



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO 717 OF 2006**

**FIDELITY COMMERCIAL BANK LTD.....PLAINTIFF**

**Versus**

**AZIM JIWA RAJWANI.....DEFENDANT**

**JUDGEMENT**

1. Fidelity Commercial Bank Ltd (Fidelity) now SBM Bank (k) Ltd (SBM Bank or the Plaintiff) brings this Suit against Azim Jiwa Rajwani (Rajwani or the Defendant) principally to stop the latter from proceeding with his intention to commence Winding up Proceedings against the Bank.

2. Rajwani was a customer of Fidelity and so was Kissi Petroleum Products Ltd (Kissi), a Company in which he is a Director and Shareholder. In that capacity he stood as a Guarantor to Kissi in respect to certain facilities which were granted by the Bank to Kissi. At a personal level Rajwani held a current account No. 11303731 which had a Credit balance of Kshs. 10,294,161.37 as at 31<sup>st</sup> December 2005. As Kissi had fallen into arrears, Fidelity, exercising what it saw as its right of lien and set-off, applied the sum of Kshs.10,294,161.37 towards payment of that facility. Fidelity saw that Right as resting in the Guarantee dated 15<sup>th</sup> January 2002, a Supplemental Debenture of 12<sup>th</sup> September 2002 and a set-off dated 13<sup>th</sup> July 2004. In addition Fidelity relied on an alleged express consent by Rajwani in a meeting of 7<sup>th</sup> January 2005.

3. Displeased with this turn of events, Rajwani, in a letter of 17<sup>th</sup> November 2006 demanded that the sums be refunded but Fidelity stood its ground. The stand off persisted and on 25<sup>th</sup> November 2006 Rajwani sent out a Notice to commence Winding Up proceedings against the Bank. The Bank thought that Notice to be wholly unnecessary and merely intended to put pressure on it to pay a disputed sum. By a Plaint dated 22<sup>nd</sup> December 2006, the Plaintiff seeks the following prayers:-

a) A declaration that the Defendant's Winding Up Notice dated 25<sup>th</sup> November 2006 and repeated thereafter by letter dated 20<sup>th</sup> December 2005 is illegal and a blatant abuse of the process of this Honourable Court.

b) A declaration that the Defendant's intended action of commencing and/or lodging and/or proceeding with a winding up petition against the Plaintiff in respect of the disputed sum of Kshs.10.2 million previously held on account number 11303731 is illegal, a blatant abuse of the process of this Honourable Court, and should be struck out and or invalidated.

c) An order or Permanent Injunction restraining the Defendant by itself, its servants and/or agents and/or advocates or otherwise howsoever from lodging or proceeding with a Winding Up Petition against the Plaintiff.

d) General damages for injury to the Plaintiff's business.

e) Such other or further orders as this Honourable Court may deem fit to grant.

f) Costs of this suit and interest thereon.

4. Rajwani denies the existence of a Right of lien and/or set off and Counterclaim for the sum of Ksh.10,222,532.17 and interest thereon at Commercial rates from 16<sup>th</sup> November 2004 to date. He further denies participating in a meeting of 7<sup>th</sup> January 2005 in which it is alleged that he expressly mandated Fidelity to offset the sum of Kshs. 10,294,101.37 against the alleged debt of Kissi.

5. An alternative plea is that if there was any lien, it was waived and the Guarantee revoked by Fidelity in its letter of 27<sup>th</sup> December 2000. In addition, Rajwani pleads that Kissi were not indebted to the Bank and it is infact the Bank that owes it some money.

6. Rajwani asserts that the conduct of Fidelity in applying his funds towards payment of the alleged debt of Kissi is an act of fraud, particulars of which are set out in paragraph 13 of the Amended Defence as follows:-

(a) Sometime in 2004 or thereafter the Defendant was called upon by the Plaintiff to execute a letter of set off on 13.7.2004 as part of the documentation to secure the borrowings of AFRICA ECO-CAMPS LIMITED, a Company associated with the Defendant, from the Plaintiff. It is this letter of set off that the Plaintiff has severed off from the said documents and used for purposes of supporting its claim in the total different transaction that is the subject of this suit. A dispute has arisen between the said AFRICA ECO-CAMPS LIMITED and the Plaintiff and is now the subject of NAIROBI MILIMANI HIGH COURT CIVIL SUIT NO. 373 OF 2006. The Defendant shall rely on the pleadings, affidavits, proceedings and rulings emanating from the said suit in support of his defence.

