



**I & M Bank Limited v Kabew Kenya Limited & 2 others (Civil Suit 193 of 2018)  
[2025] KEHC 8905 (KLR) (Commercial and Tax) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8905 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 193 OF 2018  
FG MUGAMBI, J  
JUNE 20, 2025**

**BETWEEN**

**I & M BANK LIMITED ..... PLAINTIFF**

**AND**

**KABEW KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**SARAUBH DEV ..... 2<sup>ND</sup> DEFENDANT**

**KATEMA ABABA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Background and Introduction**

1. This suit was commenced by a plaint dated 15<sup>th</sup> May 2018. It arises from an alleged default by the 1<sup>st</sup> defendant in the repayment of a loan facility extended to it by the plaintiff Bank. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants, who are directors of the 1<sup>st</sup> defendant, are sued on account of their executed guarantees in favour of the Bank to secure the said facility.
2. The Bank seeks judgment against the 1<sup>st</sup> defendant in the sum of Kshs. 73,794,218.63 together with interest. Further, it prays for judgment against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, jointly and severally, in the sum of Kshs. 57,078,000/= each, together with interest at prevailing bank rates from 19<sup>th</sup> February 2018. The Bank also claims costs of the suit on an advocate–client basis.
3. The defendants opposed the suit through a statement of defence dated 6<sup>th</sup> December 2019 together with a list and bundle of documents dated 6<sup>th</sup> October 2019. The matter thereafter proceeded to hearing. Upon being satisfied that the defendants had been duly served with a hearing notice, as evidenced by the Affidavit of Service sworn on 4<sup>th</sup> December 2024 and the annexed certificate of postage, the Court allowed the matter to proceed in the absence of the defendants.



4. The Bank's sole witness was Andrew Muchina, whose testimony aligned to his witness statement dated 5<sup>th</sup> June 2024. He produced the Bank's bundle of documents dated 15<sup>th</sup> May 2018 and a supplementary bundle dated 30<sup>th</sup> November 2021, which were admitted as exhibits. The cardinal issues for determination are whether the Bank has proved its case against the defendants on a balance of probabilities and whether it is entitled to the reliefs sought in the plaint.

### **Analysis and Determination**

5. Before delving into the substantive issues for determination, I consider it necessary to address the effect of the defendants' absence at the hearing of the suit.
6. The court record confirms that the application by the defendants' counsel to cease acting was allowed on 23<sup>rd</sup> May 2023. The Court also granted leave to the Bank to then serve the hearing notice upon the defendants personally, by way of substituted service. Thereafter, the matter came up for mention and hearing on several occasions, but the defendants failed to attend or participate despite service. Regarding the hearing which took place on 6<sup>th</sup> February 2025, the affidavit of service confirms that service was effected by way of registered post.
7. As I proceed to determine the issues, I am cognizant of the legal implications of the defendants' failure to attend the hearing, notwithstanding that they had filed a statement of defence. In *AMK V Kenya Power & Lighting Co Ltd*, [2020] eKLR, the Court held:

“Where a party fails to call evidence in support of its pleading (be it a plaint or defence), the evidence of the opposing party is to be believed as having not been rebutted, unless effectively displaced in cross-examination. In this case, the evidence was not displaced in cross-examination. Accordingly, the evidence of the plaintiff was uncontroverted.”
8. Similarly, in *Linus Nganga Kiongo & 3 Others V Town Council of Kikuyu*, [2012] eKLR, Odunga, J (as he then was), citing *Motex Knitwear Limited V Gopitex Knitwear Mills Ltd*, HCCC No. 834 of 2002 and *Autar Singh Bahra and Another V Raju Govindji*, HCCC No. 548 of 1998, held:

