute that the plaintiff and the defendants were well known to each other and they had been doing business together for many years. The defendants used to borrow money from the plaintiff from time to time. The defendants would repay the money by way of supply of sisal twine to the plaintiff. From the exhibits that were produced before this court, it is clear that as at 14<sup>th</sup> October 2005, the defendants were indebted to the plaintiff in the sum of Kshs.5,650,000/-. All the parties sat down and reconciled their accounts and arrived at the aforesaid sum. They agreed to enter into an agreement as to how the advanced sum was to be repaid. The defendants agreed that they would either supply sisal twine

to the plaintiff upto the value of Kshs.5,650,000/- or repay the said sum by monthly installments as stipulated in the agreement. The agreement also contained the following clause:-

***“All the above payments be made on or before the due dates. The borrowers/suppliers hereby agree failure to any one of these, they will pay one hundred thousand (Kshs.100,000/-) per month as penalty until payment in full. The borrowers/suppliers further agree to lender/purchaser (sic) he may use the personal guarantee and undertaking to recover the full amount with penalty and any other cost incurred without any notice.”***

I do not accept the defendants’ denial that they were signing the agreement and the guarantees in anticipation of advancement of Kshs.5,650,000/- by the plaintiff, having fully repaid all the other sums of money that they had earlier borrowed from the plaintiff. Such an interpretation of the agreement and the personal guarantees does not make any sense. The defendants’ denial is without any basis. I am satisfied that the defendants were unable to supply sisal twine to the plaintiff as agreed. Alternatively they failed to repay the advanced sum or any part thereof and as agreed the plaintiff dated the cheque that had been issued to him by the second defendant. The cheque was returned unpaid.

The defendants expressly agreed that they would be liable to pay penalty on any sum that remained unpaid at the rate of Kshs.100,000/- per month. It was not shown that there was any duress in signing the agreement and the personal guarantees. The defendants are liable to the plaintiff as claimed by the plaintiff in his plaint. Consequently I enter judgment for the plaintiff against the defendants jointly and severally as prayed. The defendants will bear the costs of this suit.

DATED, SIGNED and DELIVERED at Nakuru this 20<sup>th</sup> day of December, 2007.

**D. MUSINGA**

**JUDGE**

Judgment delivered in open court in the presence of Mr. Githui for the plaintiff and Mr. Wambeyi holding brief for Mr. Kurgat for the defendant.

**D. MUSINGA**

**JUDGE**