(b) The Plaintiff has previously conclusively stated that the set off was executed prior to the opening of the Defendant's current No. 11303731. The said account was opened in September 2003 or thereabouts and if there was any letter of set off it should have been one executed before the said account opening date. The letter of set off dated 13.7.2004 is therefore clearly forged.

(c) Doctoring a statement of account to show that the various moneys left the Defendant's personal current account after 10.11.2004 when in fact the Defendant's true statement of account shows that no transactions took place in the Defendant's account after 10.11.2004.

(d) Fiddling around with the Defendant's moneys and transferring them into strange and somewhat fictitious accounts without the Defendant's authority or consent.

7. The evidence of the witnesses shall be assessed and discussed in so far as is relevant. But as a precursor, the following are isolated as issues requiring the Court's attention and determination:-

(i) Did the Bank have a Right of lien and set-off over Rajwani's account?

(ii) If the answer to (i) above is in the affirmative, did the Bank exercise that Right properly and lawfully?

(iii) If the answer to (ii) above is in the positive, is the Bank deserving of the Orders in the Plaintiff?

(iv) If the answers to (i) or (ii) above are in the negative, is Rajwani entitled to the Prayers in the Counterclaim?

(v) What is the suitable Orders as to costs on the Plaintiff and Counterclaim?

#### **Right of Lien and/or set-off?**

8. The evidence of Juda Deli (PW1) is that at all material times to the dispute at hand, Rajwani held a Current Account Number 11303731 at Fidelity Bank. At the same time Kissi was a customer of the Bank. In consideration of Fidelity granting facilities to Kissi being a loan of Kshs.1,305,000/=, Rajwani and one Lutafali Jiwa Rajwani executed a Guarantee and Indemnity (P Exhibit page 6-9) to pay and satisfy to the Bank monies owed under the Guarantee and Indemnity.

9. Kissi, it would seem, took further facilities and a supplemental Debenture and further Charge over Land Reference Numbers Kisii Town/Block III/196 and Kisii Town /Block III/197 for an aggregate sum of 29 million were registered sometime in September 2002 (P Exhibit pages 11-35).

10. Rajwani (DW1) however stated as follows in respect to the Guarantee and Indemnity,

*"This is a Guarantee and Indemnity. I signed this specifically for purchase of a vehicle and fully paid for it".*

Rajwani is correct, it would seem, in stating that, the Guarantee dated 18<sup>th</sup> January 2002 was for specified sum of Kshs.1,305,000/= with interest accruing thereon. But in terms of the greater exposure which was secured by the further Charge and supplemental Debenture, Rajwani failed to give regard to the Guarantee which he and Lutafali Jiwa Rajwani expressly gave in the Supplemental Debenture. That Debenture Instrument was drawn in a way that it was also a Guarantee Document. This is fairly explicit at page 10 of the Instrument (P Exhibit page 20) which reads:-

*"It having formed part of the terms upon which the Lender agreed to make advances and grant facilities to the Company as hereinbefore mentioned that the Guarantors should guarantee the payment of all the moneys interest costs and other moneys hereby secured the Guarantors in consideration of such agreement HEREBY JOINTLY AND SEVERALLY covenant with the Lender that if and whenever the Company shall make default in the payment of the said moneys or any part thereof interest costs or other moneys due to the Lender from the Company under the provisions of this Debenture the Guarantors will jointly and severally pay the amount thereof to the Lender together with interest thereon as aforesaid until payment in full at the expiration of Seven (7) days after demand in writing thereof shall have been served upon the Guarantors and it is hereby agreed and declared that the Guarantors shall (without prejudice to their rights against the Company) be deemed under their foregoing covenant principal debtors and not merely guarantors and that neither the giving of time to the Company for the payment of the said moneys interest costs and other moneys hereby secured nor the making of any further advances nor any other indulgence which may be shown to the Company shall in any way release or discharge the Guarantors from their joint and several liability under their foregoing covenant any rule or law or equity to the contrary notwithstanding".*

11. The conclusion to draw is that Lutafali and Rajwani jointly and severally guaranteed the Debt of Kissi under the Debenture and covenanted that they would, at the expiration of seven (7) days after demand in writing, pay all moneys (including interest and costs) due to the Bank from the Kissi granted under the Debenture. Remember that the Debenture was for an aggregate sum of Kshs.29,000,000/=.

