



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO. 687 OF 2006**

**EABS BANK LIMITED.....PLAINTIFF**

**VERSUS**

**BID INSURANCE BROKERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**DILRAJ PROPERTIES LIMITED.....2<sup>ND</sup> DEFENDANT**

**STYROPACK (KENYA) LIMITED.....3<sup>RD</sup> DEFENDANT**

**DEKA INDUSTRIES.....4<sup>TH</sup> DEFENDANT**

**KAMLESH SOMCHAND SHAH.....5<sup>TH</sup> DEFENDANT**

**SOMCHAND DILESH SHAH.....6<sup>TH</sup> DEFENDANT**

**DILESH SOMCHAND BID.....7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The claim before me was commenced by a Plaintiff dated 27<sup>th</sup> November 2006.
2. It is a claim for Kshs.10,750,363.29 plus interest calculated at the rate of 25% per annum compounded. The Plaintiff also seeks costs of the suit, at court rates.
3. Although there were seven defendants originally, the suit against the 5<sup>th</sup> Defendant, **KAMLESH SOMCHAND SHAH**, was withdrawn after he passed away.
4. It is common ground that by a Facility Letter dated 17<sup>th</sup> December 1996 the Plaintiff provided a Bills Discounting Facility to the 1<sup>st</sup> Defendant, **BID INSURANCE BROKERS LIMITED**. The said facility was for Kshs.30,000,000/=.
5. As security for the facility, the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants signed a joint and several Guarantee and Indemnity in favour of the Plaintiff.
6. At Paragraph 6 of the Plaintiff, the Plaintiff set out the particulars of 6 Bills which the 1<sup>st</sup> Defendant discounted and which the Plaintiff paid out. The particulars are as follows:

<b>DRAWER</b>	<b>BILL NO.</b>	<b>FACE VALUE (KSHS)</b>
Dilraj Properties Limited	6467                      6469	700,000/=
		280,000/=
Styropack (Kenya)	6430	500,000/=

Limited	6431	500,000/=
Deka Industries	6132	1,000,000/=
	6133	1,000,000/=
	<b>TOTAL</b>	<b>3,980,000/=</b>

7. It was the Plaintiff's case that the Defendants refused or neglected to make good the said bills as per the tenor and their due dates.
8. It is on that basis that the Plaintiff brought this action against the Defendants jointly and severally, with a view to recovering the sum of Kshs.10,750,363.29, which was allegedly owing as at 30<sup>th</sup> June 2005.
9. In the body of the Plaint the interest is said to be compounded monthly at the rate of 25%.
10. The Defendants contend that the Plaint was bad in law, as it did not disclose any cause of action against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants.
11. The Defendants also asserted that the suit was time-barred by limitation.
12. It was the Defendants' contention that the Plaintiff had not given any Notices to them about the alleged failure of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants to make good any of the Bills in contention.
13. The Defendants denied owing the sums claimed or any part thereof, and they put the Plaintiff to strict proof.
14. During the trial, the Plaintiff called one witness whilst the Defendants called two witnesses.
15. **PW1, BARNABAS KIMARI**, testified that he worked as an auditor, with the Plaintiff. He joined the bank on 1<sup>st</sup> March 2002, which is long after the facility was provided by the Plaintiff, in 1996. PW1 said that his evidence was based on the documents kept by the Plaintiff.
16. PW1 made it clear that the claim was based on the facility dated 17<sup>th</sup> December 1996, which had expired on 10<sup>th</sup> December 1997.
17. He conceded that although his Witness Statement made reference to a Credit Agreement which was signed by the 1<sup>st</sup> Defendant, the Plaint did not mention any Credit Agreement.
18. PW1 further conceded that even when the Defendants had asked the Plaintiff for the particulars of the Plaint, the Plaintiff did not mention the Credit Agreement.
19. The Plaintiff also failed to provide the Defendants with the particulars of the dates when the Bills in issue were discounted.
20. More fundamentally, PW1 conceded that although the Plaintiff told the 5<sup>th</sup> Defendant that the covenant which rendered them liable was contained in a Guarantee dated 17<sup>th</sup> December 1996, the Plaint did not mention that Guarantee.
21. To the extent that the Plaintiff tendered evidence to support claims not embodied in the pleadings, the said evidence could not advance the Plaintiff's case.
22. Whilst the Plaintiff's witness admitted that the Facility Letter expired on 10<sup>th</sup> December 1997, he testified that the Guarantee did not expire on that date because the Guarantee was to be a continuing security.
23. In order to sustain the contention that that Guarantee was to be a continuing security, PW1 made reference to **Clause 2 of the Guarantee Instrument**.
24. Of course, it has got to be borne in mind that there is no mention in Plaint, of the Guarantee Instrument.
25. The particulars of the "tenor" or of the dates when the Bills were discounted were not provided by the Plaintiff, in its pleadings. But all the six Bills, whose particulars PW1 provided, are shown to have been due on 5<sup>th</sup> July 1998; 28<sup>th</sup> July 1998; 30<sup>th</sup> October 1998; 29<sup>th</sup> July 1998; and 25<sup>th</sup> October 1998.
26. In effect, as those Bills were all issued in the year 1998, they do not appear to have any nexus with the **Bills Discounted Facility** dated 17<sup>th</sup> December 1996.

