



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**CIVIL CASE NO. 394 OF 2000**

**TRUST BANK LIMITED (IN LIQUIDATION) ....PLAINTIFF**

VERSUS

**FAHARI COMMODITIES LIMITED.....1<sup>ST</sup> DEFENDANT**

**EUSTACE MURAGURI KARUA.....2<sup>ND</sup> DEFENDANT**

**ERASTUS KUBUGI WAHOME .....3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

1. The Plaintiff is Trust Bank Limited in Liquidation. It was placed under liquidation through gazette Notice No. 5836 of **24<sup>th</sup> August 2001**. However when the transaction relating to this matter took place the Plaintiff was operating as a banking institution. By this claim the Plaintiff prays for judgment for Kshs.12,873,063.95 with interest at 28% with effect from **30<sup>th</sup> November 1999**.

2. The 1<sup>st</sup> Defendant, **Fahari Commodities Limited** is a Limited Liability Company incorporated under the Companies Act. It has its registered office within Nairobi.

3. The 2<sup>nd</sup> Defendant, **Eustace Muraguri Karue** is an adult male and a director of the 1<sup>st</sup> Defendant Company.

4. The 3<sup>rd</sup> Defendant passed away during the substance of this case, and the case against him was withdrawn.

**BACK GROUND**

5. By letter dated **27<sup>th</sup> June 1996** the Ministry of Agriculture, Livestock Development and Marketing wrote to the 1<sup>st</sup> Defendant and informed it that it had been allocated, by the Government of Kenya, 360 Metric Tonnes of fertilizer at the total cost of Ksh.6,480,000.

6. It does seem that much more fertilizer was eventually supplied to the 1<sup>st</sup> Defendant because, the 1<sup>st</sup> Defendant sought and obtained from the Plaintiff guarantees for Kshs.20,891,600. The guarantees, three of them being Number 22, 23 and 24 were issued by the Plaintiff in favour of The Permanent Secretary, to guarantee payment by the 1<sup>st</sup> Defendant to the Ministry of Agriculture for total amount of Kshs.20,891,600.

7. The 1<sup>st</sup> Defendant obtained the fertilizer from the Ministry of Agriculture but failed to make payment for it. The Plaintiff was called upon by the Ministry of Finance to and honour the guarantees and remit that payment.

8. The Plaintiff forwarded to the Ministry of Finance, by letter dated **6<sup>th</sup> December 1996**, a bankers cheque for Kshs.20,891,600.

9. I need to state that the letter of the Plaintiff that forwarded the bankers cheque, in honour of the Plaintiff's guarantee, has reference to Italian Commodity Aid rather the 1<sup>st</sup> Defendant's name. That many have been an error because the 1<sup>st</sup> Defendant has not denied that the Plaintiff paid the Ministry the guaranteed amount.

10. The Plaintiff's evidence is that the 1<sup>st</sup> Defendant only made erratic repayments to it of that amount and that the amount now claimed, in this case, is the amount that was left outstanding.

11. The 2<sup>nd</sup> Defendant guaranteed the 1<sup>st</sup> Defendant's debt with the Plaintiff, by a guarantee dated **21<sup>st</sup> June 1996**. He is therefore sued as guarantor.

12. The Defendants although, they had filed a defence in this matter, they did not adduce evidence. It follows that that defence remains mere allegation, since it was not supported by any evidence.

13. On that finding I am supported by the holding in the case **Motex Knitwear Limited –Vs- Gopitex Knitwear Mills Limited [2009] eKLR** as follows:

**“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1<sup>st</sup> Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counterclaim must fail”.**

#### **ANALYSIS AND DETERMINATION**

14. I have considered the evidence adduced by the Plaintiff and its pleadings and I form the view that there is only two issues to consider in this matter. They are

a. Has the Plaintiff proved that the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant are indebted to it for Kshs.12,873,063.95 with interest at 28% with effect from 30<sup>th</sup> November 1999?

b. Is the Plaintiff entitled to costs?

