



**Prime Bank Limited v Jessa & 3 others (Commercial Case E721 of 2021)
[2024] KEHC 13414 (KLR) (Commercial and Tax) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E721 OF 2021
MN MWANGI, J
OCTOBER 25, 2024**

BETWEEN

PRIME BANK LIMITED PLAINTIFF

AND

ZULIFIKAR HAIDERALI JESSA 1ST DEFENDANT

NASIR JESA 2ND DEFENDANT

HANDS OF GREEN INVESTMENTS LIMITED 3RD DEFENDANT

WE TILLEY (MUTHAIGA) LIMITED 4TH DEFENDANT

JUDGMENT

1. The plaintiff vide a plaint dated 30th July 2021 instituted this suit seeking judgment against the defendants jointly and severally as hereunder -
 - a. The sum of Kshs.3,556,359.53; -
 - b. Interest on (a) above at the rate of 22% per annum from 1st July 2021 until payment in full; -
 - c. The sum of Euro 2,249,620.92; -
 - d. Interest on (c) above at the rate of 13% per annum from 1st January 2019 until payment in full; -
 - e. Costs of this suit plus interest thereon at Court rates from the date of the judgment until payment in full; and
 - f. Any other or further relief as the Honourable Court may deem fit to grant.



2. The plaintiff's case is that it had a banker-customer relationship with Value Pak Foods Limited (now in liquidation) from around 2006 to 2013. During the said time, the plaintiff at the joint request of Value Pak Foods Limited and the defendants, provided various banking facilities to Value Pak Foods Limited (now in liquidation). These arrangements were formalized through letters of offer, which were accepted by both Value Pak Foods Limited (now in liquidation) and the defendants. The plaintiff stated that under a Share Purchase Agreement dated 20th January 2012, the 1st and 2nd defendants acquired the entire shareholding and interest in Value Pak Foods Limited (now in liquidation) and a 93% shareholding in the 3rd defendant.
3. The plaintiff averred that vide a letter of offer dated 29th July 2013 executed by the borrower and the defendants, it reviewed and renewed the borrower's existing banking facility for a principal sum of EUR 1,575,334.00 (Loan V) and converted the borrower's then existing loan in Kenya Shillings into EUR 404,420.00 (Loan VIII), making a total principal sum of EUR 1,980,754.00 exclusive of interest and other bank charges. It further averred that it allowed the repayment of Loan V in instalments of EUR 24,570.00 with effect from 31st July 2013 and Loan VIII in 84 equal instalments of EUR 6,310.00 with effect from one month after disbursement until payment in full. Additionally, the plaintiff stated that both loans would attract normal interest at variable rates calculated on the basis of a margin of 3% per annum above the 3 months EUR LIBOR rate subject to a minimum of 8% per annum. The plaintiff contended that it was also agreed that any amount in default would attract additional interest at variable rates calculated on the basis of a margin of 5% per annum above the normal rate of interest.
4. The plaintiff's case is that the said financial facilities were secured by inter alia various legal charges created in favour of the plaintiff by the 3rd defendant over all the properties known as L.R. No. 1508/32, L.R. No. 1508/33 & L.R. No. 1508/26 and corporate guarantees in favour of the plaintiff by the 3rd & 4th defendants. That loan V was further secured by way of existing joint and several guarantees of the 1st & 2nd defendants in their personal capacities, whereas loan VIII was also secured by way of fresh joint and several guarantees that were to be obtained in favour of the plaintiff from the 1st & 2nd defendants in their personal capacities, and a corporate guarantee from the 3rd & 4th defendants. The plaintiff asserted that in view of the foregoing, and in consideration of the plaintiff granting or continuing financial facilities to the borrower, the defendants as guarantors of the borrower agreed to pay the plaintiff all liabilities on demand, including present, future, and contingent debts, and to indemnify the plaintiff for amounts advanced, plus interest, fees, and related costs, subject to the guaranteed maximum sums in the deeds.
5. The plaintiff contended that the defendants agreed that the deeds of guarantee would be continuing security and would apply to the ultimate balance that may be owing from the borrower to the plaintiff, the bankruptcy, liquidation or insolvency of the borrower would not affect or determine the liability of the defendants as guarantors under the deeds of guarantee. The plaintiff averred that it was agreed that the defendants would indemnify the plaintiff against all damages, loss, costs and expenses arising from any failure of the borrower to carry out or discharge any of its obligations or liability, and the plaintiff was entitled to treat the defendants as principal debtors so as to give effect to the deeds of guarantee. The plaintiff claimed that the borrower defaulted in its loan repayment obligations, thus it sought to realize its security comprising the legal charges created by the 3rd defendant in its favour, in exercise of its charge's statutory power of sale by issuing all the requisite statutory notices.
6. The plaintiff averred that it was however unable to conclude the security realization process as intended in view of the subsisting restraining injunctive reliefs issued by the Court in Milimani HCCC No. 522 of 2015 – Imperial Bank Limited (Under Statutory Receivership) -v- W.E. Tilley (Muthaiga) Limited & 19 others. It was stated by the plaintiff that while the financial facilities herein remained unpaid and



