



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS)

Civil Case 1533 of 1997

**MOUNT KENYA
 AGRO INDUSTRIES
 LIMITED.....**

1ST
PLAINTIFF

**JOSHUA WERU
 ICHANGI.....**
2ND
PLAINTIFF

VERSUS

**STANDARD
 CHARTERED BANK
 KENYA
 LIMITED.....D
 EFENDANT**

JUDGEMENT

This matter involves a customer/bank relationship which had gone sour since each party feels aggrieved or offended by the conduct, acts and omissions of the other. This dispute is a classic example of marriage which was conceived, celebrated and consummated in a cordial and beneficial manner but has since broken down due to the acts and omissions of the parties herein.

The 1st plaintiff is a limited liability company while the 2nd plaintiff is one of the five directors of the 1st plaintiff. It is also alleged that the 2nd plaintiff is one of the two directors authorized to sign the 1st plaintiff's cheques and with powers to operate the company's accounts. The 1st plaintiff operated a small manufacturing industry specializing in processing and drying local vegetables for export and local consumption. It had two accounts at the defendant's Nyeri branch which were current and savings accounts. It is also important to note that the 2nd plaintiff is the Managing director and the chairman of the 1st plaintiff company. The relationship between the plaintiffs and the defendant started way back in 1956 and the current dispute arose sometimes in 1994/95.

From the evidence on record it is clear that the plaintiffs enjoyed a long history of business/banking

relations with the defendant at its Nyeri branch spanning several decades. The relationship was cordial and excellent until the current dispute arose culminating in the filing of the present suit. On or about 13th February 1985 at the 1st plaintiff's request, the defendant availed a loan/overdraft and or financial facility secured by a legal charge over the 1st plaintiff's property comprised in LR.NO.9395/6 situate at Kiganjo Nyeri District. The facility was for a sum of Kshs.200,000/= at an interest rate of 14% per annum chargeable for a sum actually disbursed to the 1st plaintiff. On or about 23rd October 1987 and 7th November 1989, the plaintiffs made a charge and a further charge in favour of the 1st defendant over the 2nd plaintiff's property in title No.Nyeri Municipality Block 1/13 to enable the defendant advance a sum of Kshs.412,500/= and Kshs.260,000/= respectively. During that time the defendant agreed to raise the 1st plaintiff's overdraft facility from Kshs.200,000/= to Kshs.300,000/=. It is contended that by the end of 1998, the defendant bank had accumulated security worth Kshs.872,500/= to secure or cover an overdraft facility with a maximum limit of Kshs.200,000/=. Between 1985 and 1990 the plaintiffs had no difficulties or problems in servicing the facility extended by the bank. It is also the contention of the plaintiffs that between 1985 to 1990 they had no complaint or claim against the defendant for the relationship and the facility extended and/or consumed.

It is the case of the plaintiffs that on or about the 7th day of March 1991, the defendant on its own initiative and without the plaintiffs' knowledge, consent or consultation created an irregular loan on the 1st plaintiff's account amounting to Kshs.485,450/= and thereafter demanded from the plaintiffs to pay off the said irregular loan in order to maintain its overdraft facility with the bank. The 1st plaintiff then commenced payment of the said irregular loan by paying Kshs.15,000/= monthly reducing the said loan to a balance of Kshs.111,950/=. It is also the contention of the plaintiffs that the bank made it impossible for the plaintiffs to complete the payment of the balance by creating a series of other irregular loans thus making the equity of redemption impossible. The position of the plaintiffs is that between 1990 and 1994, the defendant created and/or secretly opened and operated several irregular loan/overdraft accounts in the names of the 1st plaintiff without its consent, knowledge and approval. The accounts were unilaterally and fraudulently posted, transferred and debited funds and service charges beyond the securities offered to the defendant. It is the contention of the plaintiffs that the conduct of the defendant in creating irregular loans and overdrafts accounts was unlawful, fraudulent and indeed intended to create a clog on the plaintiffs' equity of redemption in respect of the securities offered for the said facilities. It is further contended that the bank never gave full information on the accounts, financial statements and banking records of plaintiffs' accounts for the period covering 1984 to 1997 making the attempts of the plaintiffs to know their liability impossible and difficult.

On or about 27th June 1991, on the defendant's advice and promises of advancing further overdrafts and/or further financial facilities, the 1st plaintiff and the 2nd plaintiff executed a mortgage in favour of the defendant in respect to the 2nd plaintiff's property comprised in title No.LR.2327/109 situate in the city of Nairobi. The mortgage was to secure a financial facility to be advanced to the 1st plaintiff with a maximum of Kshs.2.1 million inclusive of interest. It is alleged that the defendant did not advance any sums of monies to the 1st plaintiff and has failed or neglected to render a true and just account of the sums claimed to have been advanced to the 1st plaintiff.

