**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 149 OF 2015**

**MIDDLE EAST BANK KENYA LIMITED……....…....…..…….…..PLAINTIFF**

**VERSUS**

**JAMWA CONSOLIDATED AGENCIES...…....……..……1ST DEFENDANT**

**JOSEPH MWAURA KAMAU…….2ND DEFENDANT**

**JANE NJERI MWAURA……...…….…….3RD DEFENDANT**

**RULING**

1. The application before me is for Judgement on Admission or, in the alternative Summary Judgement.

2. It was the plaintiff's case that it extended to the Defendants some Financial Facilities in the nature of an Asset Finance Loan of Kshs. 16,000,000/-.

3. In breach of the terms and conditions governing the contractual relationship, the defendants failed to remit payments as and when they fell due.

4. Pursuant to the said breach, the plaintiff asserted that the outstanding debt was Kshs. 10,067,747/69 as at 21st November 2014. The plaintiff further asserted that the outstanding balance continued to attract interest at the rate of 19% plus 6% penalty.

5. The reason why the plaintiff had sought Judgement on Admission is that the defendants had admitted owing the sums claimed. Indeed, the plaintiff says that the defendants had even made promises and undertakings that they would pay the outstanding amounts.

6. The plaintiff submitted that the defendants were truly and justly indebted to the plaintiff.

7. In any event, the plaintiff perceived the Defence on record as being nothing more than an attempt to delay the finalization of the suit.

8. In their Defence and Counter-claim, the defendants asserted that the facilities which the plaintiff had offered to the 1st Defendant was for the total sum of Kshs. 25,700,000/-. In other words, the facilities were not in the sum of Kshs. 16,000,000/- only, as the plaint stated.

9. The Defendants further asserted that the Facility letter dated 13th October 2012 was inadmissible in

evidence as it had not been duly stamped as required by Section 19 of the Stamp Duty Act. The lack of stamping was said to render the facility letter null and void.

10. Whilst the Plaint asserts that the financial facilities were accorded to the Defendants, the correct factual position is that the facilities were accorded to the 1st Defendant.

11. It is common ground that the 2nd and 3rd Defendants were both Directors of the 1st Defendant, **JAMWA CONSOLIDATED AGENCIES LIMITED.**

12. It is also common ground that the said 2 Directors executed personal Guarantees, as security for the facilities which the bank advanced to the company.

13. There is an admission that the bank advanced Kshs. 16,000,000/- to the company.

14. Mr. Onyambu, the learned advocate for the plaintiff, submitted that at paragraph 12 of the Defence, there was an admission that the defendants owed Kshs. 16,000,000/- to the plaintiff.

15. A look at the Defence shows that paragraph 12 does not contain such an admission. The defendants actually said;

> **"Further to the contents of paragraph 11 supra, the 2nd and 3rd Defendants state that if at all they duly furnished the plaintiff with their personal guarantees, such guarantees were to cover the entire loan facility of Kshs. 25,700,000/- and in the event that the entire loan facility of the aforesaid sum was not disbursed by the plaintiff to the 1st Defendant, such guarantees as furnished by the 2nd and 3rd Defendants cannot be enforced to recover the advanced asset finance loan facility of Kshs. 16,000,000/-, since the same was supposed to be adequately secured by the specific debenture registered against the two motor vehicles purchased out of the loan proceeds and which were comprehensively covered by the insurer in addition to the repayment of the sum of Kshs. 7,386,926.05 actually paid to the plaintiff towards the repayment of the principal sum exclusively and due credit given to the 1st Defendant".**

16. The second example of what the plaintiff deems to constitute an admission is the letter from the company which was **Exhibit "F K 6".** The plaintiff submitted that, by that letter, the company was remitting a part-payment, and was also giving its commitment to make further payments.

17. This is the gist of the message contained in that letter;

> **a) The company had paid Kshs. 2,000,000/-;**
>
> **b) The company committed itself to make all Kobil payments to its account at the plaintiff bank;**
>
> **c) The company was to get from AMACO Insurance, a commitment letter;**
>
> **d) The company requested the bank to release the truck, so that the company could use it to generate funds which could be used to settle the loan.**

18. The next letter from the company **[Exhibit "F K 7"],** was received at the bank on 7th July 2014. By that letter, the company sent some cheques to the bank, and the company asked the bank to issue it with the release letter, on the same day, so as to enable the company avoid further losses.

19. A number of matters are intertwined. For example, the company had made payment of Kshs. 2,000,000/- but it had not indicated what the outstanding balance was.

20. The company was saying to the bank that there was some sort of agreement between them, pursuant

to which the bank would release the truck, so that the company could use it to earn money, which could then be used to pay the bank.

21. However, there was no response from the bank to indicate whether or not the alleged agreement existed, or if the bank released the truck to the company.

22. Thirdly, the company was telling the bank to expect a letter of commitment from **AMACO** Insurance.

23. The introduction of the insurance company into the mix is significant. That is because the defendants view is that the insurance company had given its commitment to the bank, that the monetary compensation payable in respect to the truck which had been written-off in an accident, was to be remitted directly to the bank.

24. The company reasoned that there was a contract between the bank and the insurance company, through which the bank should have recovered the insured sum of upto Kshs. 9,000,000/-.

25. Meanwhile, in relation to the second truck, which was repossessed by the bank, it is the defendants position that by its actions, the bank frustrated the company's ability and intention to raise money which could have been used towards settling the balance.

26. Furthermore, the defendants accuse the bank of deliberately misleading them that there was a re-negotiated contract, pursuant to which the bank was to release the truck upon receipt of Kshs. 2,000,000/-.

27. The company performed its part, by paying that sum, and also released six (6) post-dated cheques for Kshs. 300,000/- each. However, the bank did not release the truck.

28. Therefore, the defendants deem the bank to be the party at fault, which culminated in the company instructing its bankers to stop payment of the post-dated cheques.

29. I find that the explanation tendered by the defendants, gives rise to an arguable defence.

30. Already, the defendants have sought and obtained the leave of the court to have Amaco Insurance Company Limited enjoined to these proceedings. To my mind, that step is a clear reflection of the seriousness which the defendants attach to their belief, that the insurance company was under a legal duty to compensate them for the truck which was written-off in an accident.

31. I am unable to accept the bank's contention that the issue of the compensation which was payable under the policy of insurance provided by Amaco had no bearing to the plaintiff's claim against the defendants. I so hold because if the insurance company was obliged to remit compensation, and if the said sums were paid over to the bank, then the said bank would not be entitled to pursue the defendants in respect to such sum as it had received.

32. I also find that the Counter-claim raises an arguable cause of action. I so find because if the repossession of one truck, by the bank, was a nullity, *(as suggested by the defendants)*, the bank could end up having to compensate the defendants for the loss and damage occasioned by the repossession and sale of the truck.

33. In a nutshell, I find no Admission of liability by the defendants. I also find that the Defence filed raised triable issues, which can only be determined after a trial.

34. Accordingly, the application dated 9th September 2015 is dismissed. The plaintiff will pay to the defendants, the costs of the application.

**DATED, SIGNED** and **DELIVERED** at **NAIROBI** this **16th day** of **February** 2017.

**FRED A. OCHIENG**

**JUDGE**

***<u>Ruling read in open court in the presence of</u>***

*No appearance for the Plaintiff*

*Gacuna for the 1st Defendant*

*Gacuna for the 2nd Defendant*

*Gacuna for the 3rd Defendant*

*Collins Odhiambo – Court clerk.*