



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO.398 OF 2007

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

BOAZ KIPCHUMBA KAINO.....1ST DEFENDANT

GRACE CHEPKAITANY BIWOTT.....2ND DEFENDANT

J U D G M E N T

INTRODUCTION

The Plaintiff herein filed this suit against the Defendants seeking Kshs. 8,467,267.60 with interest of Kshs. 19% per month from 31st August 2004 till payment in full.

The Plaintiff bank advanced a loan of Kshs. 3,956,000.00 to Sanitation Cares (K) Limited, which the Defendants individually and separately executed personal guarantee to pay with interest. At the time of filing this suit, the amount owing from Sanitation Cares (K) Limited to the Plaintiff, plus interested was Kshs. 8,467,267.60.

The defence filed defence on 12th October 2007. In the defence filed the Defendants contend that they were not notified that there was a dispute between the Plaintiff and the borrower. In a rejoinder, the Plaintiff in reply to defence indicated that the Defendants were served with demand notices.

The Plaintiff filed an application dated 25th March 2009 seeking to strike out the Defendants defence. By ruling delivered Justice Lessit on 31st July 2009, the Court found that defence filed raises triable issues and declined to strike it out.

On 5th March 2018 when this matter came up for hearing, the Defendants failed to attend Court. Affidavit of Service was filed to confirm that the Defendants were served with the hearing notice. The case proceeded for hearing ex parte.

EVIDENCE

The Plaintiff availed one witness Jane Nambaso Orumoi a recovery Manager for the Plaintiff bank. She adopted her witness statement dated 27th September 2017. She testified that the banked advance Kshs. 3,965,000 to guaranteed Sanitation Cares Company Limited and the amount was guaranteed by Defendants; that the nature of the guaranteed was for the Defendants to pay both principal, interest and other bank charges.

She testified that the debtor defaulted the the first 3 months from draw down date and did not pay up to March 1998 and later stopped paying completely in February 2000. She testified that in February 2004 the balance was Kshs. 9,083,798.53; that is when the loan became non-performing. PW1 testified that the bank was not able to sell 2 properties because they were encumbered but one property the bank managed to sell, Kshs. 1.9M was realized which reduced the balance to Kshs. 8,467,267.58. Pw1 testified that the bank suspending interest from 2nd November 2004.

Defendants never adduced evidence to controvert evidence adduced by the Plaintiff. Plaintiff availed documents to confirm that the Defendants guaranteed loan advanced to Sanitation Cares Ltd. Documents produced confirm that the said borrower defaulted in repaying the loan. There is confirmation that the Defendants were notified of the default. There is no indication that the Defendants/Guarantors made any payments to honor their guarantee. Evidence also show that the bank stopped charging interest in November 2004.

From the foregoing, I find that the Defendants have failed to discharge their guarantee obligation.

FINAL ORDER

1. I hereby enter judgment for the Plaintiff against the Defendants jointly and severally for Kshs. 8,467,267.58.
2. Costs to the Plaintiff.
3. Interest on 1 above at Courts rate from the date of filing this suit.

Judgment Delivered, Dated and Signed at Nairobi this 13th day of December, 2018

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

Naomi: **COURT ASSISTANT**

Mrs. Karani H/B for Ms. Weru: **COUNSEL FOR THE PLAINTIFF**

No appearance by DEFENDANTS8