It is also the case of the plaintiffs that in June 1993, the 2nd plaintiff with the consent, knowledge and approval of the defendant sub-divided his LR No.2327/103 into 5 sub-divided plots. The new 5 sub-divided titles which were then valued at Kshs.6.2 million then scheduled for sale in order to settle the debt. The plaintiffs were also advised to increase their security to Kshs.4,650,000/= but the plaintiffs alleged that at the time the titles that were kept by the defendant were worth over Kshs.7 million. The plaintiffs contended that the defendant's advocate on record and **M/S Kimani Kairu & Company** advocates conspired to defraud the 2nd plaintiff's titles in the five sub-divisions unlawfully and without any just cause or claim of right by alienating, selling and/or disposing of the said sub-division titles without the 2nd plaintiff's consent or authorization. In that transaction where the said properties were sold, it is alleged that the bank realized over Kshs.7 million which is a sum in excess of the amount demanded as the debt due. In short it is the case of the plaintiffs that the defendant exaggerated the debt

and as a result failed to provide particulars of alleged debt and/or accounts and other supportive documents in support or to ascertain the debt hence the plaintiffs have been denied an opportunity to redeem the mortgage debt. The failure by the defendant to provide an accurate account specifying the amount of the debt due and owing, renders the mortgage, if any, invalid and unenforceable in that the defendant has put a clog on the plaintiffs' equity of redemption. As a result the plaintiffs pray for judgement against the defendant for;

- (a) A declaration that the Plaintiff's have redeemed the charge in respect to L.R. 9395/6 (I.R.16429) situate in Kiganjo, Nyeri District.**
- (aa) A declaration that the Plaintiffs have redeemed the charge dated 23rd October 1987 and 7th November 1989 over Nyeri Municipality Block 1/13. (Now sub-divided into 5 sub-titles – Nyeri Municipality Block 1/898, Block 1/899, Block 1/900, Block 1/901 and Block 1/902).**
- (b) An order for accounts to be taken in respect of all sums advanced by the Defendant to the Plaintiffs if any and all payments effected by the Plaintiffs to the Defendant.**
- (c) An order directed to the Defendant, its agents and/or servants to hold all the sale proceeds arising from the sale of the sub-divisions of L.R. 2327/103 in the City of Nairobi namely L.R. 2327/179; L.R. 2327/180; L.R. 2327/181; L.R. 2327/182; L.R. 2327/183 in an interest earning account in favour of the parties hereto pending judgement in this suit.**
- (cc) An order directed to the Defendant to refund the 2nd Plaintiff all the sale proceeds arising from the sale of the sub-divided plots of L.R. 2327/103, City of Nairobi from the date of receipt of such funds at commercial rates of interest until payment in full.**
- (d) A declaration that the Plaintiffs have redeemed the mortgage debt, if any, secured by the 2nd Plaintiff's properties comprised in title Numbers Nyeri Municipality Block 1/898; Nyeri Municipality Block 1/899; Nyeri Municipality Block 1/900; Nyeri Municipality Block 1/901; and Nyeri Municipality Block 1/902 were by deceit and/or benefit of the Defendant and unenforceable in law.**
- (f) General damages and/or compensation for lost business opportunities; interest thereon and costs of this suit.**
- (g) An order directed to the Defendant to compensate the 2nd Plaintiff with a physical property or properties of the same nature and value in the area situate in Langata, Nairobi at the time of finalization of this suit; or**
- (gg) An order directed to the Defendant to compensate the 2nd Plaintiff with financial value that will be equal to the value of similar properties as those sold and disposed of in Langata, Nairobi at the time of finalization of this suit and that the said value be supported by a professional registered land/property valuer's report.**
- (h) And any other or further orders that this Honourable Court may deem just to grant.**
- (i) Dismissal of the Defendants Further Amended Defence and amended Counterclaim with costs.**
- (j) Judgement be entered for the Plaintiffs in terms of the prayers in the Further Amended Plaintiff.**
- (k) Costs of this suit with interest at commercial rates.**

In seeking to prove its case, the plaintiffs called five witnesses.

