IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL SUIT NO. 648 OF 2005

BETWEEN

AFRICAN BANKING CORPORATION ..... PLAINTIFF

AND

ZEITUNS HOLDINGS LIMITED .....1ST DEFENDANT

ABDIRIZAK MAALIMU AHMED.....2ND DEFENDANT

JABRI ABDULNASSIR SEIF.....3RD DEFENDANT

SONIA WANJIRU .....4TH DEFENDANT

ANITA NYAMBURA.....5TH DEFENDANT

CHIEF LANDS REGISTRAR..... 6TH DEFENDANT

JUDGMENT

Introduction and Background

1. The Plaintiff ("the Bank") filed suit by the Plaint dated 30th July 2018. Its case is that by the Letters of Offer dated 27th June 2012 and 26th November 2012, the 1st Defendant ("the Company") requested and obtained various facilities from the Bank for various business and commercial purposes. Under the Letter of Offer dated 27th June 2012, the Company was granted a Performance Bond whose limit was KES 2,887,859.00, a Letter of Credit Discounting whose limit was KES. 19,920,000.00 and a Sight Letter of Credit whose limit was USD 115,000.00. Under the Letter of Offer dated 26th November 2012, the Company was granted a Performance Bond whose limit was KES 2,887,859.00, a Letter of Credit Discounting whose limit was KES. 18,987,161.50 and a Sight Letter of Credit whose limit was KES 5,185,000.00 and a Pre-Shipment Finance whose limit was KES. 84,000,000.00.

2. These facilities were secured by, inter alia, Legal Charges duly registered over two properties; Title Numbers KILIFI/JIMBA/337 and 338 ("the suit properties") in the name of the 2nd and 3rd Defendants respectively. ("the suit properties") and Personal Deeds of Guarantee and Indemnity from the 2nd, 3rd, 4th and 5th Defendants.

3. The Bank states that when the 1st to 5th Defendants ("the Defendants") defaulted in repaying the advanced sums, it initiated the process of exercising its statutory power of sale by issuing the requisite statutory notices to the 2nd and 3rd Defendants. When the Bank attempted to sell the suit properties by public auction, it learnt that following a Judgment in **Malindi ELC Petition No. 11 of 2012** ("***ELC Petition No. 11 of 2012***") dated 8th May 2015, the 2nd and 3rd Defendants' proprietorship had been cancelled. It accused the Company, 2nd and 3rd Defendant of failing to notify it of the irregularities in the titles. The Bank states that at the time ***ELC Petition No. 11 of 2012*** was filed, its interests were already registered against the titles. It claims that the 2nd and 3rd Defendants misrepresented to it that suit properties belonged to them.

4. The Bank pleads that the 6th Defendant breached its statutory duty by failing to notify the Bank of the cancellation of the 2nd and 3rd Defendants' proprietary interest in the suit properties. It also states that the 2nd and 3rd Defendants have failed/declined to provide alternative security to supplement the affected securities. The Bank thus seeks the following reliefs against the Defendants jointly and severally:

i. A declaration that the 1st – 5th Defendants are in breach of their contractual obligations contained in the various facilities document

ii. A declaration that the 6th Defendant is in breach of his/her statutory duty

iii. The Defendants to, jointly and severally, immediately pay the outstanding amount of Kenya Shillings Two Hundred and Twenty Seven Million, Six Hundred and Twenty Six Thousand, Five Hundred and Eighty Eight (Kshs. 227,626,588.49.00) as at 19th February 2018 plus accrued interest to date

iv. General Damages against the Defendants jointly and severally

v. Interest on prayers iii, iv, and 5 above in terms of the Facility Letters

vi. Costs of the suit

vii. Any other relief that the Honourable Court may deem just and convenient.

5. The Defendants relied on their respective Statements of Defence dated 16th October 2018. The Defendants admit that the Bank advanced the Company the facilities as pleaded by the Bank and that those facilities were secured by the suit properties and guarantees. They further state that the securities were issued in accordance with the relevant law and that the Bank's interest duly registered.

6. While the Company, 2nd and 3rd Defendants deny that the Bank issued any or that they received any statutory notices, the Company states that it engaged the Bank in good faith to restructure the facilities. The 2nd, 3rd, 4th and 5th Defendants further aver that the Deeds of Guarantee and Indemnity are null and void as the relevant details were not properly filled and duly executed.

7. In respect of ***ELC Petition No. 11 of 2012***, the Company states that it was not party to the said petition and did not have any notice of the proceedings. The 2nd and 3rd Defendants also deny that they were party to the said suit or that they involved in any irregularities. They also deny the Bank's allegation that it sought any additional securities to supplement those that had been annulled by the court.

