



SBM Bank (Kenya) Limited v Law Africa Publisng Limited & 3 others (Environment & Land Case 118 of 2018) [2024] KEELC 13713 (KLR) (10 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 118 OF 2018
NA MATHEKA, J
DECEMBER 10, 2024**

BETWEEN

SBM BANK (KENYA) LIMITED PLAINTIFF

AND

LAW AFRICA PUBLISING LIMITED 1ST DEFENDANT

GITAU MAINA WAWERU 2ND DEFENDANT

KATARINA ADIKINYI JUMA 3RD DEFENDANT

MORRISON FARM LIMITED 4TH DEFENDANT

JUDGMENT

1. The Plaintiff avers that about 9th October, 2013 the Plaintiff issued a letter of offer to the 1st Defendant upon its request for a term loan facility and it was an express term of the contract that the facility would be repaid in full by the 1st Defendant within a period of Sixty (60) months with the first installment falling due Thirty (30) days after disbursement of the facility. It was a further term of the contract that the loan was disbursed
2. Pursuant to the terms of the contract Gitau Maina Waweru, Katarina Adikinyi Juma (2nd Defendant) and Morrison Farm Limited (3rd Defendant) duly executed guarantees in favor of the Plaintiff. In blatant disregard to the express terms of the letter of offer the 3rd Defendant failed neglected and/or refused to execute the charge instrument over all that property known as Title Number Subdivision Number/4891 (C.R No. 18443) Section I Mainland North Shanzu Mombasa County. Contrary to the express terms of the contract the 1st Defendant has failed, refused and/or neglected to comply with its obligation to make repayments as set out in the contract thereby resulting in the account being in arrears. The 4th Defendant as the registered owner of all that property known as Title Number Subdivision Number/4891 (C.R No. 18443) Section 1 Mainland North Shanzu Mombasa County duly deposited the title of the suit property with the Plaintiff.



3. The plaintiff prays for judgement in the following terms;
 - i. A permanent injunction restraining the 4th Defendant from selling, transferring or in any way whatsoever disposing of all that property known as Title Number Subdivision Number/ 4891 (C.R No. 18443) Section 1 Mainland North Shanzu Mombasa County.
 - ii. An order permitting the plaintiff to sale all that property known as Title Number Subdivision Number /4891 (C.R No 18443) Section 1 Mainland North Shanzu Mombasa County to recover the outstanding loan amount together with all interest accrued.
 - iii. An order against the Defendants jointly and severally to settle any outstanding amount that remains outstanding upon the sale of the property known as Title Number Sub-Division Number/4891 (C.R No 18443) Section 1 Mainland North Shanzu Mombasa County as prayed for in (a) above.
 - iv. Costs of this suit
4. This court has considered the evidence and the submissions therein. The Defendants were served but failed to attend court during the hearing or file any evidence. PW1, Peter Kimani Chege the Recovery Manager of the Plaintiff Bank gave testimony of how the 1st Defendant was advanced the loan on the strength of various securities to wit; First legal charge over all that property Known as Title Number Subdivision Number/4891 (C.R No. 18443) Section 1 Main land North Shanzu Mombasa County in the names of Morrison Farm Limited (the 4th Defendant); Personal Guarantee and Indemnity from the Directors of the Defendant Company namely Gitau Maina Waweru and Katarina Adikinyi Juma (3rd Defendant) for the sum of Kshs. 26,232, 168/= (Kenya Shillings Twenty-Six Million Two Hundred and Thirty Thousand and Sixty-Eight). Corporate Guarantee and indemnity from Morrison Farm Limited (4th Defendant) for the sum of Kshs, 26,232, 168/= (Kenya Shillings Twenty Six Million Two Hundred and Thirty Two Thousand One Hundred and Sixty Eight). The Defendants executed all the documents save for the charge on the property Known as Title Number Subdivision Number/4891 (C.R No. 18443) Section 1 Main land North Shanzu Mombasa County in the names of Morrison Farm Limited hence this suit.
5. The Law of Guarantees by Geraldine Andrews & Richard Millet 2nd Edition, at page 156 states as follows;

“A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependant upon the default of the principal and which does not arise until that point.”
6. In the context of the above text, I find that the plaintiff’s claim against the Guarantors is well-founded. The Deed of Guarantee spells out the obligations of the guarantors. In the circumstances of this case, I find that the 2nd and 3rd Defendants personally indebted to the Plaintiff for the amount recoverable from the guarantee.
7. I find the liability of the guarantors was jointly and severally which means that the Plaintiff is at liberty to elect to recover the whole amount from any of the Defendants. The same position stated in the case



of Republic vs PS in Charge of Internal Security exparte Joshua Paul (2013) eKLR. where it was held as follows;

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.”

8. The guarantees were signed by the parties who are expected to have understood its contents and details before appending their signatures. It is trite that parties are bound by their signatures. In *Mrao Ltd vs First American Bank of Kenya Limited & 2 Others* (2003) eKLR Kwach, JA (as he then was) held that;

“...it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters...”

9. Be that as it may, it is the Plaintiff's case that the charge instrument was never signed by the 4th Defendant. Section 3(3) of the [Law of Contract Act](#) provides;

“No suit shall be brought upon a contract for the disposition of an interest in land unless: -

- a)
 - i)
 - ii) is signed by all the parties thereto; and
- b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

10. It is not doubted that there is no charge instrument as the same was not executed by the Defendants.
11. I have carefully perused the documents adduced in evidence. The memorandum of acceptance of the offer of the said loan facility was signed by the Defendants. The Defendants executed the Personal Guarantee and Indemnity from the Directors of the Defendant Company namely Gitau Maina Waweru and Katarina Adikinyi Juma (3rd Defendant) for the sum of Kshs. 26,232, 168/= (Kenya Shillings Twenty-Six Million Two Hundred and Thirty Thousand and Sixty-Eight). They executed the Corporate Guarantee and indemnity from Morrison Farm Limited (4th Defendant) for the sum of Kshs, 26,232, 168/= (Kenya Shillings Twenty Six Million Two Hundred and Thirty Two Thousand One Hundred and Sixty Eight). However, the first legal charge over all that property Known as Title Number Subdivision Number/4891 (C.R No. 18443) Section 1 Main land North Shanzu Mombasa County in the names of Morrison Farm Limited (the 4th Defendant) was never executed. I have perused the board resolution by the 4th Defendant on the corporate guarantee and the same is signed by Katarina Adikinyi Juma and one Victor Bros Tito Amolo who is not a party to this suit. His signature is



also not dated. The court cannot ascertain the directors of this company with the evidence provided. The guarantees and indemnity documents are also not dated. The certificate of title was produced as evidence states that the suit was transferred to the 4th Defendant and registered on the 23rd October 2023. There is no current search on record to show the current status of the said property.

12. I find that in the absence of a legally executed charge this court cannot issue the orders claimed by the Plaintiff. I find that the Plaintiff has failed to prove its case on a balance of probabilities and it is dismissed with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10TH DAY OF DECEMBER 2024.

N.A. MATHEKA

JUDGE

