



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
CIVIL SUIT. NO. E412 OF 2020

BETWEEN

SALOM ENTERPRISES
PLAINTIFF/DEFENDANT

VERSUS

SHARED INTEREST SOCIETY LTD 1ST
DEFENDANT/PLAINTIFF
ISMON INVESTMENT LTD 2ND
DEFENDANT/PLAINTIFF

TITLE BY WAY OF COUNTERCLAIM

SHARED INTEREST SOCIETY LIMITED
PLAINTIFF

VERSUS

SALOM ENTERPRISES LIMITED 1ST
DEFENDANT
PAULINE NKOROI MWAINI 2ND
DEFENDANT
JOSEPH NTOMBURA MWAINI 3RD
DEFENDANT

JUDGMENT

Introduction and Background

1. By a plaint dated 15th October 2020, the plaintiff (SALOM) contends that in or about the year 2009 it

applied for and was granted by the 1st defendant (SISL), a financial commercial export credit facility of USD 150,000, which was subsequently increased to USD 250,000 in March 2012. The facility carried interest at 4% above the shared interest rate, initially 7.75%, thereby yielding an effective rate of 11.5%. SALOM avers that it has struggled to make repayments due to prevailing economic difficulties and the ill health of its director, Pauline Ntombura, who has been bedridden both in Kenya and the United Kingdom.

- 2.** SALOM further alleges that SISL, in breach of the loan terms, unlawfully increased interest charges and failed to render proper accounts despite repeated requests. It is also contended that SISL wrongfully and maliciously instructed the 2nd defendant, a debt collector, to harass and attach property belonging to SALOM's director.
- 3.** Accordingly, SALOM, prayed for orders that proper accounts of the facility be taken, that an injunction do issue restraining the defendants from attaching SALOM's or its director's goods, for costs of the suit, and for interest at court rates.

4. SISL defended the suit by way of a statement of defence dated 10th November 2020 and raised a counterclaim. It acknowledged the Loan Agreements with SALOM entered into on 6th October 2009 for a credit facility of USD 150,000, which was increased on 1st October 2012, when SALOM applied for additional facilities comprising an export credit of USD 100,000 and a Stock Facility of USD 150,000. SISL contends that under the agreement, interest on the export credit was to be charged at 3% above the shared interest prime rate of 6.50%, amounting to 9.50%, while the stock facility was to attract interest at 10.50%.
5. SISL further contended that by a guarantee issued in October 2014, SISL and the 2nd and 3rd defendants (PAULINE and JOSEPH respectively) agreed that JOSEPH would guarantee repayment of all monies borrowed and outstanding from SALOM, as well as discharge SALOM's obligations under the Loan Agreement. The repayment terms required full settlement of the export credit within 60 days of shipment and repayment of the stock facility within 12 months of drawdown. In the event of

breach, SISL reserved the right to demand immediate repayment of the outstanding facility together with accrued interest and charges.

- 6.** SISL avers that SALOM accepted the terms and signed the loan documents, and after receiving the first stock facility of USD 150,000, began partial repayments. This prompted SISL to enhance the loan to USD 250,000. However, upon enhancement, SALOM defaulted on its obligations and ceased making repayments. Despite numerous reminders, the loan continued to accrue interest. Out of goodwill, SISL adjusted repayment terms in July 2016 to allow monthly payments of USD 2,000, and later granted further leniency in November 2016 by waiving monthly payments for three months. Nevertheless, SALOM failed to honor these arrangements and made no payments in 2017.
- 7.** SISL therefore claims judgment against SALOM, PAULINE and JOSEPH, jointly and severally, for USD 360,717.54 being the outstanding loan and accrued interest, further interest at the contractual rate of 10.50% until hearing and determination of

the suit, interest at court rates until payment in full, and costs of the suit.

8. SALOM and its directors did not file any defence to the counterclaim, nor did they submit any arguments in respect of the main suit or the counterclaim. As a result, the counterclaim stands technically uncontested. Nevertheless, this Court bears the responsibility to scrutinize and assess the credibility of the claims advanced by SISL. The hearing proceeded on 9th December 2024 and after the Court had satisfied itself that SALOM had been served with the hearing date and did not appear, went ahead to dismiss their claim under **Order 12 Rule 3(1) of the Civil Procedure Rules**.
9. On its part, SITAM called one witness, **Immaculate Ochiero** who produced its documents and adopted her witness statement.

Analysis and Determination

10. In determining whether SISL is entitled to the prayers sought, I am guided by the Court of Appeal's pronouncement in **Mumbi M'Nabea V David M. Wachira, [2016] eKLR**. In that case,

the Court emphasized the threshold required in civil proceedings and stated:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. ...”

- 11.** This principle was further elaborated in **William Kabogo Gitau V George Thuo & 2 Others, [2010] 1 KLE 526** where the Court elaborated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more

likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

- 12.** Thus, even where a counterclaim appears uncontested, the Court must still interrogate the evidence presented to ensure that the claimant has discharged the burden of proof to the requisite standard.
- 13.** The record shows that by an offer letter dated 29th September 2009, SISL extended an export credit facility of USD 150,000 at an interest rate of 9.50%. The said offer was accepted by SALOM through a letter dated 6th October 2009.

- 14.** Subsequently, another offer letter dated 1st October 2012 was issued, extending an export credit facility of USD 100,000 at an interest rate of 9.50% and a stock facility loan of USD 150,000 at an interest rate of 10.50%. While there was no accompanying letter of acceptance for this latter offer, I am alive to the fact that the evidence has not been contested. SISL also presented minutes of a directors' meeting held on 4th March 2012, at which the directors resolved to increase their credit facility from USD 150,000 to USD 250,000. The minutes were signed by both PAULINE and JOSEPH. In the absence of any evidence to the contrary, I am inclined to accept the said minutes as genuine.
- 15.** These documents are proof, on a balance of probabilities, that SALOM was extended the facilities by SISL. What is further clear from the documentation presented before this Court is that SALOM defaulted in its repayments, that several reminders were issued, and that the facilities were restructured in an effort to accommodate SALOM's financial position.

16. SISL's averment that the facilities were secured by a guarantee issued by Pauline and Joseph is supported by the guarantee signed and witnessed on 29th October 2014. The guarantee expressly bound the guarantors to discharge SALOM's obligations under the loan agreements. The loan statements running from July 2016 up to October 2020 are attached and remain wholly uncontroverted. They provide a detailed account of the indebtedness, the accrual of interest, and the outstanding balances. SALOM did not provide any evidence to counter the claim put forward by SISL regarding the amount due and outstanding, nor did it challenge the authenticity or accuracy of the statements.

17. On the totality of the evidence before me, I am satisfied that SISL has discharged its burden of proof on a balance of probabilities. SALOM's failure to rebut this evidence leaves the counterclaim substantively unchallenged.

Disposition

18. Accordingly, the counterclaim filed by SALOM ENTERPRISES LIMITED is successful. Judgment is

hereby entered against the 1st, 2nd and 3rd defendants in the counterclaim, individually, jointly and/or severally, for USD 360,717.54, being the outstanding loan amount and accrued interest as at 12th October 2020. The decretal sum shall further attract interest at court rates from 13th October 2020 until payment in full. The plaintiff in the counterclaim shall also have the costs of the counterclaim and of the main suit.

**DATED, SIGNED AND DELIVERED IN NAIROBI
THIS 13TH DAY OF FEBRUARY 2026.**

**F. MUGAMBI
JUDGE**

Delivered in presence of:

Mr Ogendo for the defendants

Court Assistant: Lillian