12. The evidence available is that Kissi was struggling to keep up with repayment of its facilities and on 26<sup>th</sup> February 2003, (P Exhibit page 35), Fidelity called up for the payment of Kshs.29,655,931/=. Kissi does not dispute this debt and in a letter dated 28<sup>th</sup> February 2003 (P Exhibit page 44) and authored by Rajwani himself as a Director thereof, promises to arrange for the settlement thereof. The letter is reproduced below:-

28<sup>th</sup> February 2003

The Legal Officer

Fidelity Commercial Bank

P.O Box 48445

NAIROBI

Dear Sir

RE: DEMAND NOTICE

We are in receipt of the Demand Notice dated February 26, 2003, to pay. We will make arrangements to settle the outstanding debt, once the accounts have been reconciled as a true statement of affairs and as such has been confirmed the bank.

In the meantime, we kindly inform you that we have issued post-dated cheques to various creditors, copies of which we will give to your Mr. Ismail Mavji, for the purpose of honouring the same.

Thank you.

Yours faithfully,

Signed

AZIM RAJWANI

DIRECTOR

CC.

Mr. Abass – Chief Manager

Ms. Nashina Jiwa - Manager

13. It is common cause that on the strength of the alleged Guarantee, Fidelity applied a sum of Khs.10,294,161.37 from Rajwani's account No. 11303731 towards payment of the debt of Kissi.

14. Even before considering whether the Bank properly called up the Guarantee, a question arising is whether the Bank had a Right of lien and Set-off.

15. From the evidence there could be two possible places to locate that Right. The first is the Account opening Documents. At the inception of Account No. 11303731, Rajwani signed a document which contained the Rules and Regulations (P Exhibit page 110-113) governing that Account. Of interest is clause 13 which is on General lien. This reads:-

“a) When the customer is indebted to the Bank, the bank has a general lien over all property of the Customer in the Bank's possession, including but not limited to cash, goods, securities or valuables deposited for safe custody or as security cheques presented for repayment, bills and any other property movable or immovable charged to secure repayment of any money whether or not that money has been repaid and also over all property over which by the general law the Bank has a lien.

b) Where the Customer is indebted in circumstances giving the Bank a right of set off all securities as set out in paragraph (a) hereof are held as security for the debt.

c) The Bank may at any time give the Customer notice in writing that if any accrued debt is not paid within a period being not less than 28 days after receipt of the customer of the Notice then the Bank may without further notice realise sufficient of the Customer's assets to discharge the debt.

d) If the debt is not discharged within the time allowed, the Bank may realise sufficient of the Customer's assets to discharge the debt, and the Customer constitutes the bank his attorney for the purpose of conducting the sale, giving title to the assets sold and all other necessary matters. Any sum remaining after such a transaction will be held for the Customer subjected to these Terms and Conditions.

e) The Bank is under no obligation in respect of any sale under sub-class (d) other than for mala fides.

f) Funds in foreign currencies which are subject to the Bank's lien may be set off against debts or realised at the rate of exchange currency at the date of set off or realisation. The bank accepts no liability for any loss caused by exchange fluctuations.

g) Deposits for a given period of time may be set off against debts notwithstanding that the period of the deposit has not expired.

Clearly then the Bank had a General Right of Lien for the customer's indebtedness to the Bank and a Right to set off such debts against Deposits held in the Account.

16. The other Document which the Bank placed reliance was a setoff dated 13<sup>th</sup> July 2004 (P Exhibit page 45) but this proved troublesome. When confronted that it was a Right of Lien and set-off in respect to a separate debt of African Eco Camps Limited in which Rajwani was a Director, the witness for the Bank stated,

*"...combined with proposal of African Eco Camps ltd, the Defendant is not mentioned. It does not mention any debt regarding Kissi Petroleum".*

When shown another Document (P Exhibit page 121) which was part of an Application by African Eco Camps Ltd for a facility the witness said,

*"This appears to be same as document in Defendant's list pages 1-4)".*

This evidence supports the position taken by Rajwani that this Right of set-off was not in respect to Kissi Debt. I accept that to be the true position.

17. A third Document also runs into headwinds. It is a copy of Draft minutes of a meeting purportedly held on 7<sup>th</sup> January 2005 (P. Exhibit page 114). The Bank sought to rely on those minutes in support of its theory that Rajwani had in the meeting expressly acceded to the set-off. Rajwani denies ever attending that meeting. A position he took in his statement of Defence and maintained in his evidence in Court. What about the period prior to the filing of this case on 22<sup>nd</sup> December 2006?