PW1 **Mr. Joshua Weru Ichangi** is the 2nd plaintiff and director of 1st plaintiff. In his evidence he took the court through the outstanding relation the company had with the defendant. He contended that the relationship was cordial until 1995 when the current dispute arose. He disclosed that the 1st plaintiff requested and obtained an overdraft which was renewed on several occasions, the first one being the one granted in 1985. He also referred to the various securities that were given to secure the advances by the bank. He confirmed that it was after the 1st overdraft of Kshs.200,000/= was enhanced to Kshs.300,000/= that the trouble started. He also confirmed having signed many letters to the bank but contended he merely signed to accept the conditions therein. The said letters were exhibited before court with the consent of both parties in a bundle. Of material importance is that he signed the cheque of Kshs.2.2 million with his wife who is also a director in the presence of the branch manager Nyeri on 13th August 1991. He also confirmed that he agreed to sub-divide and sell his own property in Karen which he had charged to the bank and to remit proceedings in order to pay off the debt. He was represented by **M/S Kimani Kairu** in that particular transaction. However, he deliberately omitted reference to various letters forming a bundle of correspondences with the bank over the years that clearly indicated the genesis and development of this matter right from when the renewed overdraft overshot and/or exceeded the limit set by the parties.

The 2nd plaintiff in his evidence admitted and did not question the validity of any of the securities taken in favour of the defendant and confirmed having signed all the securities as a director and with full consent and knowledge of other directors. He also confirmed that the bank wrote many letters to the 1st plaintiff and to him requesting for the settlement of the debt between 1990 and 1996. He also confirmed receipt of regular written communication from the bank and statements of accounts to his postal address at Kiganjo Nyeri. He too confirmed that in spite of the many letters to the bank between 1990 and 1996, no single letter seeking clarification or questioning any entries or complaint was raised by him. He further confirmed that they were facing or experiencing financial hardship and business difficulties during the time between 1990 and 1995 yet the bank continued honouring their cheques. As at September 1993 he admitted owing over Kshs.6 million.

The second witness to give evidence in favour of the plaintiffs was **Mr. Daniel Weru Ichangi** a son and director of the 1st Plaintiff. His role and evidence was that sometimes in March 1996, he was informed by a friend that his father's properties were scheduled for auction. He stated that the auction was to take place on 12th April 1996 at Nyeri town. He then followed the matter and he was informed the outstanding amount was over Kshs.12 million. He went to the bank and exchanged several letters with the bank officials both at Nairobi and Nyeri requesting for details of the debt.

From the evidence on record his letters were responded to by both the branch office of the defendant in Nyeri and the headquarters in Nairobi. In his evidence he stated that he undertook thorough investigation and came to conclusion that entries and accounts created by the bank on the accounts of the 1st plaintiff were fraudulent, illegal and non-contractual. He also expressed ignorance of existence of any indebtedness by way of loan though he acknowledged that the 2nd plaintiff and his mother PW3 were in-charge of daily operations of the company. The witness confirmed that he was all along involved in the operation of the business of the 1st plaintiff including attending board meetings and annual general meetings but he did not explain why he did not raise the issues of lack of bank statements and the amount of debt that was outstanding in the books of the 1st plaintiff with the other directors. He also talked of pressure being applied on his parents by the bank but it suffices to say that there was no evidence of pressure that was applied against the plaintiff or its directors by the bank. In any case it is normal in business circle that a creditor would apply pressure to realize his money and in order to secure his interests provided it is not undue influence or duress.

The third witness who gave evidence **Miriam Nyathogora Ichangi** is a director and the wife to the 2nd plaintiff and also the mother to the other directors. She says that she is a caretaker of all family matters including the business and personal matters for many years until the current dispute arose in 1995. She admitted the existence of the initial overdraft which was later enhanced but denied the existence of a loan and conversion of an overdraft into a loan facility as alleged by the defendant. She contended that the

company did not apply for a loan and she blamed her husband for signing several letters behind her back. However, she confirmed the existence of all the securities produced on record and did not question why they offered several of their properties to the bank to cover their indebtedness.

The evidence of PW4 and PW5 concerns professional analysis of the documentation and statements that were exchanged between the plaintiffs and the defendant.

In this case the defendant filed a further re-amended defence and amended counterclaim. All and singular allegations by the plaintiffs were denied and a counterclaim of Kshs.7,909,501.60 was pleaded. The Defendant called 3 witnesses and produced a bundle of documents which was agreed consensually by the parties.

The first witness for the bank **Mr. Francis Joseph Kimeria** was a branch manager Nyeri between April 1990 to April 1994 and retired from the bank in 1995. He said that he dealt with the plaintiffs for period relevant to the issues in contention and as far as the accounts were concerned. He gave a detailed and vivid account of the bank/client relationship and contended that all transactions were in normal course of dealings. On the renewal of the overdraft facility with the bank, he stated that the 1st plaintiff failed to keep within the limit and exceeded the ceiling that was set by the agreement between the parties. The matter was then discussed with PW1 and PW3 who usually frequented the bank and by a letter dated 7th March 1991, the plaintiffs were advised of the status of their account and in which the bank advised them to convert the excess into a loan of Kshs.500,000/= so that the plaintiffs could have at their disposal and use the overdraft to the limit of Kshs.300,000/=. The witnesses then explained the security offered by the plaintiffs to the defendant for continuing advances whether as overdraft or loan. He also referred to the charge dated 13th February 1995 in favour of the bank in respect of title No.9395/6 Kiganjo, Nyeri Municipality Block 1/13 from the 2nd Plaintiff in favour of the bank, dated 23rd October 1987. A further charge of Nyeri Municipality Block 1/13 dated 7th November 1989, was created. Another charge of Nyeri Municipality Block 1/898-902 which were sub-divisions of Nyeri Municipality Block 1/13 and dated 1st July, 1993. He also referred to a mortgage of LR. NO.2327/103 dated 27th June 1991 and guarantees of all the directors of the 1st plaintiff Company.

