



Sbm Bank (Kenya) Limited v Mall to Mall Designs Limited & 2 others (Commercial Case E735 of 2021) [2025] KEHC 1590 (KLR) (Commercial and Tax) (14 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1590 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E735 OF 2021
MN MWANGI, J
FEBRUARY 14, 2025

BETWEEN

SBM BANK (KENYA) LIMITED PLAINTIFF

AND

MALL TO MALL DESIGNS LIMITED 1ST DEFENDANT

JORAM NDINGURI GATEI 2ND DEFENDANT

EUNICE WANJIKU GATEI 3RD DEFENDANT

JUDGMENT

1. The plaintiff vide a plaint dated 27th July 2021 instituted this suit against the defendants seeking judgment against them as hereunder -
 - i. The sums of Kshs.46,556,677.15;
 - ii. Costs of the suit;
 - iii. Interest on (i) and (ii) above at Court rates from the date of filing suit until payment in full; and
 - iv. Such other and/or further remedies as this Honourable Court deems fit.
2. The plaintiff's case is that it took over the assets and liabilities of Chase Bank (Kenya) Limited in April 2019, including banking facilities granted to the 1st defendant and any securities issued in favour of Chase Bank pursuant to any such facilities. The plaintiff contended that sometime in 2014, the 1st defendant applied for a Kshs.190,000,000/= facility, which was approved via an Offer Letter dated 2nd October 2015. The said facility included a Standby Letter of Credit (SBLC) of Kshs.100,000,000/=, Invoice Discounting Line (IDL) of Kshs.50,000,000/=, Term Loan of Kshs.20,000,000/=, and an Overdraft of Kshs.20,000,000/=. The plaintiff averred that the loan facility was secured by inter alia,



- irrevocable personal guarantees issued by the 2nd & 3rd defendants in favour of the plaintiff pursuant to a Deed of Guarantee and Indemnity dated 18th August 2014 and registered on 18th August 2015.
3. The plaintiff stated that following personal guarantees issued by the 2nd & 3rd defendants, Chase Bank issued a bank guarantee on behalf of the 1st defendant on 11th August 2015 in the form of an irrevocable and unconditional Standby Letter of Credit for ZAR 3,618,178.70 in favour of Macadams International (PTY) Ltd effective from 11th August 2015. The plaintiff contended that the guarantee was later called up by the beneficiary, leading to a debit entry of Kshs.30,754,518.95 in April 2018. The plaintiff further contended that although the 1st defendant's securities were later taken over by Prime Bank in 2017, the plaintiff remained liable for the Letter of Credit since it had crystallized and it was not transferrable.
 4. The plaintiff asserted that as at March 2021, the outstanding amount due to the plaintiff by the 1st defendant stood at Kshs.46,556,677.15, which continued to accrue interest. It contended that the defendants failed to fulfill their obligations under the Offer Letter and Personal Guarantees despite multiple demands, thus the plaintiff now claims from the defendants Kshs.46,556,677.15 plus interest as compensation for financial losses suffered due to the defendants' default.
 5. In opposition to the plaintiff's suit, the defendants filed a statement of defence dated 25th November 2021 which was later amended on 13th April 2022 to include a set off and counter-claim. In their defence, the defendants denied all the averments in the plaintiff's plaint but acknowledged that the plaintiff took over the assets and liabilities of Chase Bank Limited, which was placed under receivership in 2016. They however asserted that the plaintiff never assumed Chase Bank's banking facilities granted to the 1st defendant, as they were taken over and settled by Prime Bank Limited on 12th October 2017. The defendants contended that Chase Bank Limited had informed them that their total outstanding liabilities amounted to Kshs.23,887,813.55 as at 1st February 2017, but this was later capped at Kshs.16,000,000/= as per the plaintiff's own representation in an email sent to Prime Bank Limited's Advocate on 27th September 2017.
 6. The defendants averred that they facilitated the takeover of their liabilities by Prime Bank Limited, which fully discharged these obligations on 12th October 2017 and thereafter the securities held for the facilities were discharged. The defendants confirmed that the SBLC issued by Chase Bank Limited was limited to Macadams International (PTY) Limited and was not transferable to third parties. The defendants contended that the plaintiff's refusal to honour the SBLC when called upon in August 2016 breached the SBLC contract. The defendants claimed that the plaintiff was estopped from making further claims against them and that any interest charged on the SBLC was unlawful under the Banking Act.
 7. In their set off and counter-claim, the defendants stated that the 1st defendant applied for a Bank Guarantee of ZAR 3,618,817.70, for which a SBLC was issued on 11th August 2015. They further stated that the plaintiff's Letter of Offer dated 2nd October 2015 granted the 1st defendant a credit facility of Kshs.190,000,000/= which comprised a SBLC of Kshs.100,000,000/=: an IDL of Kshs.50,000,000/=: a Term Loan of Kshs.20,000,000/= and an Overdraft of Kshs.20,000,000/=. They further stated that the 1st defendant made payments towards the aforesaid facilities, but underpaid the term loan by Kshs.298,635.54 and overpaid the IDL by Kshs.31,704.85. They contended that the 1st defendant credited Kshs.50,417,995.29 into its current account being account No. 0302090813001, against an outstanding liability of Kshs.46,556,667.15, resulting in an overpayment of Kshs.3,861,328.14.