8. The Defendants aver that the Bank is not entitled to the relief sought in the Plaint.

Issues for Determination

9. The matter proceeded for hearing with each party calling a single witness. The Bank called Joel Nyahera Ulembe Simidi (PW 1), its Recovery Manager. The 2nd Defendant Abdirazak Maalim Ahmed (DW 1), testified on behalf of the Defendants. I do not propose to rehash the witness testimony as it was along the lines set out in the pleadings which I have summarized. Moreover, a substantial number of facts were not dispute hence I shall only refer to aspects of the evidence where necessary, either where there is a dispute or to clarify a point. The advocates also filed written submissions.

10. The Company, as the principal debtor, does not deny that it is indebted to the Bank. It only appears to contest the extent of indebtedness. While the Defendants do not deny that the Bank advanced facilities to the Company secured by charges over the suit properties dated 6th December 2012, they contend that the Bank is not entitled to exercise its statutory power of sale. The 2nd, 3rd, 4th and 5th Defendants deny that they are liable under the respective Deeds of Guarantees and Indemnity as they are null and void.

11. Having considered the Pleadings, evidence and submissions, I consider the following issues for determination;

(a) Whether the Defendants were aware of the irregularities in the titles of the suit properties and if so, the effect thereof.

(b) Whether the Deeds of Guarantee are valid

(c) Whether the Company and the Guarantors are indebted to the Bank and if so, to what extent?

Irregularities in the titles of the suit properties

12. It is not in dispute that the titles to the suit properties in the names of the 2nd and 3rd Defendants were cancelled by the court in ***ELC Petition No. 11 of 2012*** which found that the said suit properties belonged to a third party. I have read the judgment and I find that the Defendants were not party to the said suit. Further, the judgment does not mention the Defendant's adversely. What the court found in that case is that the 6th Defendant amongst other persons issued two title documents in respect of the suit properties contrary to the provisions of **sections 10(2) (B) and 32(1)(i)** of the ***Registered Lands Act(repealed).***

13. In the circumstances and absence of any other evidence, the Defendants cannot be blamed for the action taken by the court in ***ELC Petition No. 11 of 2012*** since they were not parties to the suit. It follows therefore that they could not have informed the Bank of any irregularities as they were not aware of any.

14. Since there is a valid decision of a court of competent and equal jurisdiction, this court cannot set it aside. The effect of the decision, which declared that the suit properties belonged to a third party, is that the Bank's proprietary interests therein were extinguished with the

consequence that the Bank could not exercise its statutory power of sale even if it issued statutory notices.

15. However, the invalidity of the charge does not relieve the Company of its obligation in relation to the debt as the Letter of Offer and the Charge remain contractual documents. It is also established that notwithstanding the invalidity of the charge document in so far as the proprietary interest is concerned, its obligation regarding the debt remain binding on the parties. In ***Timothy U. K. M'mella v Savings and Loan (K) Limited*** **NRB CA Civil Appeal No. 260 of 2001 [2007] eKLR**, the Court of Appeal observed that:

> *[E]ven though the charge was not valid before it was registered, and only became valid after registration and thus assisted in disposing off of the charged property, the appellant was nonetheless still liable to the respondent on account of a contract duly and freely entered into between the parties, evidenced by the various documents, correspondence as well as the conduct of both parties. That being the case, the appellant was bound to meet the conditions of the same contract.*

16. I therefore find and hold that the Company is liable for the facilities advanced to it under the Letters of Offer and secured by the Charges over the suit properties.

Whether the Deeds of Guarantee and Indemnity are valid.

17. The 2nd, 3rd 4th and 5th Defendants case is that the Deeds of Guarantee and Indemnity were not properly filled and executed as they did not state the amount being guaranteed, the names of the guarantors and name of the principal(s). The Defendants submit that the Guarantees and Indemnities annexed to the Bank's List of Documents dated 30th July 2018 and the Guarantees and Indemnities annexed to the Bank's Supplementary List of Documents dated 16th April 2019, are materially different, given that the amendments are handwritten and not properly countersigned by the Guarantors.

18. The Defendants thus contend that the contracts of Guarantee and Indemnity are to be treated just like any other contract where terms are to be given effect in the literal sense and that in this case, the contracts of guarantee and indemnity are materially defective in that they do not state the amounts being guaranteed and they have not been properly executed and attested as required by law. The Defendants are thus of the position that the guarantee and indemnity contracts are fatally defective and that the Bank's assumption that the guaranteed amount was KES. 84,000,000.00 is false and misguided.