DW1 proceeded to explain that the turning point in the accounts of the plaintiffs was on 12th June 1990 when a loan of Kshs.500,000/= was created from the current account where the overdraft was running. The loan was simply a conversion of part of the excess overdraft limit so that the client would continue enjoying the overdraft. He referred and exhibited the many letters exchanged with the plaintiffs.

It is essential to quote some of the letters that were exchanged between the plaintiffs and the defendant. In a letter dated 16th December 1991 the 2nd plaintiff acting on behalf of the 1st plaintiff wrote;

“We acknowledge receipt of your letter dated 4th of December 1991.....

We have updated you regarding the subdivision of our property which we offered as our additional security. You are aware it is our intention to sell a portion of this property once the subdivision is approved.....and use the proceeds to offset part of this loan or clear it altogether, if possible.

However our intentions have never been anything than commitment to pay off our loan outstanding.”

In another letter by the 1st plaintiff to the defendant dated 4th August 1992 states as follows:

“We write in response to your letter dated 23rd July 1992 in connection with our Bank liabilities.

Real effort has been made with regard to our commercial plots in Langata, Nairobi so as to realize sale and generate income which we intend to utilize to offset our presently large overdraft and possibly part of the loan outstanding in order to enable the company to operate on a more

profitable and liquid state.”

Letter dated 14th December 1993 states as follows;

We shall continue with these efforts and remain optimistic that even under the current situation, we should be able to reduce/settle the debt in our account as soon as possible.....”

Letter of 6th June 1994 states as follows;

“We note the Bank has approved an additional facility of Kshs.600,000/= against our proposal of Kshs.850,000/=. Secondly, we have agreed and hereby reiterate our desire to sell the remaining four (4) subplots of our Langata property to reduce the outstanding loan facility....”

In the letter of 17th March 1995 it is stated as follows;

“As we had indicated to you by the time we obtained the additional facility of Shs.600,000/= the boiler which had been offered to us by KCC Ltd had been sold to another bidder.....In the meantime we had decided to take advantage of growing of snow peas for export in a bid to generate extra funds for loan servicing and to generate raw material for processing.

As we indicated during our last meeting at CSU we feel obliged to formally request the bank for a review of our accrued debt position which you now indicate as Kshs.9,763,438/35”.

The correspondences produced in evidence by DW1 is replete with requests by the plaintiffs for more time and proposals for settlement.

On the other hand, the evidence of DW2 mainly relates to correspondences given to the specific request made by the plaintiffs. DW3’s evidence concerned the process of sale of Langata subdivisions and applications of the proceeds from that sale into the loan and overdraft accounts. She also touched and explained on all the accounts stating that the bank even took action of stopping charging interest in 1995 on the accounts of the plaintiffs upon consolidation of all accounts. She also contended that the only reason why interest was recalculated and factored in, is because the plaintiffs chose to go to court and for purposes of demand letters it was necessary to reflect the whole debt. In essence it is the case of the defendant that the plaintiff’s case has no merits and it is entitled to judgement as prayed in the counterclaim.

After the close of the respective cases of the parties, the parties filed written skeletal submissions through the advocates on record. It is now my task to consider the case of the plaintiffs and that of the defendant in order to determine whether there is a case that should place liability at the right place. The yardstick in determining whether there is a case against the defendant and against the plaintiffs is on a balance of probabilities. The evidence has to be consistent and a candid thread of a true account from the genesis to the current position of the matter. There is no doubt that the plaintiffs and the defendant had enjoyed a close relationship for a considerable period of time. The plaintiff company requested and obtained an overdraft which was renewed at several occasions and in order to secure that facility, the plaintiffs jointly and severally gave various securities to the bank. The securities were signed by the relevant parties and with authority of the 1st plaintiff.