continue to accrue interest, an order of liquidation was issued against the borrower by the High Court in Milimani HC Winding Up Cause No. 22 of 2014 on 17th August 2016. It further stated that the borrower's current account No. 3000021071 held with it was debited with varying amounts of money from time to time, whereas the account did not have sufficient credit balance to support such debits, thus placing it in an overdrawn position, and the outstanding overdrawn amount therein continues to accrue interest on the strength of the terms and conditions upon which the account was opened as well as the general banking custom, trade and usage to charge interest on overdrawn current accounts.

7. The plaintiff averred that its claim against the defendants is for Kshs.3,556,359.53 due and owing from the borrower's overdrawn account No. 300002107, together with interest thereon at the rate of 22 % per annum with effect from 1st July 2021 until payment in full, and EURO 2,249,620.92 due and owing from the borrower's loan account Nos. 700200004952 and 700300022017 together with interest thereon of the rate of 13% per annum with effect from 1st January 2019 until payment in full.
8. In opposition to this suit, the defendants filed a statement of defence dated 6th October 2021, denying all the averments contained in the plaintiff's plaint. They confirmed that Value Pak Foods Limited (hereinafter referred to as the borrower) is now in liquidation hence its properties must be applied in pari passu, to satisfy the claims of its creditors at the time when it goes into liquidation. They averred that in as much as the plaintiff is one of the borrower's secured creditors, the instant proceedings are not what the law envisages. They contended that the plaintiff ought to have applied to be joined in the High Court Winding Up Cause No. 22 of 2014, wherein it should to have lodged its claim as against the borrower, as a secured creditor. It was also contended by the defendants that their relationship with the borrower and their deeds of guarantee were extinguished the moment the borrower was put in liquidation.
9. In support of this cause, the plaintiff called one witness. The defendants also called one witness in support of their case.

Plaintiff's Case.

10. Mr. George Wachira Mathui testified as PW1. He stated that he is a Senior Manager in Credit, Litigation & Recoveries Section. He proceeded to adopt his witness statement dated 30th July 2021 as his evidence in chief. He then produced the documents in the plaintiff's bundle of documents also dated 30th July 2021 as plaintiff exhibits Nos. 1 to 32. He testified that the deeds of guarantee and corporate guarantee created in favour of the plaintiff by the defendants were independent, meaning that the plaintiff was not obligated to seek repayment from the borrower but could directly pursue the defendants as guarantors. He stated that the defendants were liable for the outstanding credit facility as a result of the aforesaid guarantees, even though the borrower was in liquidation, and the plaintiff only needed to issue a demand notice to the defendants.
11. In cross-examination, PW1 acknowledged the existence of Milimani HCCC No. 522 of 2015, in which the defendants' accounts were frozen by a Court order. He however stated that the plaintiff's recovery efforts were not influenced by this case but were instead based on the security documents. PW1 explained that the plaintiff did not participate in the winding-up proceedings as a secured creditor because the orders issued in 2015 against the defendants, and a subsequent judgment against the borrower, made their participation unnecessary. PW1 testified that the plaintiff filed this suit to enforce the guarantees provided to it by the defendants. Mr. Mathui further stated that the plaintiff could not apply to join Milimani HCCC No. 522 of 2015 since the substratum in the said suit was different from their case.



12. In re-examination, PW1 clarified that the letter dated 12th April 2016, found at page 409 of the defendants' bundle of documents, was not a response to the statutory demand dated 25th July 2016 found at page 410 of the stated documents, but was a response to an earlier statutory demand dated 5th April 2016 found at page 406 of the plaintiff's documents. He stated that the Court orders in Milimani HCCC No. 522 of 2015 only froze the affairs of the 1st, 2nd and 4th defendants, but not the assets of the 3rd defendant. Moreover, he stated that those orders do not prevent the defendants from being pursued by other creditors in separate suits, as they only concern certain assets and bank accounts.