18. As far as this Court was able to gather from the evidence the first time the meeting of 7<sup>th</sup> January 2005 is referred to in writing is the letter of 15<sup>th</sup> December 2006 (P Exhibit page 100) from Muma & Kanjama Advocates to Otieno Ragot & Co. Advocates. Muma & Kanjama and Otieno Ragot & Co. Advocates were then, respectively, Advocates for the Bank and Rajwani (as they are now). For purposes of this narrow issue of the disputed meeting the following paragraph of that letter is relevant:-

*"THAT your client, Azim Jiwa Rajwani, pursuant to a Guarantee dated 18<sup>th</sup> January 2002, a Supplemental Debenture dated 12<sup>th</sup> September 2002 (including the guarantee incorporated therein) and a Set-off dated 13<sup>th</sup> July 2004 (copies enclosed for your reference) agreed to and did secure as guarantor the repayment of banking facilities advanced to Kissi Petroleum ltd, in which Company your client was a director (full particulars whereof are within your client's knowledge). Pursuant to the said contracts and subsequent to your client's express consent obtained in a meeting held on Friday 7<sup>th</sup> January 2005, our client did offset the balance of 10.29 million then standing to the credit of your client's account against the balance outstanding in Kissi Petroleum Ltd's account".*

19. This was the response to that letter (P Exhibit page 101):-

*"Our Client denies signing any letter of Set-off in respect to this account as portrayed in the aforesaid annexures. It lacks logic for your client to have convened a meeting on 7<sup>th</sup> January 2005 to secure our client's consent to offset the alleged balance from our client's person account if indeed our client had signed a letter of set-off on 14<sup>th</sup> July 2004 as alleged. Our client is contemplating registering a complaint with the police against your client for forgery".*

20. From the language of the response, it would seem that indeed a meeting for 7<sup>th</sup> January 2005 was convened. The word used by Rajwani's own Lawyers is 'convened'. In ordinary parlance convene means:-

'come or bring together for a meeting or activity'.

(concise Oxford English Dictionary 12<sup>th</sup> Edition)

However there is no express admission that Rajwani attended the meeting and having denied attending, the Bank bore the responsibility of proving the meeting, the attendees and the deliberations.

21. But all the Bank did was to produce what it referred to as the Draft minutes of the meeting. The persons said to be present are:-

- S.U. Khimji
- Ms. N. Jiwa
- A.L Rajwani
- I.M Mawji

The first two were senior employees of the Bank. Neither of them gave evidence. The third was the Defendant himself. Mawji was the Receiver Manager of Kissi. He too was not called to testify.

22. One would have thought that Rajwani would be challenged about this meeting when he took to the witness stand. At cross-examination there was this very limited interaction on the impugned meeting:-

*“[P Exhibit page 101] signing and letter of set-off was denied. There is an allegation of a meeting of 7<sup>th</sup> January 2005”*

This was a very muted attempt and the Bank was unable to demonstrate that Rajwani indeed attended the meeting of 7<sup>th</sup> January 2005 and expressly conceded to the payment of the claimed amount.

23. But in respect to whether the Bank had a Right of Lien and set-off, it would not matter that there was no meeting of 7<sup>th</sup> January 2005 because this Court has found that Right to have been expressly given in the Document on The Rules and Regulations governing Rajwani's Current Account. However, the meeting of 7<sup>th</sup> January 2005 having been successfully challenged by Rajwani may return to haunt the Bank at a later stage of this Decision.

#### **Was the Right of Lien and set-off properly and lawfully exercised?**

24. There is evidence that the Principal Debtor fell into default of the facilities it obtained from the Bank. This is admitted by the Debtor in the letter of 28<sup>th</sup> February 2003 (P Exhibit page 10). The Bank may therefore have been entitled to call up the Guarantee given by Rajwani. How was this to be done?

25. The terms of the Guarantees themselves provide for the trigger. It expressly provides that the Guarantors will be liable to pay the guaranteed amount in full ‘at the expiration of seven (7) days after demand in thereof shall have been served upon the Guarantors’. So there is need for a 7 day Notice. Rajwani had expressly pleaded that there was non-compliance with the term to issue a demand. This is what he avers in paragraph 6 of his Defence:-

*“IN THE ALTERNATIVE AND WITHOUT PREJUDICE to the matters pleaded in paragraph 5 a foregoing the Defendant states that the Plaintiff had not, as at the time of the purported invocation of its rights under the alleged guarantee and Supplemental Debenture, complied with the mandatory terms of the aforesaid instruments as to the issuance of a demand and as such its right of recovery had not crystallized”.*

26. Only upon issuance of such a Demand and persisted default thereafter could the Bank have enforced its Right of set-off. Even then the Right of set-off could only be exercised after the giving of a further 28 day Notice (see clause 13(c) of The General Rules and Regulations governing the Account).

