



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 50 OF 2012

MICRO ENTERPRISES SUPPORT PROGRAMME TRUST

REGISTERED TRUSTEES.....PLAINTIFF

VERSUS

SAGA THRIFT & ENTERPRISES PROMOTION LIMITED.....1ST DEFENDANT

HENRY O. OKETCH.....2ND DEFENDANT

MICHAEL NDEDA.....3RD DEFENDANT

EDWARD ADERA OSAWA.....4TH DEFENDANT

NELSON OTIENO ALOYS.....5TH DEFENDANT

JUDGMENT

1. The case came up for Hearing on 30th October 2010.
2. After satisfying myself that the defendants had been duly served with an appropriate Hearing Notice, I proceeded with the trial even though the defendants and their lawyers were absent.
3. **JOHN MASHA**, the plaintiff's General-Manager in charge of Credit, testified for the plaintiff.
4. He demonstrated to the court that the plaintiff advanced three (3) financial facilities to the 1st Defendant, **SAGA THRIFT & ENTERPRISES PROMOTION LIMITED**. The said three Loan facilities had a cumulative value of Kshs. 50,000,000/-.
5. On 13th January 2005, the 1st Defendant (hereinafter cited as "**SAGA THRIFT**") applied for a loan of Kshs. 10,000,000/- from the plaintiff.
6. On 10th March 2005, the plaintiff wrote to **SAGA THRIFT** with a formal Offer of a loan amounting to Kshs. 10,000,000/-.
7. The Board of Directors of **SAGA THRIFT** passed a resolution on 4th January 2005, permitting the company to borrow funds not exceeding Kshs. 10,000,000/- from the plaintiff.

8. On 4th July 2005 **SAGA THRIFT** executed a Further Debenture in favour of the plaintiff, for the sum of Kshs. 10,000,000/-. In that Further Debenture **SAGA THRIFT** expressly describes itself as “*The Borrower*”.
9. On the same date (4th July 2005), **HENRY OKETCH; MICHAEL NDEDA; EDWARD ADERA OSAWA and NELSON OTIENO ALOYS** executed a **LETTER OF GUARANTEE & INDEMNITY** in favour of the plaintiff. Their said Guarantee was for Kshs. 10,000,000/-.
10. Thereafter, on 23rd November 2005, **SAGA THRIFT** applied for another loan. This application was for Kshs. 30,000,000/-.
11. On 21st December 2005, the plaintiff offered to **SAGA THRIFT** the loan for Kshs. 30,000,000/-.
12. The Board of Directors of **SAGA THRIFT** had passed a Resolution to borrow Kshs. 30,000,000/-. They did so at a meeting held on 16th December 2005.
13. On 26th February 2006 **SAGA THRIFT** and the plaintiff executed a Loan Agreement for Kshs. 30,000,000/-.
14. The 2nd to 5th defendants executed a Guarantee and Indemnity Letter dated 26th February 2006.
15. Meanwhile, **SAGA THRIFT** executed a Second Further Debenture on 26th February 2006, for the sum of Kshs. 30,000,000/-.
16. The defendants had, in their Defence, stated that they were not the borrowers. They said that they were mere channels through which money was transferred from the plaintiff to the final beneficiaries.
17. The defence also stated the Debentures did not constitute any Valid Guarantees, as the defendants did not derive any benefits or consideration in return.
18. As far as the defendants were concerned, if any of the final beneficiaries of the money from the plaintiff defaulted, the plaintiff should have assisted the defendants to institute and prosecute cases against the defaulters.
19. Therefore, the defendants expressed an interest in applying to the court to have the defaulting beneficiaries enjoined to this case.
20. However, by the time of the trial, the defendants had not taken any steps to have the defaulting beneficiaries enjoined to the case.
21. In any event, documents speak for themselves. And in this case, the documents have spoken clearly and eloquently. The documents make it clear that **SAGA THRIFT** was the borrower, and that the other defendants had personally guaranteed the borrowings in question.
22. The documents show that when there were defaults, the defendants sought and were granted a re-scheduling of the repayment of the balances still outstanding.
23. **SAGA THRIFT** expressly requested that their loan be re-scheduled. They even provided a proposed schedule for repayment.
24. The plaintiff approved the request and gave some specific terms and conditions which **SAGA THRIFT** were required to abide by.
25. The Board of Directors of **SAGA THRIFT** resolved to accept the terms and conditions, even though they expressed the view that the Penalty of 10% per month on late repayment was prohibitive.

26. From the letter dated 5th May 2009, the plaintiff made it clear that the balance outstanding was Kshs. 20,000,000. That amount was to be repaid within 36 months with effect from 1st October 2009.

27. The plaintiff waived the penalties incurred between 1st January 2008 and 5th May 2009. However, they made it clear that penalties incurred prior to 1st January 2008 would have to be paid.

28. It is significant that **SAGA THRIFT** was requested to indicate if they had accepted the offer contained in the letter dated 5th May 2009. In particular, the plaintiff indicated that if the offer was not accepted unconditionally within 60 days, the said offer would be deemed to have lapsed.

29. **SAGA THRIFT** gave due consideration to the offer and only signed it on 25th June 2009.

30. The effect of that acceptance was to confirm not only the quantum of the outstanding loan, but also the terms and conditions for repayment.

31. Regrettably, the defendants failed to make any payments to the plaintiff after the loan was re-scheduled. I therefore find and hold that the defendants owed to the plaintiff the sum of Kshs. 24,662,359/94 as at 23rd May 2011.

32. I grant judgment for that amount against the 5 defendants jointly and severally.

33. I also grant to the plaintiff interest at court rates from 1st of June 2011 until payment in full.

34. Finally, the defendants are ordered to pay to the plaintiff, the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of December 2014.

FRED A. OCHIENG

JUDGE

Judgment read in open court in the presence of

Kamau for the Plaintiff.

No appearance for the 1st Defendant.

Kamau for the 2nd Defendant

No appearance for the 3rd Defendant

No appearance for the 4th Defendant

No appearance for the 5th Defendant.

Collins Odhiambo – Court clerk.