The evidence on record is that the purpose of the overdraft was to secure the operation and daily running of the 1st plaintiff company. The overdraft was renewed on request and after it overshot or exceeded, the bank created the necessary process in order to protect its money and interest. The evidence on record is that the plaintiff was time and again made aware of the negative status of its account and advised to rectify the situation. PW1, PW2 and PW3 confirmed that position and explained the difficulties that were being experienced by the company by way of unpaid deliveries, new markets being sought, drought and adverse economic conditions. As a result the plaintiffs sought indulgencies from the defendant from time to time so that the matter could be resolved amicably while they were using the funds advanced to

them by the bank.

There is evidence that, the 2nd plaintiff made a proposal to the bank to subdivide his properties in Nyeri and Nairobi with a view to sell and use the proceeds to liquidate the indebtedness. The plaintiffs even sought time extension when they had a large outstanding debt, a cash injection of Kshs.600,000/= for rejuvenating the business which amount was reluctantly granted by the bank. By converting the excess amount above the limit of the overdraft that was agreed by the parties into a loan, the bank was acting in good faith and with agreement entered with the plaintiffs.

In any case, an overdraft, in its very nature is a loan facility. An overdraft is a withdrawal of money from a bank which in excess of the money that is held by the bank on behalf of its client. In essence the bank was advancing money or giving money at the disposal or use of its client when it has no funds with the bank at its account. In my view therefore a payment by a bank under an agreement by which the customer has an overdraft facility is a lending by the bank to the customer who has no funds or is unable to settle his financial commitment at that particular time. In my understanding, an overdraft is money lent with or without security by a bank to its client. For example where a customer draws a cheque for a sum in excess of the amount in his account, it is in effect a request for a loan facility and if the cheque is honoured, the customer has in real and practical sense borrowed money from the bank so that he uses it, on temporary basis to be returned with profit or gain. In **Civil Appeal No 13 of 1979 Kenya Commercial Bank Limited (appellant) vs Mohamed Ahmed and another**, the Court of Appeal held;

“Nor do I think that the finding that there was no agreement of loan can be supported. True, there was no formal contract of loan, but the effect of the arrangement between the parties was that each time the company drew money from the Bank against an uncleared cheque it was requesting the Bank to advance or lend its own money, and the Bank when cashing the company’s cheques in these circumstances was according to the company’s request and advancing the money as a loan pending clearance of the cheque.....in each case the company, by presenting a cheque, was asking the Bank to advance its own money, and the Bank in making payment was lending the money”.

The question for my determination is whether the defendant hijacked the plaintiff’s account and manipulated it to the detriment of the plaintiffs breaking all rules governing the operation of a current account. It is the case of the plaintiffs that the defendant mishandled its account, yet produced no bank documents signed by the plaintiff. It is also the case of the plaintiff that the defendant created secret accounts in the name of the plaintiffs and designated them to be loan accounts or overdraft accounts. It is contended further that the loan disbursed was not a true reflection of the status of the plaintiff’s account but was a hardcore meant to give a false and imaginary leeway to the defendant.

My answer is that a bank is allowed or entitled to charge interest on loans and overdraft not paid within a specified period either by express agreement or by right of custom. And as long as the defendant accepted cheques drawn by the 1st plaintiff for its current account when the latter had no funds, then an overdraft facility/loan was immediately created. In the circumstances of this case, when an overdraft was in place, as agreed between the parties and once the 1st plaintiff exceeded the limit and cheques were honoured by the bank, automatically the excess liability was to be converted into a loan liability and secured by a security. This is exactly what happened in this case and that explains the reasons why the plaintiffs and its directors offered additional securities and signed further charges and mortgages in order to secure the said debt.

In my assessment therefore the plaintiffs cannot be heard to argue that there was no formal loan in place or that they did not execute loan request forms. The plaintiffs were required to comprehend, appreciate and understand the implication and consequences of appending their signatures on the security documents they offered to the bank. They also did not explain why they gave the bank properties worth over Kshs.10 million when they alleged liability was not more than Kshs.500,000/=. If only, the plaintiffs and other directors who may have sanctioned the borrowing had carefully looked at the security documents, it would immediately have been apparent to them that the loans created were part of the financial accommodation that they enjoyed without blinking an eye. In actual sense it cannot be said that they were defrauded or deceived by the bank. The effect of the contractual obligation put in place, is a clear

manifestation or indication that they were cautious, alert, prudent and in a position to understand the implications and effect of their relationship with the bank. It is therefore, my judgement that the charge, mortgages and guarantee documents signed by the directors of the 1st plaintiff in favour of the bank restricted the relationship to one as clear as the sky in a dry period in Northern Kenya. That gave the defendant the contractual mandate to vary interest rates and penalties in case a default arises attributable to the persons who benefited from the monies advanced by the bank. Needless to say the function of the court is to enforce what is agreed between the parties and not what the court thinks ought to have been agreed between the parties. In **Civil Case No.1308 of 2001 Milimani Commercial Courts Rajnikant Jashbhai Desai & 2 others vs Fina Bank Limited Emukule J** had this to say;

“As regards interest, I can only say that it behoves parties to read the contracts they sign and to believe that the terms thereof are not mere words but covenants to be enforced. If the Lender reserves to himself the right to charge such interest as he shall determine and to vary the same without reference to the borrower, so it shall be.....”