27. Even in the face of the Notice having been placed at the centre of the controversy by the Defence pleaded, the Bank was unable to prove that the necessary Demands or Notices were made. Of course all these would have been unnecessary if it had been proved that the meeting of 7<sup>th</sup> January 2005 happened and Rajwani gave express authority for the set-off. But as this has not been proved then this Court can only conclude that the Bank exercised its Right of set-off prematurely.

#### **Of the IRAC Report and the Debt of the Principal Debtor.**

28. Part of the evidence called by Rajwani was interest recalculation of the facilities of Kissi by the Interest Rates Advisory Center (IRAC). IRAC describes itself as specializing in financial Consultancy and undertakes Objective and Independent Audit of Borrowing Contracts and Interest recalculation. A Report prepared by IRAC concluded;

*“The re-calculation difference in the outstanding cleared balance on 7.3.2006 between FCB's debit of Khs.18,172,224.71 and IRAC's Credit of Kshs. 2,573,663.78 is Kshs.20,745,828.49 in favour of Kisii (sic) Petroleum Products Limited”.*

29. This Court will, however, not be drawn into making any comments about the extent, if any, of the Principal Debtors exposure because the Principal Debtor is not a party to this Suit and this Court is not told why it would not have been joined if the question as to whether the debt has been fully settled was an issue to be pressed as central to these proceedings.

#### **The rendition**

30. Perhaps for clarity I rehash my findings:-

- (i) The Bank held a Right of Lien and set-off over Rajwani's Account in respect to any sums due from him to the Bank.
- (ii) Rajwani provided a Guarantee and Indemnity in favour of the Bank for the debt of Kissi to the Bank for a principal sum of Kshs.29million plus interest thereon and other charges.
- (iii) There was default and the Bank was entitled to call up the Guarantee and exercise its power of setoff.
- (iv) However, the Bank never duly called up the Guarantee and Right of set-off and its exercise of the Right of set-off was premature.

31. In those circumstances it was open for Rajwani to sue the Bank, as it now has done in the Counterclaim, for wrongful exercise of its power under the Guarantee and Right of setoff. The threat to wind up the Company was therefore intended to force a quick result where the Civil process provided for an efficacious solution. That is a mala fides deployment of Insolvency proceedings .To that extent the Banks action succeeds.

32. But as to the Claim for General Damages for injury to the Plaintiff's Business, the Banks Lawyers never lay any basis for grant of those Orders nor proposed the quantum. That was all but abandoned.

33. In respect to the Counterclaim by Rajwani, he has demonstrated that the Bank wrongfully debited his account by exercising its Rights hastily. However, for the fact that it had a Right of Lein over those funds, any orders granted in Rajwani's favour must not prejudice that Right of the Bank. A fair order is for the sums (with whatever interest the Court shall impose) to be paid back into Rajwani's account over which the Bank has a Right of Lein and Setoff. Whether or not the Principal debt will be owing after the reversal of the affairs and whether the Bank can then seek to enforce its Right of setoff are matters beyond the scope of this Decision and which the Parties herein will have to figure out for themselves.

34. These are the final orders:-

- (i) The Winding up Notice dated 25<sup>th</sup> November 2006 and repeated in the letter dated 20<sup>th</sup> December 2005, is illegal and an abuse of Court process and is hereby declared as invalid.
- (ii) The Defendant by himself or servants or agents or otherwise are hereby permanently restrained by an Order of Injunction from commencing and/or lodging and/or proceeding with a Winding up, or liquidation Petition against the Plaintiff in respect to the disputed sum of Khs.10.2 million held in Account No. 11303731.
- (iii) The Plaintiff shall pay into the Defendant's Account No. 11303731 or if the Account is closed into an Account to be opened in favour of the Defendant (but over which the Bank has a Right of Lein and set off), the sum of Khs.10,222,832.17, plus whatever interest the money would have earned if it had not been unlawfully debited from the time of the debit upto full payment.
- (iv) Each Party has succeeded in its claim and each Party shall bear its cost on both the main Claim and Counterclaim.

**Dated, delivered and signed in open Court at Nairobi this 2<sup>nd</sup> day of November, 2018.**

**F. TUIYOTT**

**JUDGE**

**Present:-**

Simiyu holding brief for Kanjama for Plaintiff

Shemenja holding brief for Awiti for Defendant

Fred -Court Assistant