8. The defendants claim a net refund of Kshs.3,594,397.45 from the plaintiff, asserting that the plaintiff breached the terms of its offer letter dated 2nd October 2015 by levying unauthorized interest. The defendants pray for judgment against the plaintiff in the following terms -
 - i. The sum of Kshs.3,594,397.45 together with interest at Court rates from the date of filing the counter-claim until payment in full;
 - ii. Costs of the counter-claim;
 - iii. Interest on (ii) above; and
 - iv. Any other relief(s) and/or alternative order(s) that the Honourable Court may deem fit and just to grant.
9. In response, the plaintiff filed a reply to the amended defence and defence to set off and counter-claim where it denied all the averments contained in the defendants' amended statement of defence, set off and counter-claim. The plaintiff contended that it had to honour the issued bank guarantee and SBLC despite their expiry, as they had already been utilized by the 1st defendant. It further stated that the interest charged was per the agreed contractual rate and there was no overpayment.
10. This matter proceeded to hearing where the plaintiff called one witness in support of its case. The defendants called two witnesses in support of their case.

Plaintiff's Case.

11. Mr. Peter Chege testified as PW1. He adopted his witness statement dated 27th February 2023 as his evidence in chief and produced the documents in the plaintiff's list and bundle of documents dated 2nd September 2021 as plaintiff exhibit Nos. 1 to 15, and the one in the supplementary list and bundle of documents dated 22nd June 2022 as plaintiff exhibit No. 16. He testified that in 2014, the 1st defendant secured a Kshs.190,000,000/= loan facility from Chase Bank Limited to refinance a loan and obtain new funding. The said facility was secured by a legal charge, a debenture, and personal guarantees from the 2nd & 3rd defendants. He further testified that in August 2015, Chase Bank Limited issued a SBLC to secure supplies for the 1st defendant, which SBLC was called upon in 2016 but not settled due to Chase Bank Limited's receivership.
12. He contended that the said SBLC was later honoured by the plaintiff in April 2018 leading to a debit of Kshs.30,754,518.95 from the 1st defendant's account. Mr. Chege stated that in 2019, the plaintiff took over Chase Bank's assets and liabilities, including banking facilities extended to the 1st defendant. He further stated that since the defendants defaulted on payments, the plaintiff took over Chase Bank Limited's claim under the Personal Guarantee. He contended that as at 30th April 2021, the outstanding balance due and owing from the defendants to the plaintiff stood at Kshs.47,691,712.40, which amount continues to accrue interest.
13. During cross-examination by Mr. Mulani, PW1 stated the SBLC issued to Macadams International (PTY) Limited on behalf of the 1st defendant by Chase Bank was secured by fixed and floating debentures over all the 1st defendant's assets and personal guarantees from the 2nd & 3rd defendants. He stated that after the plaintiff settled the SBLC, it notified the 1st defendant via email, but there was no response. He asserted that the expiry of the SBLC's validity did not extinguish the 1st defendant's liability. Mr. Chege testified that the plaintiff deducted a commission of Kshs.115,865.20 for the SBLC and confirmed that the SBLC was called up before its expiration, making it a liability of the 1st defendant. He further testified that on 5th October 2017, the 1st defendant's account was credited with



Kshs.7,363,613.25, but since the SBLC was an off-balance-sheet item, the account showed a credit balance of only Kshs.26,427.75 as at 6th October 2017.

