



REPUBLIC OF KENYA



**KENYA LAW**  
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**Zingo Investment Limited v National Bank of Kenya Limited (Civil Case E102 of 2019)  
[2024] KEHC 2888 (KLR) (Commercial and Tax) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2888 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E102 OF 2019  
JWW MONG'ARE, J  
MARCH 14, 2024**

**BETWEEN**

**ZINGO INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**NATIONAL BANK OF KENYA LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff has by a plaint dated 26<sup>th</sup> April 2019 and amended on 24<sup>th</sup> April 2020 moved this Honourable Court seeking the following reliefs:-
  - a. A declaration that the Defendant is in breach of its duty and obligation under the loan agreement:
  - b. A declaration that the Defendant is liable for the losses sustained by the Plaintiff arising from the cancellation of the contracts with clients
  - c. A declaration that the Defendant being responsible for the losses sustained by the Plaintiff, the Defendant is estopped from seeking to benefit from its own breaches by purporting to and or exercising its statutory power of sale under loan agreement arising from the cancellation
  - d. A declaration that the imposition of illegal, unwarranted and unmerited charges and/or entries on the Plaintiff's loan account(s) amounts to a fetter and a clog to the Plaintiff's equity of redemption.
  - e. A declaration that the Plaintiff is entitled to a refund and/or credit of USD 31,235.33 and Kshs. 9,945,135.69 together with interest at the prevailing



commercial rates calculated as of 4<sup>th</sup> January, 2019 until payment in full refund and/ or credits are made.

- f. An order directing the Defendant to pay to the Plaintiff or credit the Plaintiff's account with the sum of USD 31,235.33 and Kshs. 9,945,135.69 being the value of the unmerited debt, together with such amounts constructing interest accrued on the stated sums calculated at the prevailing commercial rates as of 4<sup>th</sup> January, 2019 until full payment or credit is affected.
- g. An order directing the Defendant to pay the Plaintiff the sum of (i) USD2,757,880.00 being the loss of income sustained on account of the Defendant's actions (ii) USD 268,000.00 being chemicals worth and (iii) USD 651,121.20 on account of raw materials.
- h. An order restraining the Defendant from either by itself, employees, servants or agents from otherwise exercising any statutory power of sale, either by public auction or private treaty and/or otherwise advertising, commencing or proceeding with any realization process in respect of all property known as L.R. No. 9363/98(IR No. 14628/98) and L.R No.209/8628 or any other property offered by the Plaintiff as security on account of any loan facility advanced to it by the Defendant and forming the subject matter of this suit.
  - i. An order directing the Defendant to release and or unconditional discharge of all securities held by the Defendant on account of the loan facilities advanced to the Plaintiff including but not limited to;
    - 1. Discharge of title L.R. No. 9363/98; and L.R. No. 209/8628 and any other security offered by the Plaintiff on account of the loan facilities forming the subject matter of this suit.
    - 2. Discharge of the directors from any liability arising from any guarantees executed pursuant to any facilities advanced by the Defendant and which forms part of the subject of this suit.
  - j. An order of permanent injunction restraining the Defendant from either by itself, employees' servants or agents from levying and/or imposing illegal and/ or contractual debts or charges upon the Plaintiff's accounts
  - k. Costs of the suit
  - l. Interest on ( e ), ( c ), and (b), (d) at court rates.
  - m. Such other or further relief as this honourable court may deem fit.

- 2. The Defendant filed its defence on 17<sup>th</sup> June 2019 which was amended on 6<sup>th</sup> January 2021 and further amended on 7<sup>th</sup> December 2021 seeking to have the suit by the Plaintiff struck out with costs to it.

