



**Empress Trading Limited v Gulf African Bank Limited (Civil Case 82 of 2019)
[2024] KEHC 15163 (KLR) (Commercial and Tax) (2 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 82 OF 2019
CJ KENDAGOR, J
DECEMBER 2, 2024**

BETWEEN

EMPRESS TRADING LIMITED PLAINTIFF

AND

GULF AFRICAN BANK LIMITED DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff approached the Defendant Bank (the Bank) on March 22, 2018 for a financing facility to be used for the purpose of purchasing Prime Movers and Trailers. The Bank gave the Plaintiff a finance Facility, namely, a Diminishing Musharaka Finance Facility for the sum of Kshs.200,000,000/=. The facility was payable within 60 months. The Plaintiff was to pay profit to the Bank at a variable rate of the Central Bank Rate of 9.5% per annum plus the Bank's margin comprising not more than 4% above the Central Bank Rate.
2. One of the terms of the facility was that in the event of default, the Bank would cease its commitment to advance the facility and all securities held by the Bank would become enforceable. The Plaintiff defaulted on the Facility and the Bank issued a series of Demand letters in December 2018, requesting the Plaintiff to regularize their accounts. The Plaintiff failed to settle the outstanding amount and the Defendant instructed auctioneers on 15th January, 2019 to repossess and sell the motor vehicles jointly registered in the name of the Bank and the Plaintiff to recover the outstanding amount.
3. The Plaintiff went to court vide a Plaint dated 21st February, 2019 seeking an order directing the Bank not to repossess or auction the Plaintiff's trucks and trailers. It said it was willing and ready to regularize the accounts with the Defendant Bank. The parties registered consent in Court on 25th February, 2019 in which they stayed the auction on certain terms requiring the Plaintiff to clear the arrears within



- certain duration as well as make a proposal on time needed to liquidate the remaining debt. The Court maintained the status quo until 17th December 2019, when the matter was referred to Mediation.
4. The Bank drafted a Letter of restructuring in February, 2020 and gave it to the Plaintiff with a view to consolidating and restructuring the outstanding principal. Despite several reminders thereafter, the Plaintiff did not execute the Letter of Restructure. The Bank went ahead and sold the Plaintiff's Motor Vehicles through a public auction on 18th May, 2020. Although the Plaintiff protested the auction, the Bank maintained that there was no order prohibiting it from selling the said vehicles since the Plaintiff was in default. The sale proceeds from the auction were Kshs.98,150,000/=.
 5. The Bank filed a Statement of Defense and Counter-Claim dated 29th September, 2020 where it sued the Plaintiff and brought on board the 2nd Defendant in the counter-claim, Adan Kuresh Ibrahim (Mr. Adan). It stated that, after selling the properties and applying the proceeds of the sale towards settlement of the debt, the Plaintiff still owes it the sum of Kshs.109,821,401.15/= as of 14th September, 2020. It counterclaimed from the Plaintiff and Mr. Adan jointly and severally for judgment as follows;
 - a. Kshs.109,821,401.15/= as at 14th September 2020 together with profit and charges accruing thereon until payment in full.
 - b. Costs on a full indemnity basis.
 6. The Plaintiff did not file a Response to the said Counterclaim. The Bank brought an application on 11th November, 2020 in which it sought to have the Plaintiff's suit against it dismissed with costs and judgment entered as prayed in the counterclaim. It argued that the Plaintiff's suit did not disclose any reasonable cause of action in law.
 7. The Court agreed with the Bank and dismissed the Plaintiff's suit on 24th November, 2023, with costs to the Bank. It held that the Plaintiff's case did not have any cause of action in law as the orders sought had been overtaken by events, and the Plaintiff had admitted being indebted to the Bank. The Court also noted that there was no express admission of the entire amount of Kshs.109,821,401.25/=. It stated that the matter required further enquiry and evidence to determine the exact indebtedness. It also entered partial judgment in favor of the Bank for Kshs.4,900,000/=.
 8. The Court directed parties to fix the rest of the claim for hearing upon satisfaction of pre-trial procedures. The matter went for formal proof on 1st October 2024, and parties were thereafter directed to file their submissions. The Bank filed its submissions, but the other parties did not, despite being duly notified.

Defendant's Written Submissions

9. The Bank submitted that the Plaintiff approached it for a Diminishing Musharaka Finance Facility of Kshs.200,000,000.00/= and that the Plaintiff was in default. It stated that out of this principal amount, Plaintiff is yet to pay Kshs.109,821,401.15/=: and it had failed and refused to rectify the default. It submitted that the amount has been pending since 14th September, 2020. It submitted that the Plaintiff and Mr. Adan are truly and justly indebted to the Bank. It thus requested the Court to enter judgment in its favor for the amount of Kshs.109,821,401.15/=:.
10. It relied on the cases of Stella Kavutha Muthoka & Kenny Muthoka Maluki v Kenya Women Microfinance Bank Ltd [2022] eKLR, and Meduprof-S BV v Alfred Otieno Odhiambo [2021] eKLR. It argued that the courts in the two cases cautioned borrowers against evading paying lawful debts and reminded them that the only solution was repaying the debt owed.