15. The 1<sup>st</sup> Defendant Company, by a resolution, passed at director's meeting of **3<sup>rd</sup> June 1996**, resolved to open a bank account with the Plaintiff's Westland's branch. Further on **14<sup>th</sup> June 1996** the directors of the 1<sup>st</sup> Defendant resolved to request the Plaintiff, through its Westlands branch, to issue the 1<sup>st</sup> Defendant with a bank guarantee of an aggregate amount of Kshs.21 Million.

16. Account opening forms were filed and signed by the 1<sup>st</sup> Defendant's directors on **3<sup>rd</sup> June 1996**.

17. Among the account opening forms, presented in evidence, is a form entitled General Terms and Conditions. One of the terms, clause 5, in that form provided that the bank was entitled to charge the 1<sup>st</sup> Defendant interest on overdrawn account, at such rate or rates as the Plaintiff in its sole discretion from time to time decide, but not exceeding the amount of interest permitted by the Central Bank of Kenya. That clause also permitted the Plaintiff to charge the 1<sup>st</sup> Defendant for cost that the Plaintiff would incur in obtaining legal advice, on the account, and any other expenses.

18. It is important however to note that the General Terms and Conditions form was not signed by the 1<sup>st</sup> Defendant's directors. That would mean that the 1<sup>st</sup> Defendant was not liable to pay interest or other charges demanded by the Plaintiff.

19. The Plaintiff accepted through its witness, **Yasmin Roshen Kaka** PW1 that there was no formal agreement between the Plaintiff and the Defendant, when the Plaintiff issued the guarantee to the Ministry, or when the Plaintiff honoured that guarantee and paid to the Ministry of Finance the amount guaranteed.

20. The Plaintiff submitted in evidence the 1<sup>st</sup> Defendant's statement of account reflected the payments made by the 1<sup>st</sup> Defendant.

21. It is my finding that since there is no evidence before this court that there was a signed undertaking by the 1<sup>st</sup> Defendant to pay interest or other charges the Plaintiff was not entitled to apply interest to the 1<sup>st</sup> Defendant's account.

22. Bearing that in mind and because there is sufficient evidence that the Plaintiff paid, on behalf of the 1<sup>st</sup> Defendant, the guaranteed amount, justice will be met by deducting the amount to determine how much the Plaintiff is entitled to claim.

23. The 1<sup>st</sup> Defendant in total made payments, as reflected in the bank statement of Kshs.22,231,337.35. That amount being deducted from the guaranteed amount of Kshs.20,891,600 shows that the 1<sup>st</sup> Defendant is not indebted to the Plaintiff. Indeed the 1<sup>st</sup> Defendant is in credit.

24. There is in my view a valid guarantee by the 2<sup>nd</sup> Defendant which guarantee was limited to Kshs.20,000,000. Since, in my finding, the 1<sup>st</sup> Defendant is not indebted to the Plaintiff the 2<sup>nd</sup> Defendant's guarantee cannot be called upon to make payment to the Plaintiff.

25. It follows that the Plaintiff's claim against both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants therefore fails.

26. The costs should follow the event. The event in this case is the failure of the Plaintiff to prove its case. Accordingly both Defendants are entitled to the costs of the suit.

27. In the end the Plaintiff's case is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

28. It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>th</sup> day of MARCH, 2019.**

**MARY KASANGO**

**JUDGE**

**Judgment Read and Delivered in Open Court in the presence of:**

Sophie.....**COURT ASSISTANT**

.....**COUNSEL FOR THE PLAINTIFF**

.....**COUNSEL FOR THE 1<sup>ST</sup> DEFENDANT**

.....**COUNSEL FOR THE 2<sup>ND</sup> DEFENDANT**

.....**COUNSEL FOR THE 3<sup>RD</sup> DEFENDANT**