14. In cross-examination by Mr. Onyancha, Mr. Chege stated that any guarantee called up vide a SBLC did not oblige the plaintiff to pay the money to Macadams International (PTY) Limited, but the plaintiff could have asked the 1st defendant to honour it. He then stated that once a SBLC is called up, the plaintiff had to honour it, especially because the 1st defendant defaulted in honouring the SBLC in question. He contended that the 1st defendant has neither denied that the SBLC was called up nor that it benefited from it. He stated that interest charged on the amount paid as a result of the SBLC was determined by the Central Bank of Kenya.
15. In re-examination, PW1 stated that the SBLC in question was neither transferrable nor negotiable hence the reason it was not communicated to Prime Bank Limited.
16. On being examined by the Court, Mr. Chege stated that before a SBLC is called up, it is never reflected in the transaction account. He further stated that in this case, it was reflected in the said account after it was called up.

Defendant's Case.

17. Mr. Wilfred Abincha Onono testified as DW1. He adopted his witness statement dated 25th April 2022 as his evidence in chief and produced a report contained at pages 18 - 21 of the defendants' bundle of documents as defence exhibit No. 1. He testified that he is the Managing Consultant of Interest Rates Advisory Centre (IRAC). He stated that he relied on the documents outlined in paragraph 7 of his statement and from his analysis, he found that in relation to loan account No. 030TELS152920001 the plaintiff undercharged the 1st defendant by Kshs.298,635.54, in relation to account No. 030INVD153000001, the plaintiff overcharged the 1st defendant by Kshs.31,704.85.
18. On the current account No. 0302090813001, DW1 testified that the recalculation excluded a debit of Kshs.30,754,518.95 on 16th April 2018. He explained that was so because the 1st defendant's contention was that the bank could not claim amounts it did not declare as due, when the debt was to be taken over by Prime Bank. He further testified that as at April 2020, there was a discrepancy between the plaintiff's reported debit balance of Kshs.46,556,667.15 and IRAC's credit balance of Kshs.3,861,328.14, resulting in a recalculation difference of Kshs.50,417,995.29 in favour of the 1st defendant.
19. During cross-examination, DW1 stated that the interest for 1st March 2016 as per page 78 of the plaintiff's documents, 030INVD153000001 main interest liquidation settlement bridge account was Kshs.675,820.80 and on 2nd March 2016, under interest on Invoice Discounting, the interest was Kshs.2,437,355.65. He further stated that in March 2016, there was no overdraft interest charged on the 1st defendant's account.
20. In re-examination, DW1 clarified that they use the terms agreed on by the parties, and in this instance they looked at the figures debited from the 1st defendant's account, picked up what was debited as interest and then re-calculated interest.
21. Mr. George Kagucia, testified as DW2. He adopted his witness statement dated 13th April 2022 as his evidence in chief and produced the documents in the defendants' list and bundle of documents as defence exhibit Nos. 2 to 10. He testified that he is the 1st defendant's Finance and Administration Manager. He further testified that Chase Bank (and later SBM Bank) acknowledged that the 1st defendant's outstanding liabilities as at September 2017 was Kshs.16,000,000/=, which sum was