### **BACKGROUND TO THE SUIT**



3. The Plaintiff obtained loan facilities from the Defendant for the establishment of a leather factory on its parcel of land known as L.R. No. 9363/98, takeover of existing loan facilities at Kenya Commercial Bank(KCB) and advancement of work capital secured by the following securities:-
  - i. Charge for USD 882,354 over L.R. nos. 209/8628;
  - ii. Charge for USD 2,238,000.00 over L.R no. 9363/98.
  - iii. Floating debenture for a maximum principal amount of USD 794,000.
  - iv. Joint and several guarantees of USD 3,476,000.00 by the directors of the Plaintiff.
4. Subsequently and following the aforementioned loan facility's approval, a disagreement emerged between the parties, which resulted in the filing of case no HCCC NO. 227 OF 2016-ZINGO INVESTMENT LTD. V. NATIONAL BANK LTD. The suit was however compromised through a consent dated 20<sup>th</sup> December 2017. Intending to ease the return of business in the best interests of both parties, the consent set the foundation for the parties' reestablished relationship.
5. The Defendant undertook to avail working capital to the tune of USD 1,100,000.00 to the Plaintiff vide the letter of offer dated 22<sup>nd</sup> November, 2017 to enable the Plaintiff to resume business and in turn facilitate the repayment of the outstanding loan facilities which then stood at USD 5,666,000.00.
6. To resolve the issues that arose after the offer letter dated November 22, 2017, the Defendant released an amendment to the offer letter on November 22, 2018, before dispersing the working capital. The following terms were among those introduced by the aforementioned addendum:
  - i. Procuring a submission of local purchase order to the bank;
  - ii. submission of written undertakings from local purchasers in favour of the bank to remit proceeds through the bank;
  - iii. Commencement of repayment of the facility be effective April, 2019;
  - iv. fresh board of directors' resolutions;
  - v. Planned sale process of 1.75 acres being a subdivision of LR No. 9363/98 and LR No. 209/8628 to continue and the proceeds applied to the settlement of the outstanding debt.
7. The Plaintiff alleges that in dispensing the additional loan facility of USD 1,100,000 the Defendant deliberately misapplied, diverted and/or applied part of the funds towards addressing illegal and unmerited charges/debits with the net effect that the Plaintiff was denied the benefit of close to 20% of the approved working capital. Further, the Plaintiff alleges. That the failure to disburse the agreed loan amount in full tremendously affected the Plaintiff business and occasioned cancellation of contracts awarded to the Plaintiff by its customers thus resulting in colossal losses and crippling of the Plaintiff's business. The Plaintiff claims that in furtherance of the Defendant unlawful agenda, the Defendant purported to issue statutory notices to the Plaintiff thus necessitating the filing of the instant suit by a plaint dated 26<sup>th</sup> April, 2019.
8. The Defendant filed its defence on 17<sup>th</sup> June, 2019, amended it on 6<sup>th</sup> January, 2021 and further amended it again on 7<sup>th</sup> December, 2021. The Defendant case is that it was the responsibility of the Plaintiff's client, China light Merchant Bank Beijing, to locate and authorize a suitable Intermediary



- Bank to transfer all or part of the Letter of Credit to the Plaintiff. The Defendant was only extending assistance to the Plaintiff as its only contractual role was to receive a duly confirmed letter of credit from the issuing bank with instructions to notify the Plaintiff.
9. The Defendant attributes the losses incurred by Plaintiff to its own actions for purchasing and sourcing raw materials for the specific contract before the letter of credit was confirmed by the intermediary bank. It was expensive to maintain the Plaintiff's dollar account which was not performing and lacked funds and a consequence Defendant converted it into a Kenya shilling effective 23<sup>rd</sup> June 2016.
  10. The Defendant avers it acted in good faith right from the negotiations to the drawdown of the facility and passing the necessary entries and supporting the Plaintiff by restructuring the debt and granting additional working capital. The Plaintiff defaulted in the loan repayment prior to filing HCCC no 227 of 2016 and is indebted to the Defendant.
  11. At the hearing of the main suit, the Plaintiff called 2 witnesses. The first witness, PW1 ROBERT NJOKA MUTHARA, testified he that was and still is one of the directors of the Plaintiff. He informed the court that the Plaintiff engages in the leather industry. He confirmed that he had prepared and signed a witness statement dated 30<sup>th</sup> June, 2021 which he adopted as his evidence in chief. He further produced the Plaintiff's the bundle of documents dated 30<sup>th</sup> June, 2021 as the Plaintiff's evidence in the matter.
  12. It was the testimony of PW1 that the Plaintiff brought this case against the Defendant, the National Bank of Kenya, because the Defendant took some money from the Plaintiff's business, contrary to their agreement. PW1 testified that the Plaintiff's case against the Defendant was for breach of contract in NAIROBI HCCC NO. 227 OF 2016 but the same was settled through a consent agreement by the parties. PW1 further stated that despite the consent agreement the Defendant failed to honour the consent in full by facilitating the Plaintiff with USD 1.1m and as a consequence the Plaintiff was unable to proceed with the business.
  13. PW1 told the court that despite the Defendant requesting that the Plaintiff to furnish them with their budget the Defendant went ahead to reduce the budget and disbursed less money to the Plaintiff than it needed to run the business. PW1 informed the court that the 1.1M USD was released to the Plaintiff on 4<sup>th</sup> January, 2019 and at the same time the Defendant debited the Plaintiff's account with illegal entries.
  14. He further testified that the actions of the Defendant led the Plaintiff to default in repayment of the loan and that the bank threatened to sell the property without giving proper notice as required by law. He produced the extract statement of account at page 350 of the Plaintiff's bundle of documents and testified that it only shows the debits and not the credits of the dollar account. He told the court at the time of filing the suit the loan was performing and the Plaintiff was not in arrears.
  15. During cross examination by counsel for the Defence, PW1, Mr. Chege Robert told the court that prior to filing HCC NO. 227 OF 2016, the Plaintiff was paying the loan and some accounts had been cleared. He admitted the Plaintiff was in arrears in some accounts and that it was part of the consent agreement that the Plaintiff had admitted owing the Defendant 5.56m USD in the consolidated facilities.
  16. When questioned by defence counsel during cross examination, PW1 testified that the Defendant bank honoured the terms of the consent agreement since the sum of 1.1m USD was disbursed to the Plaintiff but maintained that at the point of disbursements, the Defendant retained Kshs.7,849,000/= legal fees and a further 31,235.33 which is equivalent to 13 million Kenya shillings, which was not part of the