Defendant's Case.

13. Mr. Nasir Haiderani Jessa testified as DW1. He adopted his witness statement dated 6th October 2021 as his evidence in chief, and produced the documents in the defendants' bundle of documents as defence exhibits Nos. 1, 2, 3 & 4. He testified that the financial facilities were provided to the borrower, which is not a party to the current suit. He explained that Court orders in Milimani HCCC No. 522 of 2015 froze all the defendants' accounts, assets, and businesses, preventing them from servicing the loan as they could no longer trade. He stated that before the said orders were made, the borrower had been repaying the loan, but it ceased after the orders were issued. He further stated that the borrower was later wound up following a judgment in High Court Winding Up Cause No. 22 of 2014 delivered on 17th August 2016. DW1 testified that on 5th April 2016, the plaintiff demanded payment from the borrower, and in response, LJA Associates Advocates requested the plaintiff to join the proceedings in Milimani HCCC No. 522 of 2015 to protect its interests, but the plaintiff did not.
14. During cross-examination, DW1 admitted that he filed his witness statement on behalf of all the defendants without having formal authority to do so. He revealed that the 1st defendant is his brother, and that he is a Shareholder and Director of the 3rd & 4th defendants, as well as the borrower. He acknowledged the list of guarantors on page 115 of the letter of offer to the borrower, but described the signatures as vague. While admitting that the four guarantors had provided written guarantees, he could not recall signing the guarantee on page 375, asserting that their deed of guarantee was extinguished when the borrower went into liquidation.
15. He stated that he was unaware of any clause that exempts guarantors in the event of the borrower's liquidation. He also noted that although the 3rd defendant is not a party to Milimani HCCC No. 522 of 2015, one of its assets was frozen by orders from that case. He however confirmed that the said orders did not prevent any of the defendants from conducting business or earning a living, but he claimed that he was relying on others for financial support. While he agreed that the defendants bound themselves as guarantors, he expressed the view that it was not a fair comment for him to say that the plaintiff should not pursue the guarantors for repayment. He suggested that the plaintiff should pursue the principal borrower.
16. In re-examination, DW1 stated that in Milimani HCCC No. 522 of 2015, his personal accounts were frozen. He further stated that he cannot open a bank account in Kenya, and/or travel outside Kenya.
17. At the close of the defendants' case, the Court directed parties to file written submissions. The plaintiff's submissions were filed on 23rd April 2024 by the law firm of G. Mutua Molo & Company Advocates, while the defendants' submissions were filed by the law firm of Kaka Kamau & Co. Advocates on 15th July 2024.
18. Mr. Mutua, learned Counsel for the plaintiff submitted that the borrower, who was the plaintiff's customer received various credit facilities from the plaintiff. That on 17th August 2016, the borrower was placed in liquidation due to its inability to pay its debts. That prior to liquidation, the borrower



had unpaid liabilities to the plaintiff, which remain outstanding to date. He further submitted that part of the repayment of the said liabilities was secured by legal charges over properties L.R. No. 15081/32, 15081/33 & 15081/26, by the 3rd defendant. However, a Court order in Milimani HCCC No. 522 of 2015 restrains adverse dealings with these properties. Counsel argued that the plaintiff has shown through documentary evidence that the borrower's liabilities were also secured by guarantees from each defendant, a fact that the defendants do not dispute.