- settled by Prime Bank on 12th October 2017 while Chase Bank Limited was still in receivership. He stated that the defendants were discharged from any further obligations. He asserted that the defendants do not owe the plaintiff any money.
22. Mr. Kagucia contended that Chase Bank failed to settle a guarantee demand made by Macadams International on 6th August 2016 despite its obligations under ICC URDG 758 and it did not inform the defendants of its inability to pay due to the fact that it was under receivership. He asserted that the SBLC was not supposed to accrue interest, but Chase Bank continued to levy interest against the 1st defendant's account in contradiction to the Letter of Offer dated 2nd October 2015. He testified that since the plaintiff discharged the 1st defendant upon payment from Prime Bank, it is estopped from making any further claims. He further testified that there was no prior communication before November 2020 of an outstanding loan balance of Kshs.30,000,000/=. He referred to page 46 of the plaintiff's bundle and stated that there is email correspondence from the 1st defendant disputing the amount that was being claimed by the plaintiff in its email correspondence at page 44 of the plaintiff's bundle.
 23. During cross-examination by Mr. Kazungu, DW1 confirmed that the 1st defendant was aware of the call up of the SBLC and that the SBLC was neither negotiable nor transferrable, which means that the SBLC could not be transferred to a third party. Mr. Kagucia stated that the 1st defendant benefitted from the guarantee of ZAR 3,618,817.70, which was used for general trading by the 1st defendant. He contended that he did not see the money coming into the 1st defendant's account but he knows that the bank gave a guarantee as per the SBLC. He stated that the debit of Kshs.30,754,578.95 from the 1st defendant's account was done in the year 2018 after Chase Bank Limited had confirmed the outstanding balance and Prime Bank Limited had paid of the liability, and the securities released.
 24. In re-examination by Mr. Onyancha, Mr. Kagucia stated that the 1st defendant was not given any money by way of the SBLC. He further stated that his understanding of the SBLC not being transferable is that the said SBLC could not be transferred to any other party other than Macadams International (PTY) Limited. He testified that as far as he knows, goods were not supplied by Macadams International (PTY) Limited.
 25. At the close of the defendants' case, the Court directed parties to file written submissions. The plaintiff's submissions were filed on 17th July 2024 and 15th October 2024 by the law firm of KOD Advocates LLP, and the defendants' submissions were filed by the law firm of MJD Associates Advocates on 27th September 2024.
 26. Mr. Kazungu, learned Counsel for the plaintiff submitted that Chase Bank Limited had no choice but to honor and settle the guarantee demand of ZAR 3,618,178.70 issued on behalf of the 1st defendant to Macadams International (PTY) Limited. He referenced the terms of the SBLC, the Black's Law Dictionary definitions of "indemnity" and "bond" and the principle of estoppel, and further submitted that the 1st defendant has an obligation to reimburse the plaintiff monies that the plaintiff paid on its behalf as a result of the guarantee that the 1st defendant had issued. He relied on the Court of Appeal case of National Bank of Kenya Limited v Pipeplastic Samkolit & another [2001] KLR 112, and contended that the 1st defendant's application for a guarantee/bond and the plaintiff's subsequent issuance of an SBLC created a binding contract.
 27. He noted that the 1st defendant did not plead coercion, fraud, or undue influence regarding the guarantee/bond or SBLC terms and urged the Court to uphold the contract and affirm the plaintiff's right to indemnification by the 1st defendant. Counsel argued that the SBLC is a legal instrument governed by the Bill of Exchange Act. He cited Section 8(1) of the said Act to assert that its validity



was limited to the original parties, namely Chase Bank Limited and Standard Bank, and as such, the SBLC could not be transferred to Prime Bank Limited. Mr. Kazungu referred to a guarantee in the plaintiff's exhibits, signed by the 2nd & 3rd defendants, and argued that since the plaintiff had issued a demand notice to them for payment, they were equally liable with the 1st defendant for the sums owed to the plaintiff. To buttress these submissions, Counsel relied on the Court of Appeal case of *Karuri Civil Engineering (K) Limited v Equity Bank Limited* [2019] eKLR.