“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 defence to the 1st 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.”
9. In view of the foregoing, I proceed to consider the plaintiff's case on the basis that the defendants' pleadings remain unsubstantiated, and no evidence has been presented or tested on their part. Nonetheless, it remains the duty of this Court to evaluate the Bank's case on its own merits and to assess the veracity of the evidence presented against the applicable standard of proof.
10. The Bank avers that it extended various credit facilities to the 1<sup>st</sup> defendant pursuant to duly executed Credit Facility Letters. These facilities were advanced on diverse dates between March 2013 and August 2015 and included the following:
  - a. 27<sup>th</sup> March 2013: Kshs. 4,680,000.00 for the purchase of an LPK 2516 (6x4) tipper;
  - b. 8<sup>th</sup> May 2013: Kshs. 7,500,000.00 for the acquisition of motor vehicles KBT 450U, KBT 512U, and KBS 420E;



- c. 23<sup>rd</sup> October 2014: Kshs. 25,000,000.00 under an invoice discounting facility for working capital;
  - d. 23<sup>rd</sup> December 2014: Kshs. 10,000,000.00 as an additional overdraft facility;
  - e. 18<sup>th</sup> March 2015: Kshs. 6,300,000.00 by way of a demand loan for the purchase of an SNE-300 self-loading mixer;
  - f. 25<sup>th</sup> March 2015: Kshs. 2,598,000.00 for the purchase of a Xenon LT single cab and a Nissan Navara;
  - g. 26<sup>th</sup> March 2015: Kshs. 15,000,000.00 as an additional invoice discounting facility;
  - h. 16<sup>th</sup> June 2015: USD 20,500.00 through an extended invoice discounting arrangement;
  - i. 1<sup>st</sup> July 2015: Kshs. 40,000,000.00 as a temporary overdraft facility; and
  - j. 13<sup>th</sup> August 2015: Kshs. 7,000,000.00 for working capital under an overdraft facility.
11. These facilities are not controverted by the defendants who by their statement of defense do acknowledge receiving the credit facilities as enumerated in the plaint.
12. The Bank further contends that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants executed separate written Guarantees and Indemnities in favour of the Bank, whereby they unconditionally and irrevocably undertook to repay, upon demand, the sums advanced to the 1<sup>st</sup> defendant, together with any interest and associated costs. These guarantees were issued in consideration of the continued provision of banking facilities to the 1<sup>st</sup> defendant. The guaranteed amounts were as follows:
- a. Kshs. 4,680,000.00 on 27<sup>th</sup> March 2013;
  - b. Kshs. 7,500,000.00 on 8<sup>th</sup> May 2013;
  - c. Kshs. 14,000,000.00 on 24<sup>th</sup> December 2014;
  - d. Kshs. 6,300,000.00 on 23<sup>rd</sup> March 2015;
  - e. Kshs. 2,598,000.00 on 28<sup>th</sup> March 2015;
  - f. Kshs. 15,000,000.00 on 8<sup>th</sup> May 2015; and
  - g. Kshs. 7,000,000.00 on 18<sup>th</sup> August 2015.

This brought the total amount guaranteed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to Kshs. 57,078,000.00.

13. The Bank further avers that, by a Debenture dated 29<sup>th</sup> May 2013, the 1<sup>st</sup> defendant created a first fixed and floating charge over all its assets, undertakings, and property, as security for the repayment of monies advanced under the facilities, up to a maximum principal sum of Kshs. 15,000,000.00. A subsequent Debenture dated 3<sup>rd</sup> March 2015 created an additional charge over the 1<sup>st</sup> defendant's assets to secure a further sum of up to Kshs. 20,000,000.00.
14. It is contended that both the facility agreements and the guarantees expressly provided that the defendants shall be liable to pay all costs and expenses incurred on a full indemnity basis.
15. The Bank further states that by letters of demand dated 19<sup>th</sup> February 2018, it demanded repayment from the 1<sup>st</sup> defendant and simultaneously called up the guarantees issued by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. It is further averred that the 1<sup>st</sup> defendant had previously admitted its indebtedness and issued several promises to settle the outstanding amounts, which were not honoured.