The plaintiffs' witnesses blamed the bank for mishandling their account and loading unnecessary and illegal interest amounts into their accounts between the period 1990 and 1996 when the current dispute arose. PW1 who is the 2nd plaintiff in this case, revealed a lot of information during cross examination than during examination in chief. He deliberately omitted reference to various letters forming a bundle of correspondences with the bank over the years that clearly indicated the genesis and development of this matter right and when the first overdraft was converted into a loan because they exceeded the limit agreed and set by the bank. He also did not disclose that the 1st plaintiff was actually placed under receivership by **Kenya Industrial Estates Limited** for its failure to meet its liabilities and obligations towards that financier. It is also very clear that the PW2 and PW3 possessed an excellent education background and cannot be termed as ordinary citizens who would be unable to appreciate and understand the nature of their dealings and relationship towards a bank. The 2nd plaintiff is a retired civil servant while PW2 is a PHd holder and he did not disclose why he did not question the operation and the relationship of the plaintiff company with the bank before the debt reached over Kshs.10 million. For example **Dr. Ichangi** did not question the validity of any of the securities that was given in favour of the defendant by the 1st plaintiff and the 2nd plaintiff (his father).

The plaintiffs received regular written communications from the bank but nevertheless, no single letter seeking clarification on any transaction or questioning any entry nor a complaint of the same was raised before the account of the plaintiff became dormant with a huge liability in 1995. PW1 as the chairman of the company regularly visited and engaged the bank in correspondences and in particular replying to letters from the bank showing the rapidly changing status of the company account as the debt escalated. He consistently confirmed the indebtedness and pleaded for indulgence from the bank. He also indicated to the bank that the directors were willing to subdivide and dispose some of the assets in Langata Nairobi to settle the outstanding debt. He further confirmed that their business was experiencing several hardships yet the bank continued honouring their cheques. As at 16th September 1993 the plaintiffs admitted owing over Kshs.6 million. This evidence is manifested in the letters dated 4th December 1991, 16th December 1991, 4th August, 1992, 16th September 1993 and 17th March 1995. In particular the letter dated 16th December 1991 states in part;

“We have updated you regarding the subdivision of our property which we offered as our additional security. You are aware it was intention to sell a portion of this property once the subdivision is approved by Commissioner of Land and use the proceeds to offset part of this loan or clear it altogether, if possible. We confirm that action has been taken and now subject to lay out of roads and water, the approval has been given to go ahead with this exercise. We attach documentary proof of this. Likewise we have been in the process of subdividing our property situated along Baden Power Road. We attach documentary evidence showing that the matter is receiving the necessary attention and approval of the Commissioner of Land is expected any time now. With this effort we have been assured that the value of this security which is currently undervalued will go up. We therefore need a little more time to resolve this matter. However our intentions have never been anything than commitment to pay off our loan outstanding”. (At that

time the company had an overdraft of Kshs.691,447/= and a loan outstanding of Kshs.2,062,000/= in its books of accounts with the bank).

In the letter dated 4th August 1992, the plaintiff stated that real effort was being made with regard to the commercial plots at Langata so as to sell and generate income to settle the outstanding loan and to enable the company to operate on a more profitable and liquid state. The plaintiffs also stated that no effort was being spared to ensure the sale goes through as soon as possible since the subdivision was in the hands of the Commissioner of Lands for registration and issuance of respective title deeds. They also informed the bank that they had approached a real estate agent in order to identify possible purchasers of the said properties.

In the letter dated 16th September 1993, the plaintiffs reiterated its commitment to repay the liabilities with no reservation and conditions attached. The letter reads in part;

“The point which we wish to make is that sustenance of capacity is surely the best way of ensuring that one can keep up with the ever increasing interest charges. In all the six million which we owe is something Mount Kenya Agro-Industries Limited can easily repay given an adequate working capital facility and suitable time frame within which to liquidate. It is our view imperative to remain operational at reasonable capacity and not to close down and in this regard we have outstanding orders which we are yet to service and which are substantial.

Given that we have made strenuous effort in ensuring that the facility is adequately secured including by pledging Directors and family personal properties we feel that we must request the bank to view our two requests for a working capital facility and reasonable time frame to liquidate the position sympathetically particularly bearing in mind that the asset we have at Kiganjo is that more previous in current value terms and more importantly that in itself the installed capacity at factory has a great potential for revenue and profit generation once the working capital base is in place. This is the message we would kindly request you to transmit to your controlling office in the headquarters and we look forward to your favorable consideration.”

