



**Gulf African Bank Limited v Tron Enterprises Limited & 4 others (Commercial Case E332 of 2022) [2023] KEHC 23917 (KLR) (Commercial and Tax) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23917 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E332 OF 2022  
JWW MONG'ARE, J  
OCTOBER 18, 2023**

**BETWEEN**

**GULF AFRICAN BANK LIMITED ..... PLAINTIFF**

**AND**

**TRON ENTERPRISES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BENSON SANDE NDETA ..... 2<sup>ND</sup> DEFENDANT**

**YVONNE KATUSIME NDETA ..... 3<sup>RD</sup> DEFENDANT**

**STEPHEN OCHIENG MALLOWAH ..... 4<sup>TH</sup> DEFENDANT**

**TRON LOGISTICS LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. By a Plaint dated 29<sup>th</sup> August 2022 the Plaintiff in this case filed the present suit against the Defendants seeking that judgment be entered against the Defendants jointly and severally for the following prayers:-
  - a. Kshs. 244,728,029.14/-.
  - b. Damages.
  - c. Default damages on (a) above of 20% per annum with effect from 12<sup>th</sup> August 2022 until payment in full.
  - d. Costs of this suit.
  - e. Such further or other reliefs as this Honourable Court may deem fit and appropriate to grant.



2. The Defendants, upon being served, filed their statements of Defence on 23<sup>rd</sup> September 2022 denying being indebted to the Plaintiff and sought to have the suit against them dismissed with costs. It is noteworthy that all the five Defendants filed separate Statements of Defence. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants filed similar Statements of Defence while the 4<sup>th</sup> Defendant filed a separate and distinct Statement of Defence to the suit denying any indebtedness to the Plaintiff.
3. On 17<sup>th</sup> November 2022 and by a Notice of Motion application the Plaintiff filed an application seeking for judgment on admission against the 1<sup>st</sup> Defendant. The said application was supported by the supporting affidavit of Mr. Lawi Sato, the legal officer of the Plaintiff. With the exception of the 4<sup>th</sup> Defendant who elected not to participate in the present application although represented by counsel, all the Defendants opposed this application and filed a replying Affidavit sworn by Yvonne Ndetta, the 3<sup>rd</sup> Defendant on behalf of the other Defendants.

### **The Plaintiff's/Applicant's Case**

4. The Plaintiff, being a banking institution licensed to offer Islamic banking products to its customers, entered into various contracts with the 1<sup>st</sup> Defendant and advanced to it several loan facilities which included:
  - a. Letters of Credit Finance with a limit of GBP. 674,500 and USD. 805,500.
  - b. Diminishing Musharaka Asset Finance Facility with a limit of Kshs.39,165,000.00/-.
  - c. Diminishing Musharaka Asset Finance Facility with a limit of Kshs.190,835,000.00/-.
5. To secure the financing the 1<sup>st</sup> Defendant offered the following securities:
  - a. Joint Guarantee and Indemnities by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants for the sum of Kshs.230,000,000.00/-.
  - b. Personal Guarantees and Indemnities by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Defendants for the sum of Kshs.230,000,000.00/-
  - c. Corporate Guarantees 5<sup>th</sup> Defendants for the sum of Kshs.230,000,000.00/-
  - d. Motor Vehicles and Chattels, being 25 Mercedes Benz Prime Movers and 25 Bulk Cement Tank Trailers; and
  - e. A legal Charge in favour of the Plaintiff for the sum of Kshs.45,000,000/- over property known as Land reference No. Kisumu/Nyahera/1381 in the names of the 2<sup>nd</sup> and 4<sup>th</sup> Defendants.
6. The Plaintiff argues that it fulfilled its part of the obligation and released the loan funds to the 1<sup>st</sup> Defendant in line with the contractual agreement thereto, however the 1<sup>st</sup> Defendant has failed to meet its part of the bargain and repay the loan and that as at September 2020 the loan was in arrears of Kshs.178,795,766.24/- and continues to accrue default damages at the contractual rate of 20% per annum.
7. By a letter dated 11/3/2020 the 1<sup>st</sup> Defendant committed itself to repay the loan in full and was to do so on or before the 15<sup>th</sup> of May 2020 but failed to honor the same. Parties entered into negotiations and the 1<sup>st</sup> Defendant gave its undertaking to repay the outstanding loan once again now agreed at Kshs.142,065,001/- by the 20<sup>th</sup> June 2022. It is this letter of undertaking from the 1<sup>st</sup> Defendant that the Plaintiff urges the court to find that the same amounts to an admission of debt by the 1<sup>st</sup> Defendant



and urges the court to allow the application for judgment on admission under order 13 rule 2 of the Civil Procedure Rules against the 1<sup>st</sup> Defendant.