19. The Bank submits that the Defendant have expressly admitted in their respective Statements of Defence that the facilities advanced to the Company were secured by their Deeds of Guarantee and Indemnity but despite their admission, the Defendants seek to nullify their Deeds of Guarantees and Indemnity on technicalities, by alleging that the Guarantees were not properly filled. The Bank points out that at the hearing, DW 1 conceded that the Guarantees in the Further Supplementary List of Documents are properly filled. The Bank adds that it should be noted that none of the Guarantors have denied knowledge of the facilities and/ or the respective values, neither have they denied that the signatures on the face of the Guarantees belong to them. The Bank submits that through its Advocates, it notified them as guarantors of the default by the Company on multiple occasions and that all the letters from the Company requesting for indulgence were signed by the 4th and 5th Defendants who are all directors of the Company. The Bank thus states that it is within its legal right in calling up the Guarantees and would be prejudiced if not allowed to call up the same.

20. I find that the admission by DW 1 that he executed the said Deed of Guarantee produced by the Bank in its Supplementary List of documents dated 16th April 2019 dislodges the submission by the Defendants that the said Deeds were not properly filled and countersigned by the Guarantors. I have looked at the Deeds of Guarantee and it is my further findingthat they are executed, attested by the guarantors' advocate and properly filled. I also observe Stamp Duty was paid before stamping hence the amount must have been filled for assessment. I therefore find and hold that the Deeds of Guarantee and Indemnity were properly executed by the Guarantors and that on their faces, they were properly filled indicating the dates of execution, the names of the guarantors and the principal (being the Company) together with the principal sums guaranteed by each of the guarantors as provided in Para. 1(a) of the Deed of Guarantee which provided in part that:

> *The Guarantor, as primary obligator and not merely as surety, on demand will pay to the Bank all monies and discharge all obligations and liabilities, whether actual or contingent now or hereafter due, owing or incurred to the Bank <u>by the Principal</u>…… including liabilities in connection with…..or other credits or any instruments whatsoever from time to time entered into by the Bank for or at the request of the Principal….*

21. In the foregoing, this ground by the Defendants has no standing and collapses on its own weight.

Whether the Company and the Guarantors are indebted to the Bank and if so, to what extent?

22. In his testimony PW 1 stated that the Company failed to service the facilities as required causing its account to fall into arrears and that the Company through the 4th and 5th Defendants made several proposals on settlement of outstanding balances but none of the proposals materialized leaving the Bank no other option but to proceed with recovery measures.

23. The Bank amply demonstrated that the Company admitted indebtedness in several letters. In the letter dated 2nd December 2020 signed by the 4th and 5th Defendants, the Company requested the Bank to restructure the facilities and proposed to pay KES 4 million in partial settlement. By a letter dated 2nd December 2014, the Company's lawyer, Abdul Agonga, wrote to the Bank confirming that it had been instructed to remit the said sum of KES 4 million. In another letter dated 15th December 2014, the Company proposed to pay KES. 6 million before 13th January 2015 to allow for restructuring of facilities. There is also a letter dated 17th April 2015 in which the Company stated that it had raised KES 10 million with difficulty and sought the Bank's indulgence to make further payments.

24. The Defendants submit that the Bank promised to disburse to the Company various credit facilities to the tune of KES. 133,867,879.50

and USD 115.000.00. However, the Bank breached / failed to abide by the terms of the letter of offer and only disbursed KES. 62,462,500.00 to the Company and that therefore, the Bank seeks to mislead the court by stating that it disbursed the total amount sought.

25. As to the extent of indebtedness, the Bank contends that the amount is currently outstanding at KES. 227,626,588.49 as at 19th February 2018, having accrued interest at the contractual rates set out in the Letter of Offer of 26th November 2012.

26. In response to this claim, the Bank submitted that the court should take note of the irregular and exorbitant amount of interest pleaded and sought by the Plaintiff. The Defendants argue that *Clause 7.1* of the Deed's Guarantees and Indemnity Agreements provided that the limit on recoveries would be KES. 84,000,000.00 together the accrued interests and that *Clause 1.1* of the charge document specifying the payment covenant provided that the Company would only be demanded to pay KES. 84,000,000.00 being the maximum principal amount. The Defendants also submits that the amount claimed runs afoul of the *in duplum* rule in **section 44 (1) and (2)** of the ***Banking Act*** which provides as follows:

> *(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2)*
>
> *(2) The maximum amount referred to in subsection (1) is the sum of the following-*
>
> *(a) the principal owing when the loan becomes non-performing;*
>
> *(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes nonperforming; and*
>
> *(c) expenses incurred in the recovery of any amounts owed by the debtor.*

27. I am not prepared to accept the Defendant's argument that the amount claimed comprised exorbitant interest contrary to the *in duplum* rule. This is because this line of defence was not specifically pleaded by the Defendant in their respective Statements of Defence. This general principle was stated by the Court of Appeal in ***Nairobi City Council v Thabiti Enterprises Ltd*** **[1995-98] 2 EA 231** as follows:

> *It is now settled law that the only way to raise issues for determination by the court is through pleadings and it is only then that a claimant will be allowed to proceed to prove them. See the case of* ***Sande v. Kenya Co-operative Creameries Ltd (1992) LLR 314 (CAK).***

28. Even if I were to accept the Defendants' argument that amount claimed violated the *in duplum* rule, the first condition is that the loan must be a non performing loan. I am left to answer what is a "*non-performing loan*" and what is the evidence provided by the Defendant that the loan is non-performing, which evidence has not been provided. For the reason I have set out, I reject this line of defence.