16. In support of this assertion, the Bank relies on a letter dated 29<sup>th</sup> January 2016 from Kenya Electricity Transmission Company Limited (KETRACO), which served as a letter of comfort to the 1<sup>st</sup> defendant and its creditors. In that letter, KETRACO acknowledged that the 1<sup>st</sup> defendant had demonstrated satisfactory performance on its contractual obligations and confirmed the following:
  - a. a sum of Kshs. 70,000,000.00 would be paid to the 1<sup>st</sup> defendant pursuant to an invoice raised in support of ongoing projects;
  - b. civil works valued at Kshs. 310,000,000.00 would be undertaken by the 1<sup>st</sup> defendant as per its proposal; and
  - c. Kshs. 110,000,000.00 would be paid to support foundation and erection work for a portion of a transmission line.
17. The letter further acknowledged that project delays had affected the Bank, and assured that measures were being taken to restore the project timelines. Additionally, the Bank relies on a letter dated 10<sup>th</sup> February 2016 from the 1<sup>st</sup> defendant to KETRACO, copied to the plaintiff, which detailed the amounts allegedly owed by KETRACO to the 1<sup>st</sup> defendant.
18. In response to the issue of the letter of comfort, the defendants argue that the same emanated from KETRACO, and not from them. They assert that the said letter cannot be construed as an admission of liability on their part, nor can it be relied upon to impute any contractual or legal obligation against them. The defendants further maintain that the letter does not constitute a binding commitment by them and is, therefore, incapable of forming a basis for liability in this suit.
19. It is noteworthy that the 1<sup>st</sup> defendant does not dispute having received the credit facilities as outlined in the plaint. The principal contention raised by the defendants is that the Bank, through its appointed agents and auctioneers, Garam Auctioneers, repossessed and attached several motor vehicles belonging to the 1<sup>st</sup> defendant. The defendants assert that the Bank has failed to account for the attached vehicles, disclose the amounts realized from their sale, or provide valuations as at the time of attachment. On this basis, the defendants contend that the present suit is premature.
20. The Court has examined the letters of offer, the personal guarantees and indemnities executed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, as well as the debenture instruments. From the evidence on record, the Bank has established that the financial facilities were duly advanced to the 1<sup>st</sup> defendant, and that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants executed binding guarantees. Accordingly, the Court is satisfied that the 1<sup>st</sup> defendant is liable as the principal borrower, while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are jointly and severally liable as guarantors.
21. As earlier stated, the allegations made in the statement of defence, particularly the claim that the plaintiff repossessed and disposed of motor vehicles without proper accounting, remain unsubstantiated. Once the Bank had established a prima facie case, the evidentiary burden shifted to the defendants to demonstrate that sums had indeed been recovered from the attached assets and that such recovery had extinguished or reduced the outstanding debt. The defendants failed to discharge this burden, and accordingly, the Bank's claim remains uncontroverted.
22. In any event, I have considered the supplementary record filed by the Bank, and in particular, the letters from Garam Auctioneers, which were produced in evidence. These letters provide details of the proceeds realized from the sale of several motor vehicles repossessed from the 1<sup>st</sup> defendant. This evidence, in part, addresses the defendants' contention that the Bank failed to account for the repossessed assets.



