



**Chege v Barclays Bank of Kenya Limited; Barclays Bank of Kenya Limited (Plaintiff to the Counterclaim); Mbote Beer Distributors Limited & 2 others (Defendant to the Counterclaim) (Civil Case 382 of 2015) [2024] KEHC 4815 (KLR) (Civ) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4815 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**CIVIL**

**CIVIL CASE 382 OF 2015**

**DAS MAJANJA, J**

**MAY 8, 2024**

**BETWEEN**

**CHRISTOPHER MBOTE CHEGE ..... PLAINTIFF**

**AND**

**BARCLAYS BANK OF KENYA LIMITED ..... DEFENDANT**

**AND**

**BARCLAYS BANK OF KENYA LIMITED .... PLAINTIFF TO THE COUNTERCLAIM**

**AND**

**MBOTE BEER DISTRIBUTORS LIMITED .... DEFENDANT TO THE COUNTERCLAIM**

**CHRISTOPHER MBOTE CHEGE ..... DEFENDANT TO THE COUNTERCLAIM**

**ANNE NJERI MBOTE ..... DEFENDANT TO THE COUNTERCLAIM**

**JUDGMENT**

1. On 29.01.2020, the court rendered a judgment (“the Judgment”) where the Plaintiff’s (Christopher) claim against the Defendant (“the Bank”) was dismissed, the Bank’s counterclaim was allowed and judgment was entered for the Bank against the Defendants in the counterclaim jointly and severally for the sum of Kshs. 37,612,131.80 together with interest at 24% per annum from 31.05.2016 until payment in full.



2. By an application dated 17.02.2021, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants in the counterclaim (“the Defendants” or “the Company” and “Anne”) sought to stay the execution of the Judgment and have it set aside on grounds inter alia that they were neither served with summons to enter appearance nor hearing notices of the counterclaim and that they had a good defence against the same which they desired to put forth. The court allowed the application and the Defendants thereafter filed a statement of defence dated 11.04.2022. After the hearing, parties supplemented their positions by filing written submissions.
3. As stated by the court in the Judgment and the ruling of 29.09.2017, many of the facts surrounding this matter are common ground. The Bank granted a loan facility of Kshs. 14,700,000.00 to the Company which was secured by, inter alia, a charge over Land reference LR. NO.13537/312 Ithuri Farm (“the suit property”) and personal and joint guarantees by Christopher and Anne who at the time were directors of the Company. Fearful of the suit property being sold, Christopher sought the following reliefs:
  - a. A declaration that the intended sale by public auction and/or in any other way of realizing from security being LR. No. 13537/312 (IR No. 83246) is illegal, unlawful and against statutory provisions of the guarantee between the defendant and the plaintiff.
  - b. A perpetual injunction restricting the intended sale of title LR. No. 13537/312 (IR No. 83246) that it be stopped, discontinued and suspended pending the hearing and determination of this suit.
  - c. The plaintiff further prays that the defendant does appoint a receiver manager for the Mbote Beer Distributors Limited pending the hearing and determination of this suit.
  - d. General damages.
  - e. Any other of further relief.
4. In the counterclaim, the Bank asserts that the debt stood at Kshs. 37,612,131.80 as at 31.05.2016. This position is denied by Defendants who further claim that there were no statutory notices and/or demands made to them and that they only knew of this suit when auctioneers visited the Company premises and attempted to proclaim assets which do not belong to the Company.
5. At this stage it is important to point out that Christopher’s suit was dismissed for want of prosecution on 09.12.2019 and judgment entered for the Bank on its counterclaim. The court subsequently set aside the judgment in respect of Anne. This leaves the Counterclaim as against Anne for consideration. Joseph Muli, Corporate Recoveries Manager of the Bank and Kennedy Mbote Chege, a director of the Company testified on behalf of the Bank and Anne respectively. I do not propose to set out their respective testimonies as they were along the lines set out in the pleadings. Moreover, the case turned on the documents produced on record.
6. A reading of the Defendants’ defence leads me to conclude that they are not denying being indebted to the Bank. What they seem to contest is the level of indebtedness as they state that the loan facility and amount claimed by the Bank has since sky-rocketed and quadrupled which they claim is contrary to section 44A of the *Banking Act* (Chapter 488 of the Laws of Kenya). The fact of indebtedness is indeed confirmed by Christopher’s letter to the Bank dated 05.05.2014 after the Bank demanded the sum of Kshs. 26,215,718.50. Christopher admitted the debt and acknowledged his duties as a guarantor of the facility to the Company. The Defendants have also annexed a statement of account from the Bank which indicates a debit balance of Kshs. 47,099,457.80 as at 04.11.2021.
7. Section 176 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) creates a presumption in favour of the Bank on the terms that “A copy of any entry in a banker’s book shall in all legal proceedings be



received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.” This statement of account is prima facie proof of the debt owed to the Bank and the court ought to admit it as a true and accurate entry unless demonstrated otherwise. The Defendants have not demonstrated any false entry in the statement to negate or upstage the presumption of its correctness. Anne, as a guarantor, is liable for the unsettled debt of the Company and thus, is obligated to pay and satisfy to the Bank on demand all sums of money which is owing to the Bank from the Company. This therefore settles the position that the Defendants are indeed indebted to the Bank and in essence means that the Bank’s counterclaim is successful.

8. As to whether the Bank served the Defendants with the statutory notices, I can only state that the same must be served on the Defendants in order to give them an opportunity to remedy the breach or otherwise redeem the suit property as security. In *Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others* [1995-1998] 2 EA 260, the Court of Appeal held that the burden of showing that the statutory notice has been served is on the chargee. Once the chargor alleges non receipt of the statutory notice, it is for the chargee to prove that such a notice was in fact served. In *Moses Kibiego Yator v Eco Bank Kenya Limited NKUE&L* No. 426 of 2013 [2014] eKLR the court stated that:

In instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served. If there is material to show that the notice was received or acknowledged, say, through an acknowledgement letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargee, and that in the ordinary course of events, the notice must have reached the chargee.

9. Even though the Bank’s documents indicate that the statutory notices were sent to the Defendants “By Registered Postal Delivery” and that the addresses used were those of the Company and which addresses have not been disputed, the Bank has not placed any evidence to demonstrate that the said notices were indeed dispatched or received by the Defendants. In any event, I reiterate that the Bank still has a chance to serve the same before exercising their statutory right of sale now that it has been affirmed that the Defendants are indebted to it.

### **Disposition**

10. The Bank has proved its case on the balance of probabilities. I therefore make the following final orders:
- a. Judgment be and is hereby entered for the Plaintiff in the counterclaim against the Defendants in the counterclaim jointly and severally for the sum of Kshs. 37,612,131.80 together with interest at 24% per annum from 31st May 2016 until payment in full.
  - b. The Plaintiff’s claim against the Defendant is dismissed with costs to the Defendant.
  - c. The Plaintiff and Defendants to the counterclaim shall pay costs for the counterclaim.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2024.**

**A.MABEYA**



**JUDGE**