28. It was submitted by Mr. Kazungu that the Recalculation Report produced by DW1 was unreliable and insufficient to prove that the plaintiff charged interest rates and penalties beyond the contractual terms. He relied the case of *Shah & another v Shah & others* [2003] I EA 290 cited by the Court in *Husseni Dairy Limited v Southern Credit Banking Corporation Limited & another* [2020] eKLR and contended that the defendants failed to prove any overcharging, as the interest rates were as per the Agreement. He further submitted that DW1's evidence was inconsistent and could not be relied upon, as he failed to explain fluctuating balances in his Report despite the undisputed contractual interest rate of 18.5%.
29. Mr. Onyancha, learned Counsel for the defendants submitted that SBLCs are governed by the International Chamber of Commerce International Standby Practices (ISP98) and ICC Uniform Rules for Demand Guarantees (URDG 758), not the Bill of Exchange Act. He submitted after its amendment, the SBLC in question was governed solely by ISP98 UCP 590. He further submitted that Rule 6 of ISP98 UCP 590 only restricts transfer of a letter of credit by the beneficiary, not the issuing party, and therefore, the plaintiff's claim that the SBLC could not be transferred to Prime Bank Limited lacked merits. He relied on the case of *Margaret A. Ochieng v National Water Conservation & Pipeline Corporation* [2014] eKLR cited with authority by the Court of Appeal in *Transparency International - Kenya v Omondi (Civil Appeal 81 of 2018)* [2023] KECA 174 (KLR) and argued that in this case, Chase Bank had a duty to inform the 1st defendant if it was unable to settle the SBLC upon demand.
30. He contended that since the SBLC was not honoured, it expired on 10th August 2016 under Rule 9 of ISP98 UCP 590, making it unenforceable by any party. He asserted that the plaintiff failed to provide proof of payment to Macadams International (PTY) Limited, hence the orders sought herein should not be granted. Mr. Onyancha in citing the Black's Law Dictionary 9th Edition definition of "estoppel", submitted that Chase Bank informed the 1st defendant on 1st February 2017 that its outstanding liability was Kshs.23,887,813.55. That Prime Bank Limited requested a takeover of the 1st defendant's liabilities in a letter dated 25th August 2017. He submitted that the plaintiff's Advocates later confirmed via email on 27th September 2017 that the liability stood at Kshs. 6,010,915.60, which Chase Bank agreed to cap at Kshs.16,000,000/=. The 1st defendant then instructed Prime Bank Limited to remit this amount to Chase Bank Limited, after which it was discharged from all liabilities, and the collateral was transferred to Prime Bank Limited.
31. Counsel cited the case of *National Bank of Kenya Limited v Carol Construction Engineers Limited & another (Civil Appeal E059 of 2021)* [2022] KECA 1426 (KLR) and stated that the representations made to Prime Bank Limited amounted to estoppel by representation, which the defendants are entitled to rely on. Mr. Onyancha contended that the SBLC did not attract any interest beyond the 1.0% commission, as stipulated in Clauses 1 and 5 of the Letter of Offer dated 2nd October 2015, which was debited by the plaintiff on 6th April 2016. He referred to the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike & another* [2015] eKLR, and asserted that since the SBLC lacked an express term on default interest, the plaintiff had no justification for levying additional interest. He further argued that the plaintiff failed to provide reasons for disregarding the defendants' expert Report and urged the Court to find that excessive interest was charged, thus entitling the 1st defendant to a refund as pleaded in the counter-claim.



32. In a rejoinder, Mr. Kazungu submitted that the SBLC application form explicitly authorized Chase Bank to make payments and comply with demands without requiring further consent from the defendants until the bond/guarantee was returned and canceled. Since the SBLC had not been canceled at the time it was invoked, Chase Bank was fully authorized to act. He further submitted that the SBLC was not renewed as it matured upon the South African bank calling for it during its validity period. Counsel relied on the case of Carol Construction Engineers Limited & another v National Bank of Kenya [2020] eKLR, and argued that by failing to recall or cancel the SBLC because its expiration, the 1st defendant effectively accepted its continued existence and validity. He contended that as a result, the defendants should be estopped from denying liability arising from the SBLC.
33. Counsel contended that the defendants are attempting to unjustly enrich themselves by refusing to honor their obligations under the SBLC because despite executing the offer letter dated 2nd October 2015, the defendants seek to benefit from the SBLC without fulfilling their duty to indemnify the plaintiff once the guarantee was called upon. Counsel asserted that the South African bank made a valid claim within the agreed period, and the defendants' refusal to indemnify the plaintiff is a deliberate attempt to evade liability while still enjoying the benefits of the SBLC, amounting to unjust enrichment. To this end, Mr. Kazungu relied on the case of Samuel Kamau Macharia v Kenya Commercial Bank Limited [2003] eKLR.