In another letter dated 7th March 1994 and written by **Mr. Mathenge Ichangi** the company stated as follows;

“Arising therefrom is that the company would be able to service the bank loan of Shs 5.5 million over 72 months which would be a reasonable timeframe and one which would enable the company to build up capacity utilization without an undue debt servicing burden. In arriving at the loan amount we have assumed the company’s total indebtedness to the bank is Shs 6.7 million as of March 1 1994. This will be reduced by proceeds of Shs 1.2 million arising from completion of sale of the first plot of Directors personal property which is now at the final stage. We also propose to proceed along the agreed basis that we shall continue to reduce the company’s indebtedness with proceeds from sale of the other plots as we too are would like to get out of the borrowing soonest in view of its relative cost. An interest rate of 33% has been applied to the reschedule amount.”

In another letter dated 15th March 1995 the bank informed the directors of the plaintiff that the amount outstanding was Kshs.9,763,438/= on the loan account of the 1st plaintiff. In reply to that letter, the 2nd plaintiff on behalf of the 1st plaintiff wrote a letter dated 17th March 1995 acknowledging the debt and confirming that the company was making effort to repay the loan in full. The plaintiffs also asked for waiver of interest which had accrued between 1992 and 1994 since the company was facing financial crisis, during that period and was unable to meet its financial obligations towards the bank.

The issue of denying liability and the debt arose sometimes in 1996 when the bank advertised the suit properties for sale because the plaintiffs were unable or were unwilling to settle the debt. That is when **Dr. Ichangi** (PW2) came into the picture with the new position completely different from the one that was taken by the company and other directors. It is at that time that he demanded information on just about everything that related to the account of the company may be in order to defeat or derail the

interests and the rights of the bank which had accrued and which was admitted by the company and other directors.

Dr. Ichangi wrote various letters to Nyeri branch and the headquarters of the bank. But nevertheless he continued asking limitless questions and information in a matter that has already been settled by the other directors in terms of the amount and other necessary information concerning the debt. He did not say where he was at the time when the company and the persons in charge were admitting liability and making efforts to settle the debt which had accrued on the books of the bank.

In my assessment the new position that was adopted by the 1st plaintiff, after PW2 came into the picture was an afterthought and in an attempt to deny a liability which it had clearly admitted on broad daylight. The law is very clear that a party cannot be allowed to approbate and reprobate on an issue that is in dispute simply because he wants to create or adopt a new position in order to defeat the rights of opposite party.

In conclusion, it is my position that the persons in charge or behind the operation, control, management and daily running of the 1st plaintiff were not persons of mean and obscure education background but they were persons endowed with excellent educational background and experience coupled with adequate business skills and knowledge for them to appreciate the implications and consequence of appending their signatures on the security documents. There is ample evidence showing that they wrote various letters admitting the debt and making undertakings to repay the debt.

Perhaps it can be said that the numerous letters written by the 1st plaintiff and its directors is a classic example of a party running away from his own house when it has caught fire and when the fire had been lit by the same individuals. In this case the plaintiff wants to disown the facilities that was advanced by the bank and which resulted in economical gain to them in the running of their business. The question is can a court of equity and justice allow such a situation to prevail. As stated the fuel and fire was provided by the parties asking this court for water to extinguish their house. I do not think that is possible and a court of equity and justice cannot come to the aid of a person with dirty and soiled hands. That is the position which prevails in the case that was presented by the plaintiffs in this case. I make a determination that the case of the plaintiffs has no merit and it is hereby dismissed.

The second issue is whether the defendant has proved its counterclaim against the plaintiffs. From the correspondences that were exchanged between the plaintiffs and the bank, it is clear that there is a debt which is outstanding and which was admitted by the plaintiffs. The evidence of DW1 and DW3 clearly confirms that the plaintiffs are clearly and truly indebted to the bank. The question is the amount outstanding so as to enter judgement for the defendant against the plaintiffs. The defendant's claim is for Kshs.7,909,501.60 as per the re-amended defence and amended counterclaim which was filed in court on 18th November 2002.