### **The Defendants Case**

8. In opposing the application for judgment on admission by the Plaintiff, the Defendants, in the affidavit sworn by the 3<sup>rd</sup> Defendant, acknowledge the existence of the undertaking and the existence of the debt due to the Plaintiff. The Defendants argue that the terms of the said undertaking were not clear, unambiguous and unequivocal to pass the test set out under order 13 rule 2 of the Civil Procedure Rules.

9. Further the Defendants argue that the terms of the undertaking that the Plaintiff seeks to rely on are subject to interpretation. The said undertaking was framed as follows:

“we are aware that the company has defaulted in repaying the sums payable to the Bank and as a consequence there has been negotiations leading to an agreement of the reconciled all-inclusive sums payable to the Bank of Kshs.142,065,001.00(the reconciled sums) and is payable to the Bank on or before 20<sup>th</sup> June 2022, the completion date and in default of such payment, the parties agree on the extension of the completion date.”

10. While admitting in their submissions that the above amount was due and owing to the Plaintiff, the fact that parties agreed to negotiate an extension of the completion period, the Defendants argue, that the admission cannot be deemed to be clear and unambiguous. The Defendants argue that they have paid some portions of the loan due and that the same should be taken into consideration. The Defendants urge the court to dismiss the application and allow the matter to proceed to trial.

### **Analysis and Determination**

11. I have carefully considered the application before me and the affidavit of Lawi Sato filed in support thereto and the affidavit of Yvonne Ndeti filed in reply to the same. I have also considered with great care the submissions by the parties and the arguments made during the oral submissions before me by the parties. To my mind, the only issue that arises for determination is

“whether the judgment on admission should be entered against the 1<sup>st</sup> Defendant.”

12. It is common ground that the 1<sup>st</sup> Defendant, being the principal borrower, was upon application, granted various loan facilities by the Plaintiff, under the Islamic banking finance model, amounting to Kshs.230,000,000/-. Both parties further agree and acknowledge that the same was secured by various securities enumerated above. It is also common ground that the 2<sup>nd</sup> - 4<sup>th</sup> Defendants executed personal guarantees and indemnity to secure the loan while the 5<sup>th</sup> Defendant, being a corporate person, executed a corporate guarantee and indemnity for the sum of Kshs.230,000,000.00/-. A further security was in the form of a legal charge over Kisumu/Nyahera/1381 for Kshs.45,000,000/-. All the above facts are not in dispute.

13. The Civil Procedure Rules, 2010, under Order 13 Rule 2 provide as follows:-

“any party may at any stage of a suit, where admission of facts has been made, either on pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled, without waiting for the determination of other questions between the parties; and the court may upon such an application make such order, or give such judgment as the court may think just.”



14. In the case of *Choitram v Nazari* (1984) KLR 327, Justice Madan JA, in interpreting the above provisions, stated as Follows:-

“For the purposes of Order XII Rule 6, admissions can be expressed or implied on the pleadings or otherwise, e.g., in correspondence. Admissions have to be plain and obvious, as plain as pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning”

In the same case, Justice Chesoni JA, added;

“Admissions of fact need not be on the pleadings. They may be in correspondences or documents which are admitted or they may be even oral. The rules used words “otherwise” which are words of general application and are wide enough to include admissions made through letter, affidavits and other admitted documents and proved oral admissions .... ”

15. I have considered the rival arguments advanced in this application by the parties and note the fact that the Defendant does not deny the existence of the letter of undertaking it issued to the Plaintiff on 31<sup>st</sup> May 2020. I have also considered the fact that the outstanding amount of Kshs.142,065,001.00/- was arrived at after negotiations and reconciliation took place between the parties. I am therefore satisfied that the said undertaking amounts to a clear, unequivocal and unambiguous admission of debt by the 1<sup>st</sup> Defendant. I find no ambiguity in the said letter. The fact that the Defendant indicated in the said letter that the extension date would be extended if payment was not made did not, in my view, take away from the import and the meaning of the undertaking that the 1<sup>st</sup> Defendant was making a commitment to pay to the Plaintiff the amount owing and due under the various loan facilities. I also find the argument that along the way the 1<sup>st</sup> Defendant has made some payments, not material, since the said amounts are neither disclosed or submitted in evidence.
16. I am therefore persuaded that the application by the Plaintiff for judgment against the 1<sup>st</sup> Defendant has merit. The same is hereby allowed with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18<sup>TH</sup> DAY OF OCTOBER 2023.**

**J. W. W. MONG'ARE**

**JUDGE**

**In the presence of**

1. Kenneth Wilson for the Plaintiff/Applicant
2. Teddy Ochieng for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants/Respondents
3. Ms. Dave for the 4<sup>th</sup> Defendant/Respondents
4. Amos - Court Assistant