Analysis And Determination.

34. I have considered and analyzed the evidence adduced in line with the pleadings filed, as well as the written submissions filed by Counsel for the parties. The issues that arise for determination are: -
 - i. Whether the plaintiff's suit is merited;
 - ii. Whether the plaintiff unlawfully levied interest on the SBLC in question; and
 - iii. Whether the plaintiff is liable to refund the defendants Kshs.3,594,397.45.

Whether the plaintiff's suit is merited.

35. The plaintiff's suit against the defendants revolves around SBLCs. It is as such important to understand what a letter of credit is and its effect, in order to aptly determine this issue. A letter of credit is defined in the Black's Law Dictionary 9th Edition as hereunder -

An instrument under which the issuer (usually a bank) at a customer's request, agrees to honour a draft or other demand for payment made by a third party (the beneficiary) as long as the draft or payment complies with specified condition, and regardless of whether any underlying Agreement between the customer and the beneficiary is satisfied.

36. In Har Bottle (Merchantile) Ltd and another v National Westminster Bank and others [1977] 2 All ER 720 cited by the Court of Appeal in Ital Imports Limited v Mohammed Salim Karanja t/a Mosal Cleaning Enterprises and another [2014] eKLR, the Court considered the basis of irrevocable letters of credit and held that –

The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade was to give the seller of goods an assured right to be paid before he parted with control of the goods without risk of the payment being refused, reduced or deferred because of a dispute with the buyer. It followed the contractual duty owed by an issuing or confirming bank to the buyer to honour the credit notified by him on presentation of apparently confirming documents by the seller was matched by



a corresponding contractual liability on the part of the bank to the seller to pay him the amount of credit on presentation of the document.

37. It is not disputed that Chase Bank Limited issued a bank guarantee in the form of an irrevocable and unconditional Standby Letter of Credit for ZAR 3,618,178.70 in favour of Macadams International (PTY) Ltd on behalf of the 1st defendant. The plaintiff contends that this guarantee was called up sometime in the year 2016 but the same was not paid and/or honoured since at that time, Chase Bank Limited was in receivership. The plaintiff alleged that sometime in April 2018 the plaintiff debited Kshs.30,754,518.95 from the 1st defendant's account to pay the said guarantee.
38. The defendants challenge the legality of the said debit on grounds that Chase Bank Limited's banking facilities granted to the 1st defendant were taken over and settled by Prime Bank Limited on 12th October 2017, following representations by Chase Bank Limited that the 1st defendant's total outstanding liabilities amounted to Kshs.23,887,813.55 as at 1st February 2017, but this was later capped at Kshs.16,000,000/=.
39. From the evidence adduced and upon perusal of plaintiff exhibit No. 8, it is evident that the guarantee issued by Chase Bank Limited on behalf of the 1st defendant was called up on 6th August 2016. However, upon perusal of plaintiff exhibit No. 12, being email correspondence between the plaintiff and the defendants, it is clear that as at 22nd August 2016, the said guarantee had not been paid. The plaintiff does not dispute that all of the 1st defendant's liabilities with Chase Bank Limited were taken over by Prime Bank Limited on 12th October 2017, but contends that the SBLC was not taken over as the same was amended to render it not transferrable.
40. On the transferability of the SBLC, the defendants took the position that this only applied to the beneficiary of the guarantee and not the issuing bank. It is now well settled that Usage of Letters of Credit is governed by the ICC Uniform Customs and Practice for Documentary Credits developed by the International Chamber of Commerce, of which Kenya is a member, and not the [Bills of Exchange Act](#) as submitted by the plaintiff's Advocate. It is trite law that the beneficiary of a non-transferable SBLC cannot modify any terms of the SBLC without the applicant's consent.
41. That being the case, I am inclined to agree with the defendants that the fact that the subject SBLC contained a phrase that it was neither negotiable nor transferable meant that it could not be transferred to a third party beneficiary. It however did not restrict the issuing bank from transferring the SBLC to another bank of the 1st defendants' (the applicant) choosing. In the said circumstances, this Court finds that the plaintiff cannot use the fact that the subject SBLC was non-transferable as the reason why the 1st defendant's liability arising thereunder if any, was not transferred to Prime Bank Limited together with the other liabilities that were taken up by Prime Bank Limited in October 2017.
42. This Court notes that in as much as the plaintiff claims that it paid the guarantee issued by Chase Bank limited in favour of Macadams International (PTY) Ltd on behalf of the 1st defendant, no evidence has been adduced to that effect. It is settled law that the burden of proof lies on the party who wishes the Court to believe in the existence of a particular fact, this is pursuant to the provisions of Section 109 of the [Evidence Act](#) which states that –
- "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
43. In the absence of any evidence that the plaintiff honoured the guarantee in question, this Court finds that the plaintiff has not made out a case for being granted the orders sought. In addition, it is not



