



REPUBLIC OF KENYA

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

**CIVIL CASE 2107 OF 2000**

**PAN AFRICAN CREDIT FINANCE LTD.....PLAINTIFF**

**VERSUS**

**KAWAKANJA LTD.**

**JAMES KANYOTU .....DEFENDANTS**

**JUDGMENT**

The plaintiff Pan African Credit & Finance Limited has instituted this suit against the two defendants Kawakanja Limited and James Kanyotu to recover the sums of Kshs.38,571,240.75 and Kshs.5,200,000.00 respectively together with interest thereon at 15% per annum from 1.11.2000 and 27.10.1999 respectively until payment in full.

The claim arises from an agreement and a loan facility amounting to Kshs.5,200,000 said to have been granted by the plaintiff to the 1<sup>st</sup> defendant in August 1989 which said facility was guaranteed by the 2<sup>nd</sup> defendant and as on 30.11.1994 the 1<sup>st</sup> defendant's indebtedness to the plaintiff in respect of the aforesaid facility and monies paid plus interest amounted to Kshs.13,997,081.00. The sum remained unpaid despite demands made for payment and as at 31.10.2000 the debt outstanding from the 1<sup>st</sup> defendant was Kshs.38,571,240.75 and the sum owed by the 2<sup>nd</sup> defendant under the guarantee was Kshs.5,200,000 plus the said interest.

The defendants filed a joint defence and raised *inter alia* the defence of limitation. In the alternative the defendants pleaded that in or about July or August 1989, the 1<sup>st</sup> defendant verbally intimated to the plaintiff of its desire to borrow Kshs.5,200,000.00 for the purpose of developing LR No.11540 Limuru. The plaintiff agreed to advance to the 1<sup>st</sup> defendant the said sum in a letter of offer dated 4.8.1989 and the 1<sup>st</sup> defendant was to execute a floating charge of Kshs.7,000,000 over its assets.

The defendants further pleaded that in anticipation of the said advance the 2<sup>nd</sup> defendant executed a guarantee dated 4.8.1989 for the said sum of Kshs.5,200,000.00 but the contract of borrowing was never performed and the said sum of Kshs.5,200,000 was not disbursed to the 1<sup>st</sup> defendant with the result that the entire transaction did not materialize for lack of consideration.

The defendants further pleaded in the alternative that if there was any enforceable contract, it was unmaintainable by virtue of the provisions of the Limitation of Actions Act and further that the plaintiff varied, amended and altered the letter of offer without the knowledge, consent or authority of the 2<sup>nd</sup> defendant and thereby discharged the 2<sup>nd</sup> defendant from the guarantee.

The defendants further pleaded again in the alternative that the plaintiff's suit is incompetent and bad in law as the plaintiff shifted its basis of claim stating by its advocates letter of 7.9.1994 that the said sum of Kshs.5,200,000 was advanced by the plaintiff to the 1<sup>st</sup> defendant for the purchase of shares in the plaintiff bank and such lending would be irrevocable as the same contravened Section 56 of the Companies Act and the 2<sup>nd</sup> defendant did not furnish a guarantee for such lending.

The defendant's therefore denied indebtedness to the plaintiff and averred that the plaintiff is not entitled to any of the reliefs sought in the plaint.

The plaintiff filed a reply and denied that its suit was statute barred under the Limitation of Actions Act as the defendants had made part payment and/or acknowledged the debt. With respect to the use of the funds, the plaintiff averred that whereas the defendants applied for funds for an agricultural project it was upto them to apply the funds as they deemed fit including the purchase of shares but no shares were in fact bought in the plaintiff bank and if the defendants bought shares in a related company they are themselves to blame and are estopped from raising an illegality authored by themselves. All the other issues were joined in the Reply.

When the pleadings closed the parties framed the following issues for trial by the court.

- 1. Was there any enforceable contract between the plaintiff and the defendants or any of them.?**
- 2. If (1) above is in the affirmative what were the terms of the contract?**
- 3. Was the contract if any performed by the parties?**
- 4. Did the plaintiff vary the terms of the contract if any and if so in what way?**
- 5. What was the consideration for the personal guarantee signed by the 2<sup>nd</sup> defendant on 4.8.1989 in favour of the plaintiff?**
- 6. Was there any failure of consideration in 5 above?**
- 7. Is the guarantee enforceable against the 2<sup>nd</sup> defendant?**
- 8. Did the plaintiff advance any monies to the 1<sup>st</sup> defendant and if so how much?**
- 9. If (8) above is in the affirmative was the lending against the law?**
- 10. Did the plaintiff ever communicate the liability position of the 1<sup>st</sup> defendant?**
- 11. Did the plaintiff call upon the 2<sup>nd</sup> defendant as a guarantor to pay the sum due under the guarantee?**
- 12. Are the defendants indebted to the plaintiff and if so to what extent?**
- 13. Is this suit statute barred?**
- 14. Is the plaintiff entitled to the relief sought in the plaint?**
- 15. Who pays the costs of the suit?**

