



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 525 OF 2005**

**NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF**

**-VS-**

**ABDULWADOOD TANNERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**AMIN ABDULWADOOD.....2<sup>ND</sup> DEFENDANT**

**JAMAL ABDULWADOOD.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. **National Bank of Kenya** Limited (The Bank) brings a claim against Abdulwadood Tanners Limited (The 1<sup>st</sup> Defendant or the Company), Amin Abdulwadood (the 2<sup>nd</sup> Defendant) and Jamal Abdulwadood (the 3<sup>rd</sup> Defendant) in respect to banking facilities granted by it to the Company. The other two who are directors of the Company are sued in their capacity as guarantors to the debt.

2. Emerging from the Plaintiff and evidence is that the facilities were granted through two letters of offer of 26th February 1998 (P. Exhibit Pages 15-20) and 21<sup>st</sup> December 1998 (P. Exhibit Pages 23-24). In the earlier letter, two facilities were granted to enable the Company finance its working capital. These are:-

(i) Draft - USD 1,000,000

(ii) Loan – USD 117,000

3. This facility was secured by an all asset debenture for USD 1,200,000 over the assets of the company, and legal charges over LR 209/2835 Lunga Lunga Road and LR 9530 and 9531 Kamiti Road. In addition, joint and separate guarantees for USD 1,200,000 were executed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

4. The second facility was an overdraft of Kshs.2,500,000.00 secured by the existing securities set out in the preceding paragraph of this decision.

5. It is the case by the Bank that the Company defaulted in repayment of the facilities and seeks judgment against the Defendants jointly and severally for the following:-

a) Ksh.97,395,557.05 as against the 1<sup>st</sup> Defendant.

b) Ksh.91,900,000 each as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally, and contemporaneously with the sum claimed against the 1<sup>st</sup> Defendant.

c) Interest on (a) above at 10.5% p.a from 31<sup>st</sup> February 2005 until payment in full.

d) Interest on (b) above at 10.5% from 5<sup>th</sup> May 2005 until payment in full.

e) Costs of this suit together with interest thereon at court rates from the date of judgment until payment in full.

f) Any other relief this Honourable Court deems fit and just to grant.

6. The Company and the 3<sup>rd</sup> Defendant filed a joint statement of Defence dated 27<sup>th</sup> January 2006 and presented to Court on 30<sup>th</sup> January 2006. The gist of the Defence is that the company was unable to carry out its business owing to unlawful disturbances by members of the public who threatened to burn down the tannery and blocked access to and from the tannery thereby keeping suppliers and customers away from the Company premises. As a consequence, it is averred, the Company suffered economic loss and loss of business opportunities.

7. It is the defence of the company and 3<sup>rd</sup> Defendant that it fully cooperated with the Plaintiff in selling the Tannery and the Lunga Lunga property by way of private treaty and received verbal assurance from the Bank's agent that the monies realized from the sale would be accepted as full and final settlement of the Plaintiff's claim.

8. The 1<sup>st</sup> Defendant, word for word, repeats the Defence of his two co-Defendants in a Defence dated 17<sup>th</sup> October 2006 and filed on 26<sup>th</sup> October 2006.

9. At the hearing only the Bank offered evidence through one Paul Chelanga. The issues for determination were agreed by the parties to be the following:-

**1. Whether there was a contractual relationship between the Plaintiff and the First Defendant and if so was it for loan facilities.**

**2. If the answer to number one above is in the affirmative what were the terms of the loan facility.**

**3. Did the terms include the requirement for security and was any provided.**

**4. Was there any disbursement of the loan and if so in what sum.**

**5. Did the 1<sup>st</sup> Defendant comply with the terms of the payment and if not was there a default.**

**6. Did the Plaintiff sell any or all of the securities and if so, for what amounts.**

**7. Did the amount realized extinguish the liabilities and if not what was the shortfall.**

**8. Did the Plaintiff agree to waive the shortfall of any part of the debt?**

**9. Was the contract frustrated and are the Defendants relieved from the obligations.**

**10. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants issued any guarantees and whether they are valid, binding and enforceable.**

**11. Whether the Plaintiff is entitled to judgment under the guarantees and/or any prayers sought in the Plaintiff.**

**12. Whether interests is chargeable on the amounts claimed.**

**13. Who pays the costs of this suit?**

10. The grant of the facilities is admitted by Defendants. That the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant guaranteed the facility is not denied. That there was default is also accepted by the Defendants. Only two issues need to be considered. One is whether the operations of the company were frustrated so as to entitle the Defendants to a defence to the claim. Second, whether there was waiver of a portion of the debt as averred.

11. In respect to the alleged frustration, the Defendants choose to stay away from the hearing of the matter and no evidence was led in this respect. And in so far as the said frustration is denied by the Bank, then that Defence remains unproved and fails.

12. As to the waiver the defendants have made this plea:-

7) With Regard to paragraph 13 of the Plaintiff, the Defendants avers:

a) That the 1<sup>st</sup> and 3<sup>rd</sup> Defendants fully cooperated with the Plaintiff in selling the Tannery and the Lunga Lunga properties by private treaty.

b) That the basis for the cooperation was that the Plaintiff's agent assured them verbally in several meetings and on the basis of the Plaintiff's letter dated 22<sup>nd</sup> August 2003 that in exchange for the monies from the sale of the Tannery and the Lunga Lunga properties being paid to the Plaintiff, then the Plaintiff would accept those monies as full and final settlement.

8) Further, by virtue of the oral and written agreements between the Plaintiff and the 1<sup>st</sup> Defendant, the Plaintiff agreed to accept the sale monies of the Tannery and the Lunga Lunga properties as being full as being full and final settlement.

13. Again no evidence was led to prove the supposed assurances made by the Bank's agents. Again, the Bank denies giving such assurance. Again, that Defence fails.

14. The Bank produced the company's statement proving the debt as:-

(a) Recovery costs Kshs.888,321.80 as at 26<sup>th</sup> October 2004.

(b) OD facility converted to Kenya Shillings 94,956,985.215 as at 31<sup>st</sup> August 2004/October 2004.

(c) Loan accounts converted to Kenya Shillings 1,550,750 as at December 2005.

(See supplementary witness statement of Paul Chelanga and documents annexed thereto)

15. It is inescapable that I find that the Bank has proved its case on a balance of probabilities and enter judgment as prayed in the plaint dated 23<sup>rd</sup> September 2005 and filed on the same day.

**Dated, delivered and signed in open Court at Nairobi this 2<sup>nd</sup> day of October 2019.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:-**

**Odhiambo for Plaintiff**

**Defendant: No appearance**

Court Assistant: Nixon