



KCB Bank Kenya Limited v Mirecarn Communications Limited & 3 others (Civil Case 456 of 2023) [2025] KEHC 7809 (KLR) (Commercial and Tax) (30 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 456 OF 2023
FG MUGAMBI, J
MAY 30, 2025**

BETWEEN

KCB BANK KENYA LIMITED PLAINTIFF

AND

MIRECARN COMMUNICATIONS LIMITED 1ST DEFENDANT

HAMEDA SULEIMAN GUDHOW 2ND DEFENDANT

TAQWEM SULEIMAN GUDOW 3RD DEFENDANT

FOSIA SULEIMAN GUDHOW 4TH DEFENDANT

JUDGMENT

Background and Introduction

1. The plaintiff, a licensed and duly incorporated banking institution (hereinafter “the Bank”), instituted this suit by way of a plaint dated 28th August 2023. The Bank seeks recovery of sums allegedly advanced to the 1st defendant, a company engaged in M-Pesa dealership (hereinafter “the Company”). The 2nd, 3rd, and 4th defendants are sued as directors of the Company and as guarantors of the Company’s obligations under Murabahah financing agreements extended by the Bank to the Company.
2. The Bank avers that it granted two financing facilities to the Company: the first for Kshs. 54,607,380/= and the second for Kshs. 4,851,936/=. The first facility was secured, inter alia, by personal guarantees and indemnities executed by each of the three directors in the amount of Kshs. 40,000,000/=. The second facility was similarly secured by additional personal guarantees and indemnities of Kshs. 4,000,000/= per director.



3. According to the Bank, it was a term of the agreements that the first facility would be repaid in monthly instalments of Kshs. 910,123/= over a period of sixty (60) months, while the second facility would be repaid in monthly instalments of Kshs. 134,776/= over thirty-six (36) months. To facilitate repayment, the Company executed an undertaking that its proceeds and commissions would be remitted through its account maintained with the Bank. The Company also created a chattel over letters of assignment to Safaricom, registered in accordance with the *Movable Property Security Rights Act*.
4. The Bank contends that although the loan was initially serviced, the account eventually fell into arrears. As of 6th June 2023, the Bank claims an outstanding balance of Kshs. 54,930,239.25 resulting from the Company's default on the two facilities. The Bank now seeks judgment against the defendants for the outstanding sum, together with interest, costs, and damages.
5. No appearance or defence was filed by any of the defendants. Interlocutory judgment was consequently entered under Order 10 Rule 4 of the Civil Procedure Rules and the suit proceeded to formal proof. The Bank filed its list of documents and written submissions dated 17th October 2024, which I have carefully considered.

Analysis and Determination

6. The legal framework governing formal proof hearings has been extensively considered in judicial decisions. The fact that a defendant has failed to enter appearance or file a defence does not relieve the plaintiff of the legal burden to prove its case. A formal proof hearing is not a mere procedural formality but a substantive adjudication requiring the plaintiff to establish its claim on a balance of probabilities. The court must be persuaded that the evidence adduced is credible, sufficient, and meets the required evidentiary threshold.
7. This principle was succinctly articulated in *Peri Formwork Scaffolding V White Lotus Projects Ltd*, [2021] eKLR, where the court held:

“In a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the court as to its truth.”
8. Similarly, in *Rosaline Mary Kahumbu V National Bank of Kenya Ltd*, [2014] eKLR, the court emphasized that:

“At a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”
9. The Court of Appeal reinforced this position in *Karugi & Another V Kabiya & 3 Others*, [1983] KLR 38, where it reaffirmed that the burden is always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. The court stated:

“The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge.”



10. The same reasoning was echoed in *Gichinga Kibutha V Caroline Nduku*, [2018] eKLR, where the court made clear that:

“It is not automatic that in instances where the evidence is not controverted the claimant shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

11. Taken together, these authorities establish a consistent judicial approach which is that a plaintiff must lead cogent and credible evidence to prove every element of the claim, even in the absence of a defence. The court’s role remains evaluative and not perfunctory. With the above in hindsight, I will now proceed to determine the following issues:

- i. Whether the Bank has proved the existence of the Murabahah facility agreements and the associated guarantees;
- ii. Whether the defendants breached their obligations under the said agreements;
- iii. Whether the Bank has proved its entitlement to the amount claimed;
- iv. Whether the Bank is entitled to the prayers sought.