The plaintiff's evidence was tendered by one Hannington Taabu

who at the time of his testimony was employed by the Deposit Protection Fund Board and was previously

employed by the plaintiff from 1982 to 1994 when it went into liquidation. PW1 testified that he knew the two defendants who were customers of the plaintiff. He identified an application for a loan of Kshs.5,200,000.00 for agricultural development. The application was signed by the 2<sup>nd</sup> defendant. The plaintiff approved the loan facility of Kshs.5,200,000.00. The letter of approval was identified by PW1. A floating debenture was to be created over the 1<sup>st</sup> defendant's assets and the 2<sup>nd</sup> defendant was to execute a guarantee. PW1 identified the personal guarantee. He also identified the debenture which according to him was duly registered. The loan was then disbursed. He identified the cheque drawn to the credit of the 1<sup>st</sup> defendant by the plaintiff. He told the court that the money has never been repaid. PW1 identified the 1<sup>st</sup> defendant's statement with the plaintiff showing the 1<sup>st</sup> defendant's indebtedness to the plaintiff. He produced a bundle of documents the plaintiff sought to rely upon as PEX 1. The sum claimed according to PW1 was Kshs.38,571,240.75 plus interest thereon at 15% p.a. As regards interest the witness relied upon the letter of offer aforesaid. According to PW1, the plaintiff had the right to vary interest.

PW1 further testified that, the 1<sup>st</sup> defendant was a shareholder in an entity called Pan African Bank Limited which has a separate legal existence from the plaintiff.

On cross-examination PW1 testified that the loan facility was regularly sought and given. The 1<sup>st</sup> defendant's account was credited with the cheque for the said loan sums. He stated that on the authority of the 1<sup>st</sup> defendant an internal entry was made crediting the share capital of the 1<sup>st</sup> defendant with the said Pan African Bank Limited. PW1 further testified that the loan was to be repaid by 31.7.1994 but by 30.6.1991, the 1<sup>st</sup> defendant was in default. He admitted that a receiver had not been appointed pursuant to the provisions of the debenture. He also admitted that both the plaintiff and its sister company Pan African Bank Ltd. shared an MD: one Mohamed Aslam.

The defendants' evidence was tendered by the 2<sup>nd</sup> defendant. He testified that he is the director of the 1<sup>st</sup> defendant and was a personal friend of the plaintiff said Chairman, Mohamed Aslam. One day the said Aslam visited him at his firm and noted its state of development and asked the 2<sup>nd</sup> defendant to apply for an agricultural loan which he did and furnished security in the form of a debenture over the 1<sup>st</sup> defendant's assets. He understood that if there was default, a receiver would be appointed to recover the debt. He also admitted signing a letter of guarantee. Despite the above, the loan was never disbursed. He testified that the same was paid to Pan African Bank Ltd. and not to him or the 1<sup>st</sup> defendant. He denied authorizing the acquisition of shares in the said bank for the 1<sup>st</sup> defendant. The second defendant denied all the documents relating to the loan disbursement and share acquisition. The 2<sup>nd</sup> defendant therefore prayed for dismissal of the suit.

On cross-examination, the 2<sup>nd</sup> defendant denied having an account at Pan African Bank Ltd. and further that he had any dealing with the entity at all. He admitted that in the statements of accounts filed for the 1<sup>st</sup> defendant, investment in shares in Pan African Bank is shown. The 2<sup>nd</sup> defendant could not explain how that item was reflected in the 1<sup>st</sup> defendant's accounts prepared by its registrars. He did not also seek any explanation from the 1<sup>st</sup> defendant's auditors. He also admitted an entry in the said accounts reflecting a payment of Kshs.1,000,000.00 but could not explain how the item appeared in the 1<sup>st</sup> defendant's audited accounts because in his view, the 1<sup>st</sup> defendant had no money to pay any one.

He could also not explain a further payment of Kshs.500,000.00. Pressed further, the 2<sup>nd</sup> defendant admitted acquiring 400 shares in the said bank in the name of the 1<sup>st</sup> defendant. He also admitted discussing his indebtedness with the Deposit Protection Fund Board and issuing a cheque on an account which had not money. He said he did so under pressure and to keep the Deposit Protection Fund Board quiet.

On the conclusion of evidence Counsel agreed to file Written Submissions and by 20.7.2007 the submissions had been filed. I have considered the above evidence and the written Submissions made by

counsel. I have also given due consideration to the authorities cited. Having done so, I can now answer the issues framed by the parties for determination by the court.