- terms of the consent settlement agreement. He argued that this deprived the Plaintiff of much needed revenue to revamp the business.
17. PW1 informed the court that the problem started when the Defendant converted the dollar account into the Kenya shilling account. He testified that the Defendant failed to fully comply with the terms of the consent settlement agreement in which it was impliedly stated that the legal fees ought to be paid in full before the sum of USD 1.1 m is disbursed. He maintained that after restructuring the loan the Plaintiff used the money deposited in the account for the right purpose, which was revamp the leather business.
  18. In re-examination, PW1 affirmed that the USD 1.1m was released after the Plaintiff had met all the conditions. He maintained the consolidated debt was USD 5.66m as per the consent. He stated that the Plaintiff had 32 current accounts with the Defendant but the some were consolidated and it was left operating only 3 current accounts with the Defendant. He told the court the consent entered upon was a give and take and that was the reason why the Plaintiff failed to claim damages.
  19. The second plaintiff's witness was COSMAS CHIRCHIR(PW2) who testified that he was an accountant by profession. He informed the court he was given an assignment by the directors of ZINGO INVESTMENT, the Plaintiff, to carry out an independent audit and that he prepared the report dated 12<sup>th</sup> February, 2020. He produced the said report as his evidence before court.
  20. PW2 testified that he was tasked with preparing an opinion on the following:-
    - i. Whether the Plaintiff received the full sum of USD 1.1m.
    - ii. Whether the Plaintiff indeed incurred expenses based on the understanding that the bank would disburse the additional 1.1million USD.
    - iii. Whether there were unauthorised debits on the Plaintiff's bank statements?
    - iv. Whether the loss and damages, if any may have been occasioned by unauthorized debits in the USD accounts which reduced the desired working capital.
    - v. To confirm whether the shortfall of the funds contributed to cancellation of contractual contracts and therefore resulted in loss of business.
  21. PW2 told the court that in preparing his report he relied on the loan agreement, contract documents, bank statements, Local Purchase orders and invoices from suppliers and contracts between the Plaintiff and the interested potential customers. He further confirmed that he reviewed correspondences between the Plaintiff and the bank and also paid a courtesy call to the bank and the Plaintiff to understand their points of view in the matter.
  22. PW2 told the court the report was compiled with the help of EDWARD CHEGE and it was their finding was that 1.1m USD was disbursed to the Plaintiff on 4<sup>th</sup> January 2019 through account no. 02020061333500 Harambe Avenue. He further testified that in their auditing process they identified that unauthorized debits were made between 4<sup>th</sup> January, 2019 to 24<sup>th</sup> February, 2019 in the Plaintiff's accounts, as follows: 4/1/2019 Account No. 02020061333500 excess USD 615,646.75 during restructuring was debited while USD 5,950,777.73 was credited and that the sums of 5,663,000 and 299,060.98 which was in excess. The total was 5,965,060.98 USD.
  23. He testified that the audit revealed that during restructuring of the mortgage, the bank debited a total of 5,980,707.73 to the Plaintiffs Account to which no explanation was rendered. It was his evidence that the bank ought to have credited 314,707.73 but instead it credited 299,060.98 which led to an excess of USD 15,646.75



