REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 683 OF 2005

NATIONAL BANK OF KENYA LIMITED…….....PLAINTIFF

VERSUS

ASHA ABDI AMAN.....1ST DEFENDANT

ABDI MOHAMMED AHMED……...……2ND DEFENDANT

ALICE NASIEKO…….....…….3RD DEFENDANT

MOHAMMED ISAHAKIA…….....4TH DEFENDANT

RULING

1. The 2nd and 4th defendants have asked the court to review the orders which Havelock J. made on 3rd April 2014.

2. In order to place that application within the proper perspective it is necessary to set out part of the history of the case.

3. The plaint was filed on 13th December 2005. In the plaint it was asserted that the defendants had executed Guarantees to secure the credit facilities which the plaintiff, **NATIONAL BANK OF KENYA LIMITED,** granted to the Principal Debtor, **AROMA EXPORT AGENCIES LIMITED.**

4. The indebtedness of the Principal Debtor to the bank was in the sum of Kshs. 127,572,355/95.

5. However, as each of the defendants had executed a Guarantee for a sum not exceeding Kshs. 30,000,000/-, the plaintiff's claim against the defendants' jointly and severally was for Kshs. 30,000,000/-. The plaintiff also prayed for interest at the rate of 27% per annum, from the date when the plaintiff formally demanded payment from the defendants.

6. The court granted judgment against the 1st and 3rd Defendants. However, the case against the 2nd and 4th defendants proceeded to full trial.

7. The court records reveal that the plaintiff had already closed its case. Therefore, it was the turn of the 2nd and 4th Defendants to put forward their respective cases.

8. On 6th December 2013, the advocate for the two defendants informed the court that his clients would

call two witnesses. The court then set down the case for the defence hearing on 20th February 2014.

9. However, when the trial was set to resume, the advocate for the two defendants was reported to be ill. Secondly, one of the defendants is said to have lost his mother: He was therefore busy organizing for her burial.

10. In the light of those reasons, the plaintiff did not oppose an application for an adjournment.

11. The court then proceeded to grant to the 2nd and 4th defendants' the last adjournment. Meanwhile, the case was put-off to 3rd April 2014.

12. On 13th March 2014, the defendants' lawyers wrote to the advocates for the plaintiff, informing them that Mr. Timothy Naeku who was the advocate handling the defendants' case would be unable to proceed with the case on 3rd April 2014.

13. The reason for Mr. Naeku's inability to attend court on that date was that on 13th March 2014, his law firm was served with Hearing Notice in respect to an application scheduled for hearing on 3rd April 2014, at the Court of Appeal. The Hearing Notice which had been served on Bowry & Co. Advocates was exhibited.

14. As Mr. Naeku was required to be before the Court of Appeal on 3rd April 2014, he instructed Miss. W. Kamau to hold his brief in this case.

15. Miss Kamau dutifully attended court and informed the learned trial Judge about the inability of Mr. Naeku to proceed with the trial. Secondly, Miss Kamau informed the learned trial Judge that the two parties had commenced negotiations.

16. Indeed, the 2nd and 4th Defendants were said to have been in direct touch with the chairman of the National Bank of Kenya Limited, who had promised to instruct the bank's advocates to have the case adjourned.

17. Mr. Thangei, the learned advocate for the bank did not have any instructions from the bank's chairman.

18. The court allowed the advocates for the parties about 30 minutes break, during which they were to verify whether or not there had been a settlement between them.

19. When the case resumed, after half-an-hour, the defendants' lawyer indicated that the chairman of the bank had not yet reverted to the defendants, in respect to the offer which they had made to him.

20. In the light of the fact that the trial Judge had previously directed that the adjournment granted on 20th February 2014 was the last one, the court ordered the defendants to close their case.

21. The parties were directed to file their respective submissions, so that the court could thereafter give its Judgment.

22. On 19th May 2014, the defendants' advocates received a letter from the bank's Company Secretary & Director Legal Services & Compliance. That letter was dated 13th May 2014, and was addressed to the plaintiff's advocates, with a copy to the advocates for the defendants.

23. The significant portion of the letter was in the following words;

> *"We write to confirm that the Defendants have been in discussions with the Bank since March 2014 with a view to settling the matter out of court. Unfortunately, we inadvertently failed to notify you of the development prior to the defence hearing on 3rd April 2014. The details of the discussions had also not been brought to the attention of the Bank's witness in the matter, at the*

time.

We therefore request you to note the position and to apply for another mention day in about two months time to enable the parties conclude the discussions and record a settlement".

24. The bank had been in discussions with the defendants, as the defendants' lawyer told the court on 3rd April 2014.

25. It is to be noted that the learned Judge allowed the parties time to enable them obtain more information regarding the contemplated settlement. But that information was not immediately available as the Bank's chairman and the Bank's Company Secretary have failed to notify their own lawyers about the

ongoing negotiations.

26. Although I cannot purport to know what Havelock J. could have done if the bank's position had been disclosed to him, I think that the fact that the learned Judge was ready to wait for information on the negotiations for settlement, is indicative of a possibility that the court could have been prepared to accommodate the parties.

27. Even as late as 19th May 2014, the plaintiff was still ready to give the ongoing negotiations a chance.

28. The conduct of the plaintiff, coupled with their express written instructions are at variance with the stance adopted by their learned advocate. The reason for that disconnect is clear; the Bank had failed to give appropriate instructions to their advocate, on time.

29. Parties are always free to negotiate, as it is they who ultimately determine whether or not they still wished to continue with litigation.

30. When a party wishes to settle a case, his lawyer cannot compel him to do otherwise. The most that an advocate could do is to advice his client. But the client may choose to accept or reject such advice, if the client decided to settle the case.

31. In this case, the Bank was involved in ongoing negotiations with the 2nd and 4th defendants. It was the express desire of the bank to have the case put-off, so as to allow the parties an opportunity to pursue further negotiations.

32. I have no doubt at all that had the bank's intended instructions reached their lawyers, the said lawyers could not have acted in a manner that was inconsistent with their client's instructions.

33. Having given due consideration to the competing submissions, I find that there is merit in the application.

34. I so hold because if the orders made on 3rd April 2014 are reviewed, that would mean that the orders to have the defendants' case deemed as closed, would be set aside, as I now hereby do.

35. The bank desired more time and opportunity to continue negotiations with the defendants. Subsequently, the negotiations appear to have faltered. However, in determining the application, the court cannot be influenced by such subsequent developments.

36. The matter is determinable on the basis of the circumstances prevailing on 3rd April 2014. Those circumstances included the Bank's desire to continue with the negotiations, whilst the case was placed on hold.

37. In the result, I do now set aside the orders which resulted in the close of the defendants' case. The

net effect of that order is that the defence case for the 2nd and 4th defendants' is hereby re-opened. However, the said defendants will only have one chance to put forward their defences. In other words, when a date is fixed for the defence case, there will be no adjournment, at the behest of the defendants.

38. On the issue of the costs of the application, I order that the same shall be in the cause. I so order because the Bank has made it clear that it was the failure of the bank to give appropriate instructions to their advocate, which led their advocate to insist on a course which was not in tandem with the bank's position at the material time.

39. But the defendants should also have tried to ensure that they got some tangible information which could have helped the court appreciate the fact of the then ongoing negotiations.

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

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kamau for Thangei for the Plaintiff

No appearance for the 1st Defendant

Naeku for the 2nd Defendant

No appearance for the 3rd Defendant

Naeku for the 4th Defendant

Collins Odhiambo – Court clerk.