



**Bank of Africa Kenya Limited v Setlight Supermarket Limited & 4 others (Civil Suit 156 of 2016) [2025] KEHC 7222 (KLR) (Commercial and Tax) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7222 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 156 OF 2016**

**PM MULWA, J**

**MAY 22, 2025**

**BETWEEN**

**BANK OF AFRICA KENYA LIMITED ..... PLAINTIFF**

**AND**

**SETLIGHT SUPERMARKET LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS KHIKO NJUGUNA ..... 2<sup>ND</sup> DEFENDANT**

**ISAAC MWANGI NJUGUNA ..... 3<sup>RD</sup> DEFENDANT**

**DAVID MACHARIA NJUGUNA ..... 4<sup>TH</sup> DEFENDANT**

**SIMON GASHWE NJUGUNA ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The matter was commenced vide the plaint dated 29<sup>th</sup> April 2016, seeking judgments against the defendants for:
  - a. The sum of Kshs. 24,547,389.25 being the aggregate of the 1<sup>st</sup> Defendant's current account balance, loan balance, loan arrears and accrued interest;
  - b. Interest on the said sums at the prevailing contractual rates as follows:
    - i. On the current account balance of Kshs. 2,641,295.61 interest at the rate of 22.33% per annum from 12<sup>th</sup> February 2016 until payment in full
    - ii. On the loan account TL 2 balance of Kshs. 9,706,842.81, interest at the rate of 22.33% from 12<sup>th</sup> February 2016 until payment in full.



- iii. On the loan arrears TL 1 of Kshs. 7,504,090.19 interest at the rate of 29% per annum from 12<sup>th</sup> February 2016 until payment in full.
    - iv. On the loan arrears TL 2 of Kshs. 4,516,290 interest at the rate of 29% per annum from 12<sup>th</sup> February 2016 until payment in full.
  - c. Costs of the suit.
  - d. Any other orders of the court.
- 2. The Plaintiff's case is that between 2012 and 2015, the 1<sup>st</sup> Defendant, through the 2<sup>nd</sup> to 5<sup>th</sup> Defendants as its duly appointed representatives, applied for various banking facilities to meet its operational needs, including working capital, refinancing of capital expenditure, and acquisition of stock. These facilities were extended through several offer letters, duly executed. The 1<sup>st</sup> Defendant partially serviced the facilities but subsequently defaulted. The Plaintiff then exercised its statutory power of sale over motor vehicles charged as security. Despite this, an outstanding balance of Kshs. 24,547,389.25 remained unpaid.
- 3. It is relevant to note that default judgment had initially been entered in favour of the Plaintiff, but was subsequently set aside upon application by the Defendants, who filed a defence but failed to appear at the hearing.
- 4. The Defendants filed a statement of defence dated 19<sup>th</sup> October 2020, wherein they denied the Plaintiff's claim in general terms. However, despite being served with a hearing notice, the Defendants failed to attend the hearing or call any evidence in rebuttal of the Plaintiff's case.
- 5. During the hearing, the Plaintiff called one witness, Ms. Ann Faith Muthoni (Pw1), a Recoveries Officer with the Plaintiff bank. She adopted her witness statement dated 23<sup>rd</sup> February 2023 and produced a bundle of documents dated 29<sup>th</sup> April 2016. She confirmed that the Plaintiff advanced financial facilities to the Defendants and, upon default, sold the secured assets. A residual balance of Kshs. 24,547,389.25 remained due and owing, forming the basis of this claim.
- 6. After closing its case, the Plaintiff filed written submissions dated 4<sup>th</sup> September 2024. The Defendants neither filed submissions nor appeared to participate in the proceedings.

### **Analysis and determination**

- 6. Having carefully considered the pleadings, the uncontested evidence on record, and the applicable law, the central issue for determination is whether the Defendants are indebted to the Plaintiff for the sum of Kshs. 24, 547, 389.25 being the loan balance alleged to have accrued in respect of the loan advanced by the bank to the 1<sup>st</sup> Defendant.
- 7. The standard of proof in civil matters is on a balance of probabilities, as set out in Sections 107 and 108 of the *Evidence Act*. In *Kirugi & Another v Kabiya & 3 Others* [1987] KLR 347, the Court held that:
  - “The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard by way of formal proof.”
- 7. The Plaintiff has discharged that burden. It adduced credible and uncontroverted documentary evidence, including offer letters, bank statements and correspondence, clearly showing the issuance of credit facilities, default by the 1<sup>st</sup> Defendant, the enforcement of security, and the outstanding balance claimed.



8. It is trite that pleadings do not constitute evidence. In *Trust Bank Ltd v Paramount Universal Bank Ltd & 2 Others* [2009] eKLR, the Court held:

“It is trite that where a party fails to adduce evidence in support of its pleadings, the pleadings remain mere statements of facts and have no probative value.”

9. Again, in the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi (Milimani)* HCCC No. 834 of 2002, Lesiit, J. (as she then was) citing the case of *Autar Singh Bahra And Another v Raju Govindji*, HCCC No. 548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.”

10. It is settled law that where a party fails to adduce evidence in support of its pleadings, such pleadings remain mere assertions without any probative value. They do not constitute evidence and cannot form the basis of a rebuttal to the plaintiff’s case. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff’s case. The failure to call evidence means that the evidence adduced by the plaintiff remains uncontroverted and therefore unchallenged. In such a situation, the plaintiff is taken to have proved its case on the balance of probability in the absence of the defendant’s evidence.

11. In the instant case the plaintiff gave evidence which was not challenged and produced documents in support of her claim. I find the plaintiff’s evidence to be credible and I am satisfied the plaintiff pleaded and proved its case on a balance of probability.

12. The 1<sup>st</sup> Defendant having received financial accommodation, was bound to repay the loans as per the terms agreed. The guarantors (2<sup>nd</sup> to 5<sup>th</sup> Defendants), having executed deeds of guarantee and indemnity, are equally liable to satisfy the debt upon the 1<sup>st</sup> Defendant’s default.

13. The upshot is that I enter judgment in favour of the Plaintiff against the Defendants jointly and severally for:

- a. Kshs. 24,547,389.25;
- b. Interest on the said sum as pleaded:
  - i. 22.33% per annum on the current account balance of Kshs. 2,641,295.61 from 12<sup>th</sup> February 2016 until payment in full;
  - ii. 22.33% per annum on the loan account TL2 of Kshs. 9,706,842.81 from 12<sup>th</sup> February 2016 until payment in full;
  - iii. 29% per annum on the loan arrears TL1 of Kshs. 7,504,090.19 from 12<sup>th</sup> February 2016 until payment in full;
  - iv. 29% per annum on the loan arrears TL2 of Kshs. 4,516,290.00 from 12<sup>th</sup> February 2016 until payment in full;
- c. Costs of the suit to the Plaintiff.



**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup> DAY OF MAY 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Mr. Onyango for Plaintiff

N/A for Defendants

Court Assistant: Carlos