24. Pw2 testified that the deduction of Kshs.7,849,891.81/- was factored in the mortgage loan of 5.866,000 USD and therefore its deduction amounted to double deduction. He testified that the bank deducted an excess of 50,000 USD in terms of legal fees as per the consent letter the legal fees was Kshs.4,600,000/= while the bank deducted 4,650,000.
25. Mr. Chirchir told the court the insurance premium of Kshs 1,833,003 was deducted during while the sum of Kshs.1,545,245.69/= was factored in during restructuring and thus the additional sum of Kshs.300,000/= deducted on 6/2/2018 which was illegal.
26. He stated the Plaintiff purchased chemicals on 1<sup>st</sup> December, 2018 from SRIBALA LEATHERS for the sum of 368,000USD and placed a deposit of USD 268,000 which amounted to a loss. He stated the amount lost by the Plaintiff in terms of materials and chemicals in the year 2019 is approximately 2,757,888 USD. He told the court that from 2019-2022 the estimated loss of business is 12,799,358 USD, unauthorized debits were 15,646.75 USD loss of chemicals and raw materials 919,121.20 USD.
27. During cross examination he stated the illegal debits were made in 2019. He could not explain how the whole claim was written off but agreed that as at 20<sup>th</sup> December, 2019 the Plaintiff was unable to pay the loan. He stated the Plaintiff was supposed to pay the legal fees but only paid the same at the point of restructuring the loan.
28. The defence called one witness, PAUL KIPKORE CHELANGAI (DW1). DW1 testified he worked with the Defendant at the credit section as the Recoveries Manager. He adopted his witness statement and produced the Defendant's bundle of documents both dated 6<sup>th</sup> September, 2021 as his evidence in chief.
29. DW1 testified that at the time of filing HCC 227 of 2016 the loan was not being serviced and the Defendant attempted to exercise its right of sale of the Plaintiff's property the same was halted by the consent entered in which the Plaintiff admitted being indebted in the sum of USD 5,666,000 as a condition to withdraw the suit the Defendant was to inject additional capital to the Plaintiff on the laid down conditions as per the offer letter dated 2<sup>nd</sup> November, 2017.
30. He testified the sum of USD 5,666,000 was payable in 120 months or 10 years while the 2<sup>nd</sup> one was payable in 24 months from the date of restructuring. He told the court the loan had not been repaid. He told the court the amount of USD 1.100,000 was disbursed on 4<sup>th</sup> January, 2019 to the Plaintiff's account and which was withdrawn by way of cheques.
31. He testified the principal amount of USD 1,100,000 was affected due to the non-compliance of the Plaintiff which led to the deduction of legal fees, insurance premiums. He states the sum of 15,588.58 was refunded and credited in the Plaintiff's account. He explained to the court that insurance premiums are deducted as and when they fall due he told the court in the event the account has no funds the amount is recovered when money is deposited in the account.
32. DW1 explained to the court that the entire legal fees of 14,284,991 was recovered when the funds were deposited in the Plaintiff's account. He denied that the bank was in breach of the loan agreement. He testified that an addendum to the offer letter was done on 22<sup>nd</sup> November, 2019. He testified that as per the offer letter the provision of interest was applicable to the facility.
33. He stated that the Bank operated the Plaintiff's bank account within the parameters set out by the Central Bank of Kenya. He urged the court to dismiss the Plaintiff's case and the notices issued to sell the properties charged were proper.