11. The question for determination is whether the Plaintiff and Mr. Adan are indebted to the Bank a sum of Kshs.109,821,401.15/=.
12. During the formal proof, the Bank called one witness, an employee, who adopted his witness statement dated 29th February, 2024. He produced the following documents as exhibits to prove the outstanding debt:-
 1. Letter of Offer – Ex 1 dated 22/03/2018
 2. Letter of Offer- Ex 2 dated 10/12/2018
 3. Guarantee - Ex 3 dated 17/12/2018
 4. Copy of Demand- Exhibit 4
 5. Letter dated 3/12/2018- Exhibit 5
 6. Letter dated 10/12/2018- Exhibit 6
 7. [You did not Record this] dated 31/12/2018- Exhibit 7
 8. Instructions to Auctioneers dated 15/1/2019- Exhibit 8
 9. Account Statements as at 25/2/2019 – Exhibit 9
 10. Consent Order dated 25/2/2019- Exhibit 10
 11. Letter of Restructure dated 25/2/2020- Exhibit 11
 12. Letter dated 10/3/2020- Exhibit 12
 13. Correspondence letter dated 19/3/2020-Exhibit 13.
 14. Valuation Report- Exhibit 14
 15. Advertisements- Exhibit 15
 16. Letter dated 11/5/2020- Exhibit 16
 17. Letter dated 18/5/2020- Exhibit 17
 18. Certificates of Sale – Exhibit 18
 19. Letters of Guarantee dated 29/9/2020- Exhibit 19
 20. Copy of Ruling dated 24/11/2023 on the Bank’s application- Exhibit 20
13. The witness testified that the Bank advanced Kshs.200 million to the Plaintiff through an offer dated 22nd March, 2018. He stated that it was agreed that the profit rate is 13.5% per annum. The said facility was secured by joint registration of motor vehicles and trailers. He testified that the Plaintiff defaulted, the motor vehicles were re-possessed, and sold for a value of Kshs.98,150,000/= leaving a balance of Kshs.109,821,401.15 as at 14/12/2020. He stated that they ask for judgment of the same amount together with profit at the rate of 13.5% until payment in full.
14. I have looked at the said documents/exhibits. I have seen the Letter of Offer dated 22nd March, 2018. The letter was written by the Bank addressed to Adan Kuresh Ibrahim T/A Empress Trading. It shows that Mr. Adan accepted the terms and conditions of the Offer on 3rd April, 2018 when he executed the



Letter of Offer in the presence of his advocate. It appears that, at this time, the Plaintiff Company had not yet been incorporated.

15. The Bank argued that one of the terms and conditions of the Letter of Offer dated 22nd March, 2018 was that Mr. Adan would incorporate a company and transfer the said business to the company. I looked at the Letter of Offer, and I could not see or identify a specific express term to that effect. Nonetheless, the Bank stated that subsequently, Mr. Adan incorporated the Plaintiff Company sometime in December 2018.
16. I have also seen a second Letter of Offer written by the Bank addressed to the Directors of the Plaintiff Company dated 10th December 2018. The letter states that its purpose was to vary the facility earlier offered to Mr. Adan by transferring the Facility to the Plaintiff. In other words, it was meant to ensure the Plaintiff takes over the Facility earlier given to Mr. Adan. The Directors of the Plaintiff accepted the offer letter on 17th December 2018 by executing the document in the presence of their advocate and imposing the company seal.
17. To my mind, this is enough proof that there was a valid Finance Facility between the Bank and the Plaintiff. This court issued a ruling on 17th December, 2019 in which it found that the Plaintiff admitted being indebted to the Bank. Later, on 24th November, 2023, this Court delivered a ruling in which it held that the only issue remaining for determination in this matter was the exact indebtedness. This Court will delve into this issue.
18. The Bank maintains that the Plaintiff is yet to pay Kshs.109,821,401.15/=. It made this claim in the Counter-Claim dated 29th September, 2020. I note that the Plaintiff did not file any response to the Bank's Counter-claim. Nonetheless, the Bank is mandated to prove the debt, notwithstanding the Plaintiff's inaction.
19. How much did the Plaintiff owe the Bank as at 14th September 2020? To answer this question, the Bank provided a Statement of Accounts. In my analysis, the statement shows two things;
 - a. The Plaintiff had, by 14th September, 2020 repaid Kshs.15,337,681.00/= towards the settlement of the Facility.
 - b. The Plaintiff made no other payments after 14th September, 2020.
20. The Bank also produced various Certificates of Sale. The certificates showed that the Bank had auctioned Plaintiff's motor vehicles at the following prices;
 - a. Motor Vehicle KCQ 144W and ZF 6544-11,000,000/=
 - b. Motor Vehicle KCQ 913H.....2,700,000/=
 - c. Motor Vehicle KCQ 145W, KCQ 149W, KCQ 146W,
 - d. KCQ 143W, ZF 6548, ZF 6549 & ZF 6546.....39,650,000/=
 - e. Motor Vehicle KCQ 913H.....800,000/=
 - f. Motor Vehicle KCQ 147W, KCQ 150W, KCQ 151W,
KCQ 152W, ZF 6547, ZF 6550, ZF 6551 & ZF 9106.....44,000,000/=TOTAL-----118,150,000/=
21. In my analysis, I find that the Bank issued different figures for the amount it received from the sale of the motor vehicles. In the Counter-Claim, the Bank indicated that it received Kshs. 98,150,000.00/



