

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
COMMERCIAL SUIT NO. E234 OF 2023

KCB BANK KENYA LIMITED.....
PLAINTIFF

VERSUS

YES WE TALK LIMITED..... 1ST
DEFENDANT

GULED NUR ABDI.....2ND
DEFENDANT

JUDGMENT

1. This Judgement is in respect of the Plaintiff’s claim against the Defendant. It is an undefended claim.

Background Facts

2. The Plaintiff filed the Amended Plaint dated 16th August 2024. It stated that through an offer letter dated 16th March 2022, the Plaintiff offered to provide the Defendant with a Safaricom dealership financing facility of Kshs.30,000,000. This was for the purpose of purchasing Safaricom Limited products, which offer the 1st Defendant accepted on the same day.

3. The parties therefore entered into a Master Murabaha Financing Agreement for the facility of KShs.30,000,000. It was repayable in 60 equal monthly installments of Kshs.682, 593, which was payment of both principal and profit.
4. The 1st Defendant has been in default of paying the monthly installments since 31st March 2022 and has fallen into arrears. The arrears keep on accumulating with time. The arrears standing at Kshs.5, 841, 279.35 and the total outstanding balance being Kshs.39, 970, 929.35 as at 26th January 2023.
5. Pursuant to the Deed of Guarantee and indemnity dated 17th March 2022, the 2nd Defendant guaranteed the Plaintiff that in the case of the 1st Defendant's default should be found liable pursuant to the Deed of indemnity.
6. The Plaintiff prayed for judgment against the Defendants as follows;
 - a) *A declaration that the 1st Defendants have breached the Master Murabaha Financing Agreement dated 17th March 2022*

- b) A declaration that the 2nd Defendant is liable for the 1st Defendant's breach of the Master Murabaha Financing Agreement as per his undertaking pursuant to the Deed of Guarantee and Indemnity.*
 - c) The outstanding balance of the Agreement of Kshs.39, 970, 929.35 as at 26th January 2023.*
 - d) Loss of profit in the sum of kshs.10, 955, 580.*
 - e) General damages for breach of contract.*
 - f) Default damages pursuant to the Agreement.*
 - g) Interest on b, c, d and e above the court rates and for such period of time as this court may deem fit to grant..*
 - h) Any such other or further relief as this court may deem appropriate.*
7. There was no response filed by any of the Defendants; hence this suit proceeded as an undefended claim.

Issues for determination

8. After considering the suit and the testimony by PW1 and the written submissions, the Court frames the following issues for determination;

- (i) *Whether the Defendants are in breach of the Agreement with the Plaintiff.*
- (ii) *Whether the Plaintiff is entitled to the orders sought.*

Analysis

9. It is noteworthy that both Defendants failed to appear and/or file a defence. It followed that on 3rd April 2025, an interlocutory judgement was entered allowing prayers (b) and (c) in the Amended Plaintiff plus interest at Court rates from the date of filing suit until the date of the judgement. Thereafter, the matter proceeded to a formal proof hearing on 9th July 2025, where PW1- **Mr. Martin Othigo Omondi** testified, and the Plaintiff's case was closed.

(i) **Whether the Defendants are in breach of the Agreement with the Plaintiff.**

10. It is undisputed that the Plaintiff extended an offer of Safaricom dealership financing of Kshs. 30,000,000 to the 1st

Defendant, who accepted the terms by signing the financing offer letter dated 16th March 2022. On the same day, the parties executed a Master Murabaha Financing Agreement, thereby formalizing their contractual relationship. Subsequently, on 17th March 2022, the 2nd Defendant executed a Deed of Guarantee and Indemnity, undertaking to compensate the Plaintiff in the event of default by the 1st Defendant.

11. Consequently, a binding contractual relationship was duly established between the Plaintiff and the Defendants through the financing agreement and the accompanying guarantee securing the facility.
12. The Court has perused the Master Murabaha Financing Agreement. The conditions attaching to the Agreement are set out in Clause No. 6. The conditions are self-explanatory and are not denied by the Defendant.
13. The default arose when the 1st Defendant failed to pay the monthly instalments of Kshs. 6832,593.00 as agreed. This act of default is said to have existed since 31/03/2022.

14. Having defaulted in payment, the 2nd Defendant was called upon to make good his guarantee and indemnity. He failed to do so.