23. The next issue for determination is whether the plaintiff is entitled to the reliefs sought in the plaint, namely, judgment against the 1<sup>st</sup> defendant in the sum of Kshs. 73,794,218.63, and judgment against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the sum of Kshs. 57,078,000.00 each, together with interest and costs.
24. PW1 confirmed that, as at the time of filing suit, the outstanding amount due from the 1<sup>st</sup> defendant stood at Kshs. 73,794,218.63. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were sued in their capacity as guarantors, having executed written Guarantees and Indemnities for a cumulative amount of Kshs. 57,078,000.00 each. Their liability arose from express undertakings to unconditionally repay the sums advanced to the 1<sup>st</sup> defendant upon demand, including any interest accrued and costs incurred.
25. A contract of guarantee has been defined in *The Law of Guarantees* by Geraldine Andrews & Richard Millett, 2<sup>nd</sup> Edition, at page 156, as follows:
- “A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point.”
26. I have examined the various Guarantee and Indemnity agreements executed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in light of this definition. The defining characteristic of a guarantee is its secondary nature. It is not autonomous but rather contingent upon the default of the principal debtor. This principle is well-established in case law. In *Basil Criticos V National Bank of Kenya Limited & Another, Nairobi Civil Appeal No. 80 of 2017*, the Court of Appeal affirmed that: ‘a guarantor’s liability is secondary to that of the principal debtor and that unless otherwise provided, where a guarantee limits the guarantor’s liability to a fixed sum, the guarantor will be liable to the extent of the guaranteed sum only and not the entire debt’.
27. Each of the said defendants guaranteed the repayment of the principal debt up to a maximum sum of Kshs. 57,078,000.00. The language of the guarantees clearly stipulates that the obligations were joint and several. The Black’s Law Dictionary defines joint and several liability as follows:
- “A liability is said to be joint and several when the creditor may demand payment or sue one or more of the parties to such liability separately, or all of them together at his option.”
28. Accordingly, the question arises whether the Bank is entitled to recover Kshs. 57,078,000.00 from each guarantor separately, thereby resulting in a potential cumulative recovery of Kshs. 114,156,000.00. The answer must be in the negative. The nature of the liability as joint and several entitles the Bank to recover the guaranteed amount from either one or both guarantors. However, this does not permit double recovery.
29. Given that guarantees are accessory to the principal contract between the borrower and the Bank, a guarantor cannot also be called upon to pay more than the debt lawfully due from the principal debtor. Guarantees must be construed in a manner that avoids unjust enrichment or the imposition of disproportionate liability.
30. Therefore, while the Bank is at liberty to pursue either or both guarantors, its total recovery from them cannot exceed the amount due from the 1<sup>st</sup> defendant. Consequently, the sum recoverable from the guarantors need not, and cannot necessarily, amount to the maximum guaranteed sum of Kshs. 57,078,000.00 from each of them, as prayed by the Bank. To hold otherwise would unjustly entitle



the Bank to recover Kshs. 114,156,000.00 an amount far in excess of the principal debt owed by the 1<sup>st</sup> defendant, and would offend the settled principle that a guarantor's liability is ancillary and cannot exceed that of the principal debtor.

31. Furthermore, once the Bank recovers the guaranteed amount, whether from one guarantor in full or apportioned between both, the obligations of the other guarantor(s) are discharged to the extent of that recovery. This position aligns with the equitable principle against unjust enrichment and affirms the accessory nature of a guarantor's obligation. To hold otherwise would not only distort the concept of joint and several liability but would also contravene the settled doctrine that a guarantee cannot impose liability greater than that of the principal debtor.

### **Disposition**

32. Accordingly, judgment is hereby entered as follows:
- i. Judgment is entered in favour of the plaintiff against the 1<sup>st</sup> defendant in the sum of Kshs. 73,794,218.63, together with interest thereon at the contractual rate from 19<sup>th</sup> February 2018 until payment in full.
  - ii. Judgment is entered against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, jointly and severally, in their capacity as guarantors of the 1<sup>st</sup> defendant, in the sum of Kshs. 57,078,000.00 each, being the maximum amount guaranteed by each. Provided that the total amount recoverable from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, whether jointly or individually, shall not exceed the total sum due from the 1<sup>st</sup> defendant, and in no event shall the amount recovered from either guarantor exceed Kshs. 57,078,000.00.
  - iii. For the avoidance of doubt, any sums recovered from the 2<sup>nd</sup> and/or 3<sup>rd</sup> defendants shall operate as a discharge, to that extent, of the 1<sup>st</sup> defendant's liability.
  - iv. The plaintiff is awarded the costs of the suit, to be borne jointly and severally by the defendants.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20<sup>TH</sup> DAY OF JUNE 2025.**

**F. MUGAMBI**

**JUDGE**