- = from the auction sale. Its witness maintained the same in his oral testimony during the formal proof. However, a relook at the documentary evidence placed before the Court shows otherwise. The Certificates of Sale issued by the Bank and produced as Exhibit 18 show that the total amount received from the public auction was Kshs.118,150,000/=. The difference between the two figures is Kshs.20,000,000/=. The Bank has not explained the variance between the two values.
22. In the circumstances, and in lieu of any clarification from the Bank, I am inclined to work with the amounts reflected in the Certificates of Sale. I thus find that the total amount received from the Public Auction was Kshs.118,150,000/=. The vehicles were auctioned on 18th May, 2020. Thus, I find that, by 14th September 2020, the Bank had received a total of Kshs.133,487,681/=. This figure being a combination of the amount received from the Public Auction and the amount the Plaintiff had repaid to the Bank before the material date.
 23. I have looked at the Bank's Statement of Accounts to ascertain the exact figure outstanding as of 14th September, 2020. The statement does not show the exact figure for the date in question but rather runs all through the period of the Facility from July 2018 to June 2023. However, the Bank maintained that there was a balance of Kshs.109,821,401.15/= as at 14th September, 2020. I note that the Bank arrived at this figure on the erroneous assumption that it had received Kshs. 98,150,000.00/= from the public auction.
 24. Given that the evidence placed before the Court shows that the Bank received Kshs.118,150,000/= from the public auction, I find that the Bank's Claim should be readjusted downwards to capture the variance between the two figures. The Balance is less by Kshs.20,000,000/=: bringing the final figure to Kshs.89,821,401.15/=. I find that the Bank has proved that the Plaintiff had an outstanding Balance of Kshs.89,821,401.15/= as at 14th September 2020.
 25. I also note that on 24th November, 2023 this Court entered Partial Judgment in favor of the Bank for the sum of the Kshs.4,900,000/=. I am of the view that I should consider this amount before making the final determination. To my mind, the amount awarded in the partial judgment also relates to the same period under review - that is as at 14th September 2020. Therefore, now that the Court had already awarded this, it should not reflect in the award in this judgment. Thus, the figure Kshs.89,821,401.15/= should be reduced by Kshs.4,900,000/=. Ultimately, I find that the award in this judgment is Kshs.84,921,401.15/=.
 26. I therefore enter judgment for the Bank for Kshs.84,921,401.15/= as at 14th September, 2020 together with profit and charges accruing thereon in the rates as agreed upon until payment in full.
 27. Before I pen off, I note that the Bank asked the Court to enter the judgment jointly and severally against the Plaintiff and Mr. Adan. I doubt whether it is appropriate for this court to impose liability on the 2nd Defendant (Mr. Adan) in his personal capacity, given that the Bank has not explained why he should be held jointly and severally liable for the contractual breach.
 28. From the evidence before the Court, Mr. Adan admitted to being the Managing Director of the Plaintiff Company. He stated as much in an affidavit dated 21st February, 2019. However, I find that that fact alone, without more, does not justify why the court should impose liability on him for the contractual breach committed by the Plaintiff Company.



29. The Company Law principle that a company's legal personality is distinct from its members and directors is well known in Kenya. The principle was restated by Mabeya J. in *Multichoice Kenya Ltd v Mainkam Ltd & Anor* (2013) eKLR, where he stated as follows:

“I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of *Salomon v Salomon* (1897) A.C. 22 Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly oppose to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity.”

30. The Principle was also applied in *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Anor*. (2014) eKLR, where the Court held as follows;

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *SALOMON & CO LTD v SALOMON* [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality.”

31. There is no mention of impropriety, fraud, or dishonourable conduct on the part of Mr Adan. I thus find that his inclusion in the Counter-Claim was wrongful and misplaced. The court cannot, therefore, impose liability on him for the wrongs of the Plaintiff. The Plaintiff has a legal personality distinct from him.

Disposition

32. Judgment is hereby entered for the Defendant Bank against the Plaintiff for Kshs.84,921,401.15/= as at 14th September, 2020 together with profit and charges accruing thereon until payment in full.
33. There was no acknowledgement that this sum was paid, nor is there anything on the record to show that there has been execution of the partial Judgment entered on November 24, 2023, for the sum of the Kshs.4,900,000/=. Therefore, the decree will include it in the total awarded as the final judgment in the calculation, along with any profit and charges that accumulate until full payment is made.
34. The Defendant Bank shall have costs.
35. It is so ordered.



DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT ONLINE PLATFORM ON THIS 2ND DAY OF DECEMBER, 2023.

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Nadio Advocate (present) holding brief for Mutungi Advocate for Plaintiff in the counterclaim.

