



Mashin Construction Limited & another v Gulf African Bank Limited; Gulf African Bank Limited (Plaintiff to the Counterclaim); Mashin Construction Limited & 2 others (Defendant to the Counterclaim) (Commercial Case E105 of 2019) [2025] KEHC 5187 (KLR) (Commercial and Tax) (28 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E105 OF 2019
JWW MONG'ARE, J
APRIL 28, 2025**

BETWEEN

MASHIN CONSTRUCTION LIMITED 1ST PLAINTIFF

GULF AFRICAN BANK LIMITED 2ND PLAINTIFF

AND

GULF AFRICAN BANK LIMITED DEFENDANT

AND

GULF AFRICAN BANK LIMITED PLAINTIFF TO THE COUNTERCLAIM

AND

MASHIN CONSTRUCTION LIMITED DEFENDANT TO THE COUNTERCLAIM

ABDINASIR MOHAMMED SHEIKH DEFENDANT TO THE COUNTERCLAIM

MOHAMED SHEIKH NUR DEFENDANT TO THE COUNTERCLAIM

JUDGMENT

1. It is common ground that at all material times, the Plaintiff in the main suit (“the Company”) was a customer of the Defendant (“the Bank”) in the main suit whereas the 2nd and 3rd Defendants in the counterclaim (“Abdinasir” and “Mohamed”), were directors of the Company. Through a Letter of Offer for construction finance dated 10th July 2015, which was later varied on 13th August 2015, 17th



November, 2015 and 18th December 2015, the Bank offered to advance the Company a Diminishing Musharakah Construction Finance Facility loan to the maximum aggregate principal amount of Kshs.250,000,000.00/=. This facility was to be used to construct a building on a property known as LR. No. 209/3028, Nairobi.

2. The facility was secured by inter alia, a charge over the Company's property LR. No. 330/1354, Lavington Nairobi ("the suit property") and the Directors' Guarantees. Among the conditions of the offer was that the Company would repay the loan over a period of 24 months with a grace moratorium period of 18 months. Over time, the Company's account fell into arrears prompting the Bank to issue a statutory notice on 23rd October 2018 through which it demanded the payment of the sum of Kshs.313,278,728.20/= and a further Statutory Notice dated 12th February 2019 where the Bank demanded Kshs.327,361,852.21/=. This precipitated the filing of the instant suit where it sought to temporarily injunct the Bank from exercising its statutory right of sale over the suit property or that in the alternative, the company be given more time to rectify the default and redeem the suit property. The court(Okwany J.,) in its ruling of 4th July 2019 declined to issue the injunctive order but acceded to the request for more time by the Company to rectify the default and granted it a period of 3 months to comply and pay the full amount claimed by the Bank failure of which the Bank was at liberty to proceed with the intended sale of the suit property in order to recover the full sum due to it.
3. Ultimately, the matter was set down for hearing where ABDINASIR testified on behalf Company (PW 1) and the Company also called an Expert Witness, ABDULAHI HASHIM BIN SHAYKH ABUBAKAR (PW 2). PW 1 relied on his witness statement dated 26th April 2019 and the Bundle of Documents of the same date (PExhibit 1-7). The Bundle contains a copy of the Offer Letters dated 10th July 2015 and varied on 17th November 2015, a copy of the Charge dated 8th December 2017, copies of the statutory demand notices dated 23rd October 2018 and 12th February 2019, a copy of the redemption notice from the Bank's auctioneers dated 5th April 2019 and a copy of the notification of sale of the same date. PW 2 relied on his witness statement dated 22nd March 2024.
4. On its part, the Bank called its Legal Officer, LAWI SATO (DW 1) who relied on his witness statement dated 1st December 2020 and produced the Bank's Bundle of Documents dated 11th June 2019(DExhibit 1-2) containing a copy of the Master Musharakah Agreement and a copy of the valuation report of the suit property. He also produced the Bundle of Documents dated 5th May 2021(PExhibit 3-6) containing copies of the Letters of Offer, copy of the Guarantee and Indemnity dated 3rd August 2015, copy of the Company's Statement of Accounts and copy of the Demand Letter dated 12th February 2019. The Bank also called Prof. AHSENE LAHSASNA, an Expert Witness (DW 2) who relied on his witness statement dated 7th July 2024.
5. At the close of the hearing, the parties were directed to file written submissions which are on record and which together with the pleadings and evidence, I shall be making relevant references to in my analysis and determination below.

Analysis and Determination

6. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act*(Chapter 80 of the Laws of Kenya) which provides that "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is said that he burden of



proof lies on that person”. In *Miller .V. Minister Of Pensions* 1947 ALL E.R 372, Lord Denning aptly summarised the application of the standard in the following terms:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

7. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited* [2019] KECA 1058 (KLR) simply put it that ‘Courts will make a finding based on which party’s version of the story is more believable.’ The court is being called to determine the Company’s suit as set out in the Plaintiff dated 26th April 2019 and the Bank’s counterclaim dated 24th February 2020. I propose to first deal with the Company’s suit where from its submissions, it urges the court to resolve the following issues:-
- i. Whether the Facility Agreement as variously varied is an Islamic Diminishing Musharakah.
 - ii. Whether Islamic Shariah Law is the applicable law in the instant case.
 - iii. Whether, in the light of Shariah fiscal principles and law, the Facility Agreement is legal.
 - iv. Whether the Ban, in adopting financially punitive measures, and in attempting to redeem its investment in the venture breached the terms of the Facility Agreement and the Charge Agreement.