19. Mr. Mutua relied on the Court of Appeal case of National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & another [2001] eKLR, and stated that the deeds of guarantee herein were commercial contracts, thus the parties thereto were bound by the terms they agreed to, upon execution. He highlighted that during cross-examination, the defendants' witness could not identify any clause in the deeds of guarantee that discharged the guarantors' liability upon the liquidation of the borrower. He submitted that the said guarantees expressly provided that the guarantors' liability thereunder would continue even in the event of the borrower's bankruptcy, liquidation or insolvency. Counsel for the plaintiff argued that the issue of whether the borrower was a necessary party in these proceedings was not raised in the defendants' pleadings but was first mentioned in the defendants' opening address and oral testimony.
20. Mr. Mutua referred to the Court of Appeal case of Barclays Bank of Kenya Limited v Kepha Nyabera & 191 others [2013] eKLR, to assert that a secured creditor like the plaintiff has the discretion to choose the remedy for recovering an outstanding debt, and as such, the plaintiff was not obligated to sue the borrower, as pursuing the defendants as guarantors was a valid legal option. Counsel argued that the issue of the freezing injunctive orders from Milimani HCCC No. 522 of 2015 affecting the defendants' ability to meet their obligations was not raised in the defendants' defence. Additionally, he stated that during cross-examination, the defendants' witness admitted that the 3rd defendant was not a party to that case, meaning it was not affected by the orders. Furthermore, the injunctive orders did not prevent the defendants from continuing with their lives or conducting business activities.
21. He cited the Court of Appeal case of Kenya Commercial Finance Company Limited v Kipng'eno Arap Ngeny & another [2002] eKLR, and Clause 1 of the general terms and conditions applicable to customer's accounts. He argued that by issuing payment instructions on an unfunded account, the borrower authorized the plaintiff to honour those instructions, even if it resulted in the account becoming overdrawn. Additionally, he noted that Clause 5 of the same document permitted the plaintiff to charge interest on overdrawn accounts, even if no specific interest rate had been agreed upon with the borrower.
22. Mr. Kaka, learned Counsel for the defendants submitted that this suit is fatally defective due to the non-joinder of the borrower. He stated that pursuing the case is futile, as there are existing Court orders from Milimani HCCC No. 522 of 2015 freezing all of the defendants' accounts and properties, a fact known to the plaintiff. Counsel cited Section 96(2) of the Land Act and further submitted that the plaintiff was obligated to issue the defendants, as guarantors, with a 40-day Notice before selling the charged property. He noted that the plaintiff had not produced such a Notice and claimed that they were unable to complete the security realization process due to the injunctive orders, despite never attempting to join the proceedings in Milimani HCCC No. 522 of 2015.
23. Counsel for the defendants cited the case of Robert Njoka & another v Barclays Bank of Kenya Limited & another [2017] eKLR, and argued that the plaintiff had not presented any evidence to show that the borrower refused to pay its loans. He contended that the plaintiff should have first secured its rights in the Winding Up Cause before pursuing the guarantors. Additionally, he contended that the guarantees provided by the defendants were extinguished when the borrower was placed in liquidation.



Analysis And Determination.

24. I have considered and analyzed the evidence adduced by the witnesses who testified, in line with the pleadings filed. I have also considered the written submissions made by Counsel for the parties. The issues that arise for determination are: -
- i. Whether the fact that Value Pak Foods Limited is not a party to this suit is fatal to these proceedings;
 - ii. Whether the defendants' guarantees were extinguished when the borrower was placed in liquidation; and
 - iii. Whether the plaintiff has proved its case on a balance of probabilities.

Whether the fact that Value Pak Foods Limited is not a party to this suit is fatal to these proceedings.

25. The defendants herein executed deeds of guarantee and corporate guarantees in favour of the plaintiff as security for the financial facilities advanced to the borrower (now in liquidation). Other than the said guarantees, the said financial facilities were also secured by inter alia, legal charges created by the 3rd defendant in favour of the plaintiff over land parcel Nos. 15081/32, 15081/33 & 15081/26. It is the defendants' contention that the suit herein is fatally defective for non-joinder of borrower (now in liquidation). The plaintiff in response thereto submitted that the issue of whether or not borrower (now in liquidation), was a necessary party in these proceedings was not raised in the defendants' pleadings but was first mentioned in their opening address and oral testimony.
26. It is trite law that parties are bound by their pleadings. In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] KEHC 6553 (KLR) the Court held thus –
- A party is bound its pleadings, and the court only decides a matter based on the pleadings before it. Affidavit and oral evidence is intended to breathe life to the pleadings. For life to be successfully breathed into the suit or cause or application, to enable the court grant the orders sought or meet the prayers made, the evidence tendered must be in sync with the pleadings.
27. Further, the Court in the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] KEHC 5465 (KLR) held the following –

It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....”



...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....” (Emphasis added).

28. Upon perusal of the defendants’ statement of defence and witness statement, it is clear that this issue was not pleaded. Therefore the defendants’ witness testimony to the effect that the borrower (now in liquidation) is not a party to this suit does not support any of the pleadings filed by the defendants. It is therefore for rejection, and it is hereby disregarded.
29. As a result of the above, this Court shall not proceed to determine at length the said issue, as doing so will amount to wasting the Court’s precious judicial time and resources, and ultimately, the Court will be indulging in an academic exercise.

Whether the defendants’ guarantees were extinguished when the borrower was placed in liquidation.