disputed that in a letter dated 1st February 2017, Chase Bank Limited demanded from the 1st defendant its liability with Chase Bank Limited. In the said letter Chase Bank Limited demanded from the 1st defendant Kshs.23,887,813.55 being the 1st defendant's entire debt to the plaintiff. Subsequently, Chase Bank Limited's Advocate in an email sent on 27th September 2017 confirmed that the 1st defendant's liability stood at Kshs.16,010,915.60, but the same had been capped at Kshs.16,000,000/=.

44. The 1st defendant asserted that in view of the foregoing, the plaintiff is estopped from making any further demand from the defendants after their liabilities were taken over by Prime Bank Limited on 12th October 2017. The doctrine of estoppel is provided for in Section 120 of the *Evidence Act* which states that -

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

45. The Court of Appeal in *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR, held follows in respect to the doctrine of estoppel -

The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.

46. The letter dated 1st February 2017 addressed to the 1st defendant by Chase Bank Limited, ought to have included the amount paid or to be paid the said Bank as a result of the SBLC, since the SBLC had by then matured. In view of the fact that the Chase Bank Limited's Advocate in an email sent on 27th September 2017 confirmed that that the 1st defendant's liability stood at Kshs.16,010,915.60, but the same had been capped at Kshs.16,000,000/= and the finding that the plaintiff could not use the fact that the subject SBLC was non-transferable as the reason why the 1st defendant's liability arising thereunder was not transferred to Prime Bank Limited. I am persuaded that the doctrine of estoppel is applicable in this case. Chase Bank Limited having advised the 1st defendant on the extent of its liability and with it being fully aware that the SBLC had been called up by the beneficiary, is estopped from making any further claims from the 1st defendant after the 1st defendant's liabilities to Chase Bank were taken up by Prime Bank Limited on 12th October 2017.

47. As a result, I hold that the plaintiff had no right to debit Kshs.30,754,518.95 from the 1st defendant's account and to charge interest on the said sum. In the end, this Court finds that the plaintiff has not made out a case to warrant being granted the orders sought in the main suit.

48. In view of the above finding, this Court finds that the other issues earlier identified for determination are moot.

49. It is my finding that the plaintiff's suit against the defendants in the main suit and the defendants' set off and counter-claim are both unsuccessful. Consequently, the main suit is dismissed with costs to the defendants pursuant to the provisions of Section 27 of the *Civil Procedure Act*. The counter-claim is also dismissed with costs to plaintiff in the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF FEBRUARY, 2025.

Judgment delivered through Microsoft Teams Online Platform.



NJOKI MWANGI

JUDGE

In the presence of:

Ms Maingi h/b for Mr. Kazungu for the plaintiff

Mr. E. Onyancha for the defendants

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