## **ANALYSIS AND DETERMINATION**



34. At the close of the evidence, learned counsels appearing in this case were permitted to file written submissions. I have considered the pleadings, the evidence plus the written submissions and frame the following issues for determination.
- i. Whether the Defendant breached its duty and obligation under the loan agreement?
  - ii. Whether the Defendant is liable for the losses incurred by the Plaintiff?
  - iii. Whether the Plaintiff is entitled to the reliefs sought?
35. On the first issue it is not in dispute that the Plaintiff pledged L.R. no. 9363/98 and L.R. no. 209/8628 to secure a loan facility from the National Bank of Kenya, as a takeover facility from Kenya Commercial Bank. A charge for USD 2,238,000 and USD 882,354 were created on 4<sup>th</sup> October, 2013 respectively. On 25<sup>th</sup> September, 2013 a floating debenture was created for the sum of USD 794,000 and a joint guarantee by the directors of the Plaintiff was created on 06<sup>th</sup> September, 2013.
36. It is not in dispute that the Plaintiff expanded the business and at some point, defaulted in the loan repayment. The Plaintiff faulted the Defendant for the loss of USD 10,898,920 incurred for the failure to find an intermediary bank to approve the letters of credit. The Plaintiff filed HCC NO. 227 OF 2016 which was determined by consent entered on 20<sup>th</sup> December, 2017 that Plaintiff was in loan arrears of USD 5,666,000. The Defendant was to advance the Plaintiff the sum of USD 1.1 million as additional capital.
37. The Plaintiff avers the same was not advanced in full as the Defendant charged illegal interest and levied illegal penalties. The Plaintiff contends that Defendant in deducting the legal fees deducted sums over the agreed legal fees which crippled the business operations of the Plaintiff. The Defendant on the other hand, denies contributing to the Plaintiff's misfortune and more particularly argues that it was expensive to maintain the USD account which was in operational and the only best way was to close the same and consolidate all the Plaintiff's loan accounts.
38. The Defendant argues the loan amount having fallen into arrears it was under obligation to recover the same from the Plaintiff by realizing the Plaintiff's securities. The Plaintiff did acknowledge the outstanding debt through the consent dated 20<sup>th</sup> December, 2017 Defendant cannot be faulted for realizing the debt accrued by Plaintiff. In *Noakes Co. Ltd vs Rice* [1900-3] All ER 34 it was held that:-
- “redemption is of the very nature and essence of a mortgage as mortgages are regarded in equity. It is inherent in the thing itself and it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption.”
39. The Plaintiff has in its evidence acknowledged the existence of the debt but faults the manner in which it was disbursed. The Plaintiff places blame on the failed business venture on the Defendant. It is with no doubt that the dispute on the interest charged and the illegal penalties cannot be a basis for non-payment of the loan amount, which continues to accrue interest. I find that while the Plaintiff is justified in challenging the so-called illegal levies and interest, the Plaintiff is under an obligation to continue paying the principal amount pending the resolution of the illegal penalties and the extra interest charged. In default, the Defendant is within its rights in seeking to exercise the statutory power of sale, and can only be stopped if the debt is repaid in full.



40. I am guided by the decision in the case of Andrew M. Wanjohi –v- equity building society & 7 another (2006) eKLR, where the court held that: “.....by offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon.” This fact runs true in the present case and the court will not stand in the way of a lender who having performed its obligations under a charge instrument, seeks to enforce its statutory power of sale to realize the unpaid loan.
41. The issues raised therein in support of the Plaintiff’s claims in this case are unrelated to the loan agreement’s terms and conditions on which the loans were advanced which contained clear provisions regarding default and repayment of the principal amount. I find no fault on the part of the Defendant bank that led or contributed to the Plaintiff’s failure to meet its part of the bargain. In any event, the testimony by the bank which was not controverted during cross examination revealed that the bank performed its part of the agreement and released all the funds that it was expected to release to the Plaintiff. There was no evidence called to demonstrate that the Bank was at fault and therefore the Bank cannot therefore be hindered from recovering the loan amount due from the Plaintiff.
42. On the second issue, it is evident and important to note that the Plaintiff purchased the raw materials before the local credits were approved. I do agree with the Defendant that the Defendant cannot be faulted for the actions of the Plaintiff on obtaining the raw materials before the local credits were approved.
43. In the circumstances, I find that the Plaintiff authored its own misfortune and contributed to the failure of his business. I am therefore unable to fault the Defendant or find any contribution from the Defendant in the business decisions taken by the Plaintiff. I am therefore unable to find the Defendant liable for the losses incurred by the Plaintiff.
44. Consequently, I find the Plaintiff’s has failed to establish its case to the standard of proof required, which is on a balance of probabilities. The evidence by the witnesses called by the Plaintiff, in my considered view, did not aid the Plaintiff in establishing its case as pleaded. In view of the foregoing I am not persuaded that the Plaintiff is entitled to the reliefs sought and having defaulted on his obligations to service the loans, the loan amount in default continue to accrue interest. The Plaintiff’s case against the Defendant therefore fails in totality and the same is hereby dismissed with costs to the Defendant.

It is so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 14<sup>th</sup> DAY of MARCH, 2024

.....

J.W.W. MONG’ARE

JUDGE

**In the Presence of:-**

1. Mr. Kirimi for the Plaintiff
2. Mr. Chege for the Defendant
3. Amos- Court Assistant

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