29. What then is the amount due? In order to prove its case, the Bank produced three statements of account as follows;

§ AC 007420001000053 KES

From 18th December 2012 to 19th February 2018

Opening balance – KES 42,542,500.00

Closing balance – KES 152,736,565.00

§ AC 007200001000192 CURRENT AC KES

From 27th May 2012 to 19th February 2018

Opening balance – KES 1,200,000.00

Closing balance – KES 2,900,000.00

§ AC 007420001000015

From 10th July 2012 to 19th February 2018

Opening Balance – 19,920,000.00

Closing Balance – 72,921,932.28

30. The Defendants argue that the Bank did not advance the full amount under the Letters of Offer. It supports this by pointing out that the according to the opening entries in each account, the amount advanced to the Company was only KES. 62,462,500.00. I have considered the statement in light of **section 176** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which creates a presumption in favour of the Bank as follows:

> *176. 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.*

31. I reject the Defendant's argument for several reasons. First, the Letters of Offer were executed on June and November 2012 before the opening balance in the Statement of Accounts. Second, each account starts with "B/F" which means it reflects the balance brought forward. Last, the Company admitted the facilities. At no time in its Statement of Defence or subsequent correspondence did the Company claim that the Bank never advanced the amount agreed. In view of the various letters admitting the debt and seeking restructure of the facilities, I find that the Statements of Account reflect the Company's indebtedness and hold that the Company was indebted to the Bank in the sum of KES 227,626,588.49 as at 19th February 2018.

32. The liability of the 2nd to 5th Defendants is limited under the respective Guarantees to KES 84,000,000.00 and consequently judgment against each of them is limited to that amount only.

33. I now turn to the issue of interest. Para. 26 of the Plaint states that, *"The outstanding amount as at 19th February 2018 is Kshs. 227,626,588.48, which amount continues to accrue interest at the contractual rates until payment in full."* In Prayer 5 of the Plaint, the Bank seeks interest, *"in terms of the Facility Letters."*

34. The Court of Appeal in ***Highway Furniture Mart Limited v Permanent Secretary. Office of the President and Another*** **NYR CA Civil Appeal No. 52 of 2005 [2006] eKLR** held that the award of interest prior to the filing of the suit is a matter of substantive law. Consequently, the basis and rate of the interest claimed must be pleaded with particularity to enable the other party understand the claim and defend it. In this case there were two letters of offers each having three facilities. It is true that each facility had an interest rate, however, the Bank did not disaggregate either in the pleadings or evidence the amount claimed to show what rate of interest applied to each facility. The court is therefore unable to find what rate of interest would apply to KES 227,626,588.48 as pleaded in the plaint. I am thus unable to discern and grant interest, "in terms of the Facility Letter". The default position then is that interest shall apply at court rates from the date of filing suit.

Claim against the Chief Registrar of Lands

35. The Claim against the 6th Defendant is for a declaration that the 6th Defendant was in breach of its statutory duty and for general damages. This arises from the decision in ***ELC Petition No. 11 of 2012*** under which the titles to the suit property were cancelled leading the Bank's loss of securities. In my view and as this claim concerns land and the attendant consequences relating to a decree issued by the Environment and Land Court, I decline to entertain it for lack of jurisdiction.

Conclusion and Disposition

36. In conclusion and for the reasons I have set out above, the Plaintiff's suit succeeds to the following extent set out as follows:

(a) Judgment be and is hereby entered for the Plaintiff against the 1st, 2nd, 3rd, 4th and 5th Defendants jointly and severally for KES 227,626,588.49.00 save that judgment against the 2nd, 3rd, 4thand 5th Defendants shall be limited to KES 84,000,000.00 for each defendant.

(b) Interest (a) shall accrue at court rates from the date of filing suit.

(c) The suit against the 6th Defendant is struck out.

(d) The 1st, 2nd, 3rd, 4th and 5th Defendants shall bear costs of the suit.

DATED and **DELIVERED** at **NAIROBI** this **9th** day of **APRIL** 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Owino instructed by Kimani Michuki Advocates for the Plaintiff.

Mr Memba instructed by Busaidy, Ng'arua and Company Advocates for the 1st, 2nd, 3rd, 4th and 5th Defendants.