30. The defendants do not dispute that they created deeds of guarantee and corporate guarantees in favour of the plaintiff as security for the financial facilities advanced to the borrower (now in liquidation). They however contend that the said guarantees were extinguished when the borrower was placed in liquidation. It is worthy on note from cross-examination of the defence witness that he acknowledged that the said guarantees do not provide for exemption of guarantors in the event of the borrower’s liquidation. Upon perusal of the aforesaid guarantees, this Court finds that they expressly provide that the guarantors’ liability thereunder would continue even in the event of the borrower’s bankruptcy, liquidation or insolvency.
31. This Court agrees with Counsel for the plaintiff that guarantees are commercial contracts. It is trite law that parties are bound by their commercial agreements and must keep their part of the bargain. It is now well settled that Courts are not in the business of rewriting contracts for parties. This position was restated by the Court of Appeal in the case of National Bank Of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another (supra) as follows -

...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

32. In the premise, this Court finds that the defendants cannot rely on the existence of Milimani HCCC No. 522 of 2015 and the order liquidating the borrower in arguing that the guarantees created by the defendants in favour of the plaintiff as security for the financial facilities advanced by the plaintiff to the borrower were extinguished, when the borrower was placed in liquidation. Such an argument is not tenable.



Whether the plaintiff has proved its case on a balance of probabilities.

33. The defendants' case is that the plaintiff is not entitled to the reliefs sought for failing to demonstrate that the borrower (now in liquidation) is incapable of paying its debts. It is however noteworthy that all through the proceedings and pleadings in this case, the parties herein agree that the borrower was placed in liquidation in a judgment delivered by the Court in Milimani HC Winding Up Cause No. 22 of 2014 on 17th August 2016, for its inability to pay its debts. It is therefore not true that the plaintiff did not demonstrate that the borrower was unable to repay the financial facilities advanced to it by the plaintiff.
34. The defendants asserted that other than the guarantees created by the defendant in favour of the plaintiff as security for financial facilities advanced to the borrower (now in liquidation) by the plaintiff, the said financial facilities were also secured by inter alia, legal charges created by the 3rd defendant in favour of the plaintiff over land parcel Nos. LR 15081/32, 15081/33 & 15081/26. The defendants contended that before pursuing the defendants for payment of the said financial facilities, the plaintiff ought to have first extinguished all other remedies available to it such as lodging its claim in the Winding Up Cause that placed the borrower in liquidation, pursuing the borrower, and/or applying to be joined to the proceedings in Milimani HCCC No. 522 of 2015.
35. The defendants further submitted that the plaintiff has not demonstrated that it tried to realize the security charged to it before pursuing the defendants as the borrower's guarantors. This Court however notes that the defendants' witness agreed that the defendants bound themselves as guarantors, and agreed that it would not be fair to argue that the plaintiff should not pursue the guarantors for repayment. It is now settled that a secured creditor like the plaintiff herein, has the discretion to choose the remedy for recovering an outstanding debt. In the case of *Olkasasi Limited v Equity Bank Limited* [2015] eKLR the Court held as follows on the issue of recovery of debts from guarantors -

A guarantee constitutes a separate contract from the borrower's simple contract for loan and the liability of a guarantor is separate from that of the borrower; it arises upon the default by the borrower to fulfil the terms of the contract for loan. The guarantor is, therefore, sued and liable on the guarantee except, however, where the guarantee is also given in form of a charge on immovable property of the guarantor, the guarantor will benefit from certain provisions of the law available to a chargor; In view of the foregoing, and the fact that the borrower's debt to the plaintiff is not disputed, this Court is persuaded that the plaintiff is entitled to the reliefs sought.

36. From the evidence adduced in this case, I am satisfied that the plaintiff has proved its case on a balance of probabilities. Section 27 of the *Civil Procedure Act* provides that costs follow the event. The plaintiff having succeeded in this suit is as such awarded costs of the suit.
37. In the circumstances, I hereby enter judgment for the plaintiff as against the defendants jointly and severally for -
- i. The sum of Kshs.3,556,359.53 with interest to be calculated at the rate of 22% per annum from 1st July 2021 until payment in full;
 - ii. The sum of Euro 2,249,620.92 with interest to be calculated at the rate of 13% per annum from 1st January 2019 until payment in full; and
 - iii. Costs of this suit plus interest thereon at Court rates from the date of judgment until payment in full is awarded to the plaintiff.



It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Mutua for the plaintiff

Mr. Kaka for the defendants

Ms B. Wokabi - Court Assistant.

