



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

**Civil Case 55 of 1999**

**THE DELPHIS BANK LIMITED .....**  
**..... PLAINTIFF**

**- V E R S U S -**

**1. THE WORLD FASHIONS LIMITED.**  
**2. NATIONAL & SEASUN GARMENT FACTORY LTD**  
**.....DEFENDANTS**

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

The plaintiff is a banking institution. The plaintiffs claim is in the sum of shs. 4,854.463.45 with interest thereof at the rate of 32% p.a. which is beyond court rates.

The first defendant is the maker of promissory notes and the second defendant is the endorser thereof. Both defendants filed defence to the claim which they deny. Both parties gave evidence.

Upon the completion by National & Seasun Garment Factory of form exhibit No. 1 the plaintiff opened an account in its bank being No. 01027410. This was current account. The form is dated 25.1.93 on 27.1.1993 exhibit 2 headed "General terms and conditions" comprising of 31 clauses of agreements was signed by 2<sup>nd</sup> defendant in acceptance of all the conditions laid down thereon by the plaintiff.

On 18.11.1993 the plaintiff granted banking facilities as set out in Exhibit numbered 3 namely Bills discounting for discounting local bills drawn on approved drawers, terms and conditions including rate of interest are set out in that exhibit. The Security required was –

1. pledge of bills
2. guarantee of Directors for Kshs. 2.million.

The limit of the facility was shs. 1.5. million and it was to expire on 30.9.1994.

The evidence on both sides is that the first defendant WORLD FASHIONS LTD handed over/ endorsed to the plaintiff promissory notes from time to time. The bills were credited to the second defendant account with the plaintiff. However 45 bills were never paid by the first defendant. The current account opened by second defendant with plaintiff was active to start with but according to the bank statements exhibited by the plaintiff the account turned into debit balances. In 1996 shillings 2

million was paid towards reducing the balance. This payment is evidenced by Dexh. No. 2 dated 27.6.96. There is such entry reflected in the account reducing the overdraft from Khs. 5,254.119.50 to shs. 3,2309.120.50. By 31.8.98 the debit balance had climbed to shs. 11,25.988.85. A credit was posted amounting to shs. 9 million reducing the account to 2,251.988.85. In his evidence the DW1 admitted this balance should have been 1954175/35 after the payment of 9 million. However the plaintiffs witness in re-examination admitted that the value of the promissory notes was 2591467/-. It is submitted the balance is interest and other charges. The interest was charged at the rate of 32% as agreed upon. Upon a perusal of exhibit 7 it is clear after the payment of 9 million, the entries on account are interest, ledger fees and other miscellaneous debits. It is agreed that only one current account was being operated and the bills were dealt with on the same account.

I have perused the statement of defence of both defendants. Their dispute is that the property security was sold for shs. 10 million and only shs. 9. million was credited to the account while 1 million went towards conveyance and other related disbursements and this should have covered all debits. They claim interest was unconcruable at 48%. These defences are not supported by evidence. The defendants agreed to all conditions of running the account and the expenses to be paid by defendants and interest to be charged were all set out in documents signed by the second defendants. The interest charged was 32% as confirmed by PW1. It is to be noted that no evidence was led as to the non payment of promissory notes by the first defendant and the plaintiffs evidence that they were never paid is uncontroverted.

Upon considering the submissions of both counsel and upon perusing the exhibits produced by both parties I am convinced that the plaintiffs case is proved. The defendant has no merit. I, therefore enter judgment as prayed in the plaint. Interest is awarded up to the date of filing plaint at the rate of 32% however after filing plaint to the date of payment in full interest is awarded at the court rates. Costs are granted to the plaintiff.

Dated this 28<sup>th</sup> day of October, 2004.

J. KHAMINWA

**JUDGE**

28.10.04

Khaminwa – Judge

Cege – Court clerk

Mr. Gor

Mr. Okongo holding brief for Y.A. Ali.

Judgement read in his presence.

Mr. Okongo – I am instructed to apply for stay for 7 days to make formal application to appeal. I pray for copies of judgment and proceedings.

Mr. Gor – No objection.

Temporary stay granted for 7 days. Proceedings to be supplied upon payment of copying charges.

**J. KHAMINWA**

**JUDGE**