



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

**Civil Case 445 of 1999**

**COMMERCE BANK LIMITED.....PLAINTIFF**

**VERSUS**

**IMPALA GARMENTS LIMITED & 2 OTHERS.....DEFENDANTS**

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

The brief facts in this case are that: on 30/7/1996, the Plaintiff – Giro Commercial Bank Limited, gave a short term loan of K.Shs.8 million, for 12 months, at 32% interest rate, to the 1<sup>st</sup> Defendant – Impala Garments Limited. The facility was supported by a charge on property – Kisumu Municipality/Block 10/17, which belonged to the 3<sup>rd</sup> Defendant – Savita V. Jethwa. On top of the charge, the facility was further supported by personal Guarantees by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, who were directors of the 1<sup>st</sup> Defendant company.

As on 31/12/1998, the 1<sup>st</sup> Defendant – the borrower, was in default and the debt, as on that date, stood at K.Shs.14,419,926/- which sum continued to attract interest.

Upon the suit herein being filed, defences, which are general denials of the claim, were filed by the 1<sup>st</sup> through 3<sup>rd</sup> Defendants. The 4<sup>th</sup> Defendant has not filed any defence and judgment was entered against the 4<sup>th</sup> Defendant.

This judgment is accordingly against the first three Defendants who, despite being duly served with hearing notices have, on several occasions, failed/refused/neglected to appear in this court, and defend themselves. The specific dates when the Defendants failed to show up are: 18/2/04; 5/4/04; and 8/6/04. Hence, the proceedings **ex parte**, by the Plaintiff, on 8/6/04, when the Plaintiff was called upon by the court to adduce the evidence for its claim against the Defendants.

The Plaintiff called only one witness – MODARI PARBHAKAR SHASTRY, the General Manager of the plaintiff Bank who, after making an affirmation, narrated to the court how the 1<sup>st</sup> Defendant entered into the loan facility with the Plaintiff on 31/7/1996 and how the charge on the Kisumu Property, belonging to the 3<sup>rd</sup> Defendant, was executed and registered on 5/9/1996; how the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants executed personal guarantees on 31/7/1996. The witness went on and told the court how the total disbursement was made and how, and when, the 1<sup>st</sup> Defendant defaulted on 23/2/1999 and produced letters to that effect addressed to both the principal borrower and the two guarantors – 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The letters and demand notes to all the concerned Defendants elicited no responses. Statutory Notice had been given on 23/2/1999; and the Sale Advertised in the Daily Nation on 27/1/03 and again on 10/2/03. Ultimately the property was sold for K.Shs.4.57 million on 11/2/03; and the plaint in this suit originally filed on 20/4/1999, was amended on 25/9/2001 reflecting the inadequacy of the security initially offered **vis-à-vis** the sum claimed due to accrued interest.

The witness produced and put in the original copies of the documents as one document – one Exhibit – in support of every claim made, including a second Statement of Account from 1/12/1998 until the sale, which shows the sale proceeds received and credited to the Account, leaving unpaid balance of the sum claimed in the Amended Plaint.

The two combined statements of Accounts produced on 10/11/04, covered the period 1/1/1999 to 31/3/03. This was in compliance with the court's order of 8/11/04 for a comprehensive Statement of

Accounts up to the Amended Plaintiff herein earlier referred to.

I have closely read the defence filed by the Defendants herein and have reached the finding and conclusion that the defences are mere denials of properly documented evidence by the Plaintiff. I begin with the 1<sup>st</sup> Defendant – the borrower. All the purported defences, and challenges that the Defendant would put the Plaintiff to strict proof, in my view, fizzled out when the Defendant failed to appear/participate in the proceedings to cross-examine the Plaintiff's witness or challenge any of the documents produced in proof of each and every aspect of the claim.

I dismiss the same as sheer attempts to deny even documents bearing the signatures of the 1<sup>st</sup> Defendant company, **vide** its directors and principal officers.

The same goes for the written statement of defence by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, dated 19/5/1999 and filed in Court on 21/5/99. There is no doubt that the two guarantee contracts, executed by them, are there on record for anybody to see. I find the feeble defence that the suit is premature, based on the challenge that the charged property was worth K.Shs.15,000,000/- hollow in the absence of any Valuation report. And that is not all. Had that property been worth the alleged value, there would have been no need for further personal guarantees to secure only K.Shs.8,000,000/- initially lent to the 1<sup>st</sup> Defendant.

All in all, I find and conclude that the Plaintiffs have proved their claim, on a balance of probabilities, if not more, against the Defendants, jointly and severally. Accordingly:

- (a) I enter judgment against the Defendants, jointly and severally, for K.Shs.14,419,926/- being the amount due from the Defendants to the Plaintiff as on 31/12/1998 under the loan facility and guarantees as set out herein.
- (b) The said sum of K.Shs. 14,419,926/- to be paid at the rate of 31% with effect from 1/1/1999 till payment in full.
- (c) Costs of this suit together with interest thereon at court rates.

DATED and delivered in Nairobi, this 2<sup>nd</sup> day of November, 2006.

O.K. MUTUNGI

JUDGE