The plaintiff's claim is founded on the letter of offer dated 4.8.1999. The same was accepted by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant admitted signing the same on behalf of the 1<sup>st</sup> defendant. The plaintiff produced a copy of its cheque for Kshs.5,200,000.00 dated 22.12.1989 payable to Pan African Bank Limited. It also produced the 1<sup>st</sup> defendant's audited accounts which show that the 1<sup>st</sup> defendant was indebted to the plaintiff in the sum of Kshs.5,797,838.00 as in the year 1991 and Kshs.5,353,503.00 in the year 1990. There is no way the 1<sup>st</sup> defendant's auditors would have known of the 1<sup>st</sup> defendant's indebtedness to the plaintiff unless they were given that information by the 1<sup>st</sup> defendant or the same was obtained from the 1<sup>st</sup> defendant's books of accounts which books must have been given to the auditors by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant's denial of the indebtedness is not believable. He is the one who signed the accounts. The evidence discloses that the 1<sup>st</sup> defendant utilized the loan funds to purchase shares in Pan African Bank Limited. The same audited accounts of the 1<sup>st</sup> defendant clearly attest to that fact. Again the 2<sup>nd</sup> defendant's denial that he authorized the purchase of shares in the said bank is not serious as the said shares are treated as investment in the 1<sup>st</sup> defendant's audited accounts. On the evidence adduced it is clear that on the 1<sup>st</sup> defendant's application for a loan from the plaintiff, the latter made an offer of the same to the 1<sup>st</sup> defendant who accepted the offer and the plaintiff disbursed the loan sum of Kshs.5,200,000.00 to the credit of the 1<sup>st</sup> defendant in Pan African Bank Limited. The 1<sup>st</sup> defendant chose to utilize the loan sums for the purchase of shares in the said bank instead of agricultural purposes as originally intended. The 1<sup>st</sup> defendant took benefit of the loan and its expression of ignorance is a red herring.

The terms of the loan are clearly spelt out in the letter of offer. The loan was to be repaid by 31.7.1994 at the interest rate of 18% p.a. with overdue payments attracting further interest at the same rate. Security was by way of a floating debenture over the 1<sup>st</sup> defendant's assets.

As regards the plaintiff's claim against the 2<sup>nd</sup> defendant the plaintiff produced the letter of guarantee dated 4.8.1989. The 2<sup>nd</sup> defendant freely admitted executing the same. The 2<sup>nd</sup> defendant's liability was not, at any time, to exceed Kshs.5,200,000.00 exclusive of interest and other charges. As the 1<sup>st</sup> defendant defaulted, the 2<sup>nd</sup> defendant's liability arose on demand. A demand was made upon him on 26.10.1999 and he too defaulted.

On the defence of limitation made by the defendants, it is not disputed that the plaintiff's claim is founded on contract. Under the Limitation of Actions Act such a claim may not be brought after the expiry of 6 years from the date the cause of action accrued. And what is the date the plaintiff's cause of action accrued? The reference point is the contract itself. The letter of offer provided that the latest repayment date was 31.7.1994. If that was the only reference point the plaintiff's cause of action would be statute barred by 31.7.2000. But the letter of offer contains special Condition 5. It reads as follows:-

**“5 Notwithstanding anything mentioned hereinabove**

**please note that this is a demand loan and any outstanding**

**amount including interest and charges will have to be paid**

**by you immediately upon our demand.”**

That Special Condition varied the date of accrual of the cause of action and pegged it upon the making of a demand by the plaintiff. There is no dispute that the plaintiff made their demand vide their letter dated 15.12.1994. Accordingly, the plaintiff had upto 14.12.2000 to institute these proceedings. These proceedings having been instituted on 28.11.2000 are not caught by the Limitation of Actions Act.

The demand upon the 2<sup>nd</sup> defendant was made on 26.10.1999 and this suit instituted about a year later. It is obvious that the plaintiffs claim against the 2<sup>nd</sup> defendant cannot be defeated on the ground that it is statute barred.

As regards the defence based on Section 56 of the Companies Act, I am afraid the same was clearly misconceived and I reject it summarily.

Arising from my above findings, the answers to the issues framed by the parties for trial are now obvious. I have found that there was indeed an enforceable contract between the plaintiff and both defendants. I have further found that the terms of the contract were spelt out in the letter of offer of 4.8.1989 and the letter of guarantee of even date. The defendants did not show in what manner the contracts were varied and no evidence of variation was adduced. My above findings show that consideration was furnished for the guarantee executed by the 2<sup>nd</sup> defendant and with regard to the contract between the plaintiff and the 1<sup>st</sup> defendant the plaintiff disbursed the loan sums of Kshs.5,200,000.00. There can therefore be question of failure of consideration. I have also found that the lending was not against the law and lawful demand was made upon both defendants. I have also found that the plaintiff's claim is not statute barred.

Arising from the above answers to the issues framed by the parties for trial, I find and hold that the plaintiff has proved its case against both defendants on a balance of probabilities and is entitled to judgment as prayed.

Judgment is accordingly entered in favour of the plaintiff against the defendants as prayed in the plaint with costs. It is so ordered.

**DATED and SIGNED at NAIROBI** this 11<sup>th</sup> day of December 2007.

**F. AZANGALALA**

**JUDGE**

**DATED and DELIVERED at NAIROBI** this 13<sup>th</sup> day of December 2007.

**M.A. WARSAME**

**JUDGE**

Read in the presence of:- M/S Kirimi for the plaintiff and Mr. Kakaya for the defendant in open court.

**M.A. WARSAME**

**JUDGE**

**13/12/2007**