27. The Plaintiff did not lead evidence to demonstrate the nexus, if any, between the said Bills, which it presented to court, and the facility dated 17<sup>th</sup> December 1996.
28. It was the evidence of PW1 that pursuant to Paragraph 3 of Page 7, the Plaintiff was entitled to demand payment within 24 hours of service of Notice upon the 1<sup>st</sup> Defendant.
29. According to the witness, the Plaintiff gave the appropriate Notices. However, when he was asked to identify any such Notices, from amongst the documents exhibited by the Plaintiff, PW1 found no notices.
30. In the event, I find that the Plaintiff did not give notices pursuant to **Clause 2 of the Credit Agreement**.
31. The witness also conceded that the clause which stipulated that if default of payment is made after the Notices served had expired, additional interest would become payable, but the applicable rate was never indicated.
32. Therefore, I find that there was no contractual agreement on the rate of interest which would have been applicable if the Plaintiff had given Notice to the 1<sup>st</sup> Defendant, and if the Defendant failed to remit payment in accordance with such notice.
33. I further find that the Plaintiff failed to provide evidence to prove that the Bills in issue were ever discounted.
34. It is clear from the evidence of PW1 that the latest due date on the Bills exhibited by the Plaintiff was 30<sup>th</sup> October 1998.
35. That implies that if the Bills were discounted and if thereafter the Defendants did not make good the discounted Bills, the Plaintiff could have instituted action against the Defendants after giving appropriate Notices.
36. In this case, the Plaintiff's witness says that the Notices were given on 29<sup>th</sup> June 2005.
37. Assuming that that was the correct position, that would imply that the notice was given more than seven years after the date when the latest Bills had become due and payable.
38. But even the notice allegedly given on 29<sup>th</sup> June 2005 was not produced in court. Therefore, there is no proof that the Plaintiff served the Defendants with a notice on 29<sup>th</sup> June 2005.
39. The Defendants have made available to the court, a Notice dated 3<sup>rd</sup> August 1998, which was addressed to the 2<sup>nd</sup> Defendant. By that notice, the Plaintiff's Advocates threatened to file an action if payment was not made within 24 hours.
40. In effect, by 3<sup>rd</sup> August 1998, a cause of action had accrued against the 2<sup>nd</sup> Defendant, if the Notice of that date is to be treated seriously.
41. The claims by the Plaintiff are said to arise from contracts between the Plaintiff and each of the Defendants.
42. Pursuant to **Section 4(1)(a) of the Limitation of Actions Act**, actions founded on contract may not be brought after the end of 6 years from the date when the cause of action accrued.
43. As the Plaintiff had threatened to take action in August 1998, that means that by that date, the cause of action had already accrued.
44. Therefore, the Plaintiff should have brought its claim to court within 6 years, from August 1998.
45. As the suit was not filed until 2006, it was filed outside the period allowed by law. In effect, the suit is time-barred. On that basis, it is for striking out.
46. However, even if it were not time-barred, the Plaintiff has failed to adduce sufficient evidence to prove its case. In other words, the case lacks merit.
47. In the final analysis, the suit is dismissed, with costs to the Defendants.

**DATED, SIGNED and DELIVERED at NAIROBI this 4<sup>th</sup> day of June 2018.**

**FRED A. OCHIENG**

**JUDGE**