There is evidence to show that as at 17th March 1995, the amount outstanding was Kshs.9,763,438.55. That is the amount in which the 2nd plaintiff wanted the bank to review to enable him to settle the liability that was owing and due against the 1st plaintiff. However, by a letter dated 18th April 1995 from the bank's advocate, the defendant demanded a sum of Kshs.10,029,207.60 being the amount due in respect of the loan/overdraft facilities granted to the 1st plaintiff at its own request full particulars within its knowledge. The said letter was also sent to each of the directors of the 1st plaintiff as guarantors and having guaranteed the debt or liability of the 1st plaintiff. By that time the account of the plaintiffs was substandard because it was not operating normally as there were no funds generated into the said account. It can be safely stated that it was dormant with no possibility of the plaintiffs repaying the said sum. That is why DW3 stated that the bank took action of stopping charge of interest in 1995 upon consolidation of account. She also contended that the only reason why the interest was recalculated and factored in this case was because the plaintiffs chose to go to court and in order to reflect the debt.

It is clear in my mind that at the time the current dispute arose the amount of the debt was not in dispute but the question was how to repay the said loan. The plaintiffs made proposals for the sale of their

properties at Nyeri and Nairobi in order to settle the debt once and for all. The sale of the said properties took over six years and I do not think that can be placed at the door steps of the plaintiffs. In that transaction the plaintiffs were represented by **M/S Kimani Kairu** advocates and the reasons for the delay was partially because of the subdivisions and lack of clients or customers to purchase the said properties. There is a letter dated 11th July 1995 from M/S **Kimani Kairu** advocate to the bank's advocate confirming the sale of one property had been conducted.

It is also the evidence of the defendant and in particular DW3 that from the sale of the plaintiff's property, the bank received Kshs.6,429,901 as at November 2000/=. It is also clear that as at the time the bank received the first payment the debt was Kshs.8,363,245.55. And the sum received was Kshs.1,140,000/=. As there is no dispute that all sale proceeds were credited into the account of the plaintiff and some of the payments were made after the current suit was filed, it is important to do justice to the respective parties so as to ensure no party takes advantage of the other. It is not true as alleged by the plaintiffs that some of the suit properties were wrongly sold because the evidence on record is that the sale was voluntarily undertaken at the instance, direction, knowledge and consent of the 2nd plaintiff as a way of settling the debt due from the bank.

The plaintiffs were represented by their own advocate though there is somewhat belatedly attempt to disown him. I make a finding that **M/S Kimani Kairu** advocate had legitimate authority or instructions to act on behalf of the plaintiffs. The said Advocate executed the instructions given, diligently, prudently, professionally and reasonably and to the best interest of the plaintiffs. That is the reason why the plaintiffs did not make an attempt to sue them for professional negligence or did not say why they did not enjoin them as the defendants in this suit. I also make a finding that the 1st plaintiff and its directors made advances or arrangements to the bank in respect of the debt due and owing which they failed to honour. It is also my determination that they had the ability, capacity and authority to execute the security documents and other subsequent correspondences in which they admitted liability to the bank in full thereby making their assertion that they did not comprehend the implication of their actions and omissions as preposterous act which has no foundation and basis. That assertion is too rejected and the proper position is that the defendant has proved its case against the plaintiffs that the bank advanced money which was utilized but which the plaintiffs failed to repay.

The issue is the amount that should be repaid by the plaintiffs. At the time the interest was stopped, the amount outstanding was Kshs.9,763,438/= and at that time the process of the sale of the Langata properties was on and the purpose why the 2nd plaintiff offered his own properties for sale was in order to repay the debt in full to the defendant. No doubt the sale of the Langata properties delayed and took a period of over six years and I do not think that delay can be attributed to the plaintiffs. In my assessment they had intention at the time they offered the Langata properties to redeem the debt. In my determination therefore the correct sum that should be paid by the plaintiffs is Kshs.9,763,438/= less the amount received or generated from the proceeds of the Langata properties which is Kshs.6,429,901/= which gives a sum of Kshs.3,300,000/= as the amount due and owing in this matter to the bank. It is my decision therefore, that the plaintiffs have a legitimate right to expect that the properties offered as security would have been sold within a short time in order to repay the loan when it was owing and due. I therefore enter judgement for the defendant against the plaintiffs jointly and severally in the sum of Kshs.3.3 million plus costs and interest at court rates from the date of this judgement until payment in full.

Lastly may I, express a word of gratitude to **Mr. Nabutete** learned counsel for the Plaintiffs and **Mr. Njagi** learned counsel for the defendant for their industry and research. I also express a word of thanks and gratitude to the parties herein for their patience in the time this judgement took to be delivered. I regret the delay and apologize to the parties for any inconveniences occasioned.

Order:

- (1) The case of the plaintiffs is dismissed with no orders as to costs.**
- (2) I enter judgement for the defendant against the plaintiffs jointly and severally for the sum of**

Kshs.3.3 million plus costs and interests at court rates with effect from the delivery of this judgement till payment in full.

(3) Orders accordingly.

Dated, signed and delivered at Nairobi this 5th day of November, 2009.

M. WARSAME

JUDGE