



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 447 OF 2002**

**ORIENT COMMERCIAL BANK LIMITED.....PLAINTIFF**

**-VERSUS-**

**FLYSTAR LIMITED ..... DEFENDANT**

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

1. The Plaintiff Orient Commercial Bank Limited is a Limited Liability Company incorporated under the Companies Act, and is carrying on banking business. The Plaintiff changed its name from Delphis Bank Limited to Orient Commercial Bank Limited.
2. Flystar limited Is incorporated under the Companies Act and carries out business in Nairobi.
3. The Plaintiff's claim is that, the Defendant, which operated an Account Number 100256\*\*\* with the Plaintiff, on or about 10<sup>th</sup> November 1999 requested the Plaintiff to issue a financial guarantee in favour of Mr. Kirti Karamshi Shah for USD 122,500, for a period of 6 months. That period was subsequently extended finally to 31<sup>st</sup> March 2001.
4. It was part of the agreement that the Plaintiff would at all times honor the aforesaid guarantee, when called upon to do so, and the Plaintiff would in turn debit the Defendant's account with the amount paid in discharge of the guarantee. As security for that facility, the Defendant deposited with the Plaintiff Title over property L.R. No. 99/232. The Plaintiff, by this claim, pleaded that the Defendant created an Equitable/English mortgage in its favour by the said deposit of Title of the aforesaid property.
5. The Plaintiff pleaded that on or about 12<sup>th</sup> February 2001 it was called upon to honour the guarantee of the beneficiary. It is in that regard the Plaintiff now claims judgment for Kshs. 11,451,630.95 with interest at 22% from 1<sup>st</sup> February 2002 until payment in full; a declaration that the Defendant created an Equitable/English Mortgage in favour of the Plaintiff over Title No. L.R. 99/232; and for an Order that the Plaintiff be allowed to realize Title L.R. no. 99/232 in satisfaction of the claim herein.
6. This suit was fixed for hearing on 28<sup>th</sup> November 2018 and although the Defendant was served with a hearing notice, for that day, it failed to attend the said hearing. It follows that the Plaintiff proceeded to formally prove its case and the defence filed by the Defendant in the absence of evidence remained mere allegation. That is what was stated when the Defendant failed to attend the trial in the case: **TRUST BANK LIMITED (IN LIQUIDATION) V FAHARI COMMODITIES LIMITED & 2 OTHERS [2019] eKLR** viz:

***“The 1<sup>st</sup> Plaintiff proceeded to prove its case. The Defendant did not adduce any evidence in support of its defence. That defence, as it has been held severally by the Courts, remained mere allegation. This was the holding in the case of PHELISTA MUKAMU MAKAU V ELIZABETH KANINI MULUMBI (2015) eKLR where the Court stated:***

***“In this matter, apart from filing its statement of defence, the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”***

7. The Plaintiff's witness Wilfred Machini testified on behalf of the Plaintiff. He stated that he is the Credit Manager of the Plaintiff.
8. He further testified that the Plaintiff changed its name from Delphis Bank to Orient Commercial Bank Ltd. in the year 2003.
9. The witness narrated how the Defendant in the year 1999 requested the Plaintiff to issue financial guarantee to Mr. Kirti Karamshi Shah for USD 122,500 for a period of 6 months. As security, the Defendant offered immovable property, namely L.R. No. 99/232.

10. The witness confirmed that the Plaintiff financial guaranteed guarantee on behalf of Mr. Shah for USD 122,500. the period of that guarantee was extended finally to 5<sup>th</sup> June 2000.

11. That it is the Plaintiff's claim that the Defendant breached the agreement by failing to deposit sufficient fund in its account toward repayment of the money paid for Mr. Shah. The witness stated that the Plaintiff's claim against the Defendant is for Kshs. 11,451,630.95 with interest.

12. I have considered the Plaintiff's evidence and the documents in support. The Plaintiff has proved by correspondence and Bank statements, amongst others, the Defendant's indebtedness. The Plaintiff has also proved the deposit of Title, by the Defendant, as security for the Defendant.

13. The Plaintiff having proved its case is entitled to costs of the suit. Cost will indeed follow the event.

14. In the end, the Judgment of the Court is:

**a) Judgment is hereby entered for the Plaintiff against the Defendant for Kshs. 11,451,630.95 plus interest at 22% per annum from 1<sup>st</sup> February 2002 until payment in full.**

**b) Judgment is hereby entered for the Plaintiff declaring that the Defendant created in favour of the Plaintiff, an Equitable/English Mortgage over Title No. L.R. 99/232 by depositing the same with the Plaintiff to secure the financial guarantee issued to KIRTI KARAMSHI SHAH.**

**c) An Order is hereby made allowing the Plaintiff to realize by public auction, Title No. 99/232 in satisfaction of the Plaintiff's claim herein.**

**d) Sale as Ordered in (c) will only proceed after the Terms and Conditions of sale are settled by the deputy registrar of this Court.**

**e) The costs of this suit are awarded to the Plaintiff.**

**DATED, SIGNED and DELIVERED at NAIROBI this 8<sup>TH</sup> day of MAY, 2019.**

**MARY KASANGO**

**JUDGE**

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

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

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

..... **FOR THE DEFENDANT**