15. In **Francis H Shiaba v Morris M Isiye 2020 KEELC**

3008 (KLR) the Court defined breach of contract as follows;

“As to whether or not the Defendant breached the agreement for sale, Black’s Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as;

“a violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

*In the case of **Shah -vs- Guilders International Bank Ltd (2003) KLR** the Court in considering the terms of the parties contract stated-*

“The parties executed the same willingly and they are therefore bound by it.”

16. The Court is persuaded that indeed the 1st Defendant is in breach of that agreement by failure to make the monthly instalments.

(ii) Whether the Plaintiff is entitled to the orders sought.

17. Having been satisfied that the Plaintiff has established that there was a binding contract between the parties, and that there was default, is the Plaintiff therefore entitled to the prayers sought?

18. It was the Plaintiff's case that the failure, neglect, and refusal by the 1st Defendant to pay each installment of the contract price on the due payment date is indeed in breach of its obligations under the Agreement. That the 2nd

Defendant should equally be found liable pursuant to **Clause 4** of the Deed of Guarantee and Indemnity.

19. In addition, the Plaintiff submitted that it has suffered immeasurable loss of business and profit when the Defendants breached the Agreement and failed to re-pay the loan. It therefore prayed that the prayer for general damages for breach of contract be granted.

20. As a general rule, general damages are not recoverable in cases of alleged breach of contract. In the case of **Kenya Women Microfinance Ltd vs Martha Wangari Kamau (2021) eKLR**, the Court held that;

“The law is that general damages are not awardable for breach of contract or breach of contractual obligations. A contract for performance of specific duties or obligations, if breached, would lead to compensation for the specific loss suffered as a result of the breach, but not general damages.”

21. As to the claim for default damages, the Plaintiff submits as follows;

“The Plaintiff has proved its entitlement to default damages as provided for under Clause 6.6 of its

Agreement with the 1st Defendant (PEXh2). Further by agreement of the parties, the default damages were mutually recognized as special damages courtesy of Clauses 6.7.2 and 6.7.4 of PEXh2 thus:

“6.7.2 Such liquidated damages are not by way of a fine or penalty and will constitute actual loss suffered by the Bank as a consequence of delinquent payments by the Customer;

...

6.7.4 The liquidated damages provided herein are without prejudice to other remedies that may be available to the Bank.”

22. If default damages were a special damages claim, then the same was not specifically pleaded. There is no evidence before the Court to show the actually amount claimed under this head of damages. The danger herein is that the Court has to be wary of granting a liquidated claim and then awarding default damages that covers costs, expenses, loss of profits and costs of default covered under the liquidated claim. The Court on the basis of the pleadings, evidence

adduced and submissions filed is not persuaded that the claim is allowable.

23. This claim including the claim for default damages fails for the reason that this is a case of breach of contract where the nature of the general damages is not recoverable.

24. However, the Court did allow the liquidated prayer for loss of profit in the sum of kshs.10, 955, 580 as was stipulated in the Letter of Offer.

25. The Court notes that default judgement was entered for the liquidated amounts plus interest. The prayers due for consideration in the formal proof are prayers (a), (i), (d), (e), (f) and (g) of the Amended Plaintiff.

26. The Plaintiff pleaded that interest be awarded at Court rates from the date of filing the suit, as prayed for in the Amended plaintiff.

27. Given the foregoing, and having considered the pleadings, evidence, and submissions of Counsel, the Court finds that the Plaintiff has proved its case on a balance of probabilities.

28. Accordingly, judgment is entered in favour of the Plaintiff against the Defendants jointly and severally on the Declarations sought.

29. As to costs, the same are awarded to the Plaintiff at the lower scale, since the suit was undefended.

Determination

30. Judgment be is hereby entered in favour of the Plaintiff as against the Defendants jointly and severally as follows;

- a) *A declaration that the 1st Defendant has breached the Master Murabaha Financing Agreement dated 17th March 2022.*
- b) *A declaration that the 2nd Defendant is liable for the 1st Defendant's breach of the Master Murabaha Financing Agreement as per his undertaking pursuant to the Deed of Guarantee and Indemnity.*
- c) *The costs of the Suit are awarded to the Plaintiff on the lower scale.*
- d) *Interest on (c) above at Court rates from the date of Judgement until payment in full.*

29. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI
THIS 27TH DAY OF APRIL, 2026.**

**NJOROGE BENJAMIN K.
JUDGE**

In the presence of:

Mr. Omondi for the Plaintiff.

N/A for the Defendants.

Mr. John Paul - Court Assistant.