Whether the Facility Agreement as variously varied is an Islamic Diminishing Musharakah

8. It is not in dispute that the Company applied for a Diminishing Musharaka facility from the Bank and that the parties had for all intents and purposes sought to be bound by an agreement covering such a facility. As a matter of fact, the parties admittedly executed the Letter of Offer dated 10th July 2015 that was varied on various dates and defines a “Musharakah” at Clause 1 as “...the arrangement between the Bank and the Customer pursuant to which the Bank will purchase from the Customer an undivided beneficial ownership interest in the Musharakah Asset pursuant to a Purchase Agreement for the purpose of creating a “Shirkat ul Milk” (beneficial ownership as proprietors in common in specified shares) in the Musharakah Assets as provided for under and on the terms contained in the Master and Purchase Agreement with the customer having the right to exclusively use and enjoy and the exploit the Musharakah Assets’. Whereas the Company contends that this facility was an “Islamic Diminishing Musharakah”, the Letters of Offer indicate that the facility type was a “Diminishing Musharaka Construction Facility”. Further, whereas the Company submits that this facility was governed by Islamic Shariah Law, my reading of the Facility Agreements does not explicitly import this law to the parties’ arrangement.
9. I am in agreement with the Bank that as per Clause 6.1 of the Master Musharakah Agreement executed by the parties, “...the Transaction Documents are governed by and shall be construed in accordance with the laws of the Republic of Kenya” and that the Charge also provided at Clause 17.1 that the same “...shall be governed by and construed in accordance with the laws of the Republic of Kenya”. The evidence of the two Expert Witnesses was also compelling as to the type of facility advanced to the Company. Both of them stated that what was advanced to the Company was a Diminishing Musharakah but there was nowhere they indicated that the facility was to be governed by Islamic



Shariah Law. While the Bank states that it is Shariah Compliant and while I agree that the facility was issued to the Company under the precepts of Shariah Compliant Banking, I find that this should not be conflated and confused to mean that the facility was subject to Islamic Shariah Law. To my understanding, being Shariah Complaint means that the Bank does not charge interest and that as per PW 2, default damages or penalties charged by the Bank should be remitted for charitable purposes as approved by the Shariah Supervisory Board of the Bank.

10. PW 1 admitted that there is nowhere the Bank charged interest on the facility and that there is nowhere on any entry in the Bank's statement labelled "Interest". There was also no evidence that the default penalties charged by the Bank for the Company's default were not used for charitable purposes. The Company cannot therefore claim that the Bank has not been shariah compliant. In any case, as per Clause 16.1 of the Charge, the Company, PW 1 and Mohamed were satisfied that the facility agreement was shariah compliant and they expressly waived their right claim that the facility was not shariah compliant.
11. It is for the above reasons that I find that the parties entered into a diminishing Musharakah Construction Financing Facility that was shariah compliant but that the same was not governed by Islamic Shariah Law as contended by the Company but the national laws of the country. Further, there is no evidence that the Bank levied interest on the facility as claimed by the Company. As per the facility, the Bank was entitled to charge profits at a rate agreed by the parties in the facility agreements and further, it was entitled to charge default damages/penalties in case of default by the Company. I therefore do not find any evidence of illegality of the financing agreements or the profits and penalties charged and/or levied by the Bank as the same was provided for in the agreements and were acceded to by the Company. These findings collapse all the other issues for determination in the suit as the legs upon which the Company sought to sustain its suit has now collapsed. The Company's suit stands dismissed.
12. Turning to the Bank's counterclaim, it seeks to recover the sum of Kshs.327,361,852.21/= which it claims remains unpaid to date. As stated in the court's ruling of 4th July 2019, the Company is admittedly in debt to the Bank. Although it challenged the amount claimed by the Bank, PW 1 admitted that he did not proffer any evidence as to the amount owed to the Bank. The bank produced the Company's statements of accounts showing that as at 12th February 2019, the Company was indebted to the Bank in the sum of Kshs.327,361,852.21/=. It should not be lost that section 176 of the *Evidence Act* creates a presumption in favour of the Bank's entries in its statements of accounts and since the Company, ABDINASIR and MOHAMED have failed to rightly challenge the entries therein, it follows that the statements of account issued by the Bank are the true reflection of the Company's indebtedness. I therefore find that the Bank has demonstrated on a balance of probabilities that the Company owes it Kshs.327,361,852.21/=. As ABDINASIR and MOHAMMED are guarantors of the Company, having admittedly executed the guarantees dated 3rd August 2015, they are equally liable to pay the Bank all the sums owed to it. The Bank's counterclaim therefore has merit and is allowed.

Conclusion and Disposition

13. In the upshot, I now make the following final orders:-
 - a. The Plaintiff's suit as per the Plaint dated 26th April 2019 is dismissed.
 - b. The Defendant's counterclaim dated 24th February 2020 is allowed.
 - c. Judgment be and is hereby entered for the Defendant against the Plaintiff and Defendants in the Counterclaim jointly and severally for the sum of Kshs. 327,361,852.21/=



- d. The Defendant is awarded interest on c) above at court rates from the date of judgment until payment in full.
- e. The Defendant is awarded costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Gecaga holding brief for Mr. Ogunde for the Plaintiff.
2. No appearance for the Defendant.
3. Amos - Court Assistant