The existence of the Murabahah facility agreements and the associated guarantees:

12. The Bank produced a bundle of documents including:

- a. A facility application letter dated 7th February 2022 for Kshs. 40,000,000/= (page 55);
- b. A letter of offer dated 28th February 2022 incorporating a markup of Kshs. 14,607,380/= to the facility bringing the total facility to Kshs. 54,607,380/=: payable in monthly instalments of Kshs. 910,123/= (page 1-6);
- c. A duly executed Murabahah Agreement dated 28th February 2022 for the facility of Kshs. 54,607,380/=: (pages 7-24);
- d. A Board resolution authorizing the facility of Kshs. 40,000,000/=: dated 28th February 2022 (page 47).
- e. Executed personal guarantees and indemnities dated 28th February 2022 executed by the 2nd, 3rd and 4th defendants, each limited to Kshs. 40,000,000/=: (pages 25-35).

13. These documents collectively establish the existence of the first facility and the personal guarantees securing it. As previously stated, no contrary evidence has been offered to displace this position. It is therefore my finding that the Bank has proved this point to the required standard.

14. However, regarding the second facility of Kshs. 4,851,936/=: the only document on record is a board resolution dated 13th June 2022 approving the loan (page 41). Notably absent from the record are the critical contractual instruments that would ordinarily evidence the creation of a binding financial obligation, namely, a facility letter, a duly executed loan agreement, or signed guarantees from the directors. A board resolution, while indicative of an intention to borrow, cannot, without more, constitute conclusive proof of the existence or enforceability of the facility. It merely reflects an internal corporate decision and not a bilateral agreement with enforceable obligations.

15. The Court of Appeal in *William Muthee Muthami V Bank of Baroda*, [2014] eKLR, underscored the importance of establishing the foundational elements of a contract in loan transactions. It held that a



party seeking to enforce contractual rights must demonstrate, through cogent evidence, the presence of an offer, acceptance, and consideration, which collectively form the requisite consensus ad idem. Mere assertions of indebtedness or internal approvals do not discharge this burden.

16. In the present case, the Bank has failed to produce any documentary evidence showing that the second facility was formally offered, accepted, and supported by consideration. There is no indication of agreed terms such as interest rate, repayment schedule, security, or disbursement instructions, nor any guarantees signed by the defendants in relation to this specific facility. The absence of such documentation goes to the very root of contract formation.
17. Consequently, I find that the plaintiff has failed to establish the existence of a binding contractual obligation in respect of the second Murabahah facility. The evidentiary threshold required to prove such a claim has not been met. The court is, therefore, only satisfied that the first Murabahah facility was duly contracted and is enforceable. The claim in respect of the second facility fails for want of proof.

Proof of default and outstanding sums:

18. The Bank alleges that the Company subsequently defaulted in servicing the loan, which default stood at Kshs. 54,930,239.25 as at 6th June 2023. However, this assertion is not supported by any documentary evidence, such as bank statements. In financial disputes, especially those involving liquidated claims, it is incumbent upon the lender to furnish clear, itemized documentation to demonstrate the existence, nature, and extent of the alleged indebtedness.
19. The lack of bank statements further raises an unresolved and material concern: whether the amount claimed as due includes sums from the second facility, which this Court has found was not proved. Without a breakdown or supporting account records, it is impossible to segregate what portion of the alleged debt, if any, is attributable solely to the first Murabahah facility, whose existence has been established, and what, if any, may be attributable to the unproven second facility.
20. The Court is therefore left in the dark as to whether the figure of Kshs. 54,930,239.25 is accurate, inflated, or legally enforceable. In such circumstances, the alleged breach and default must be treated as an unsubstantiated allegation. As held in *Margaret Njeri Muiruri V Bank of Baroda (K) Ltd*, [2014] eKLR, a financial institution bears the burden of proving its claim through complete and accurate records. It is not sufficient to simply allege default and demand repayment; the Court must be satisfied that the debt is clearly proved and properly quantified.
21. In the absence of such proof, this Court cannot affirm the existence or quantum of the alleged default, and any claim predicated upon it including claims against guarantors must be considered unproven.

Disposition and Final Orders

22. Accordingly, and for the reasons already stated, I make the following orders:
 - i. Judgment is entered in favour of the plaintiff against the 1st to 4th defendants on liability only in respect of the first Murabahah facility;
 - ii. The Bank shall, within 45 days from the date of delivery of this judgment file and serve on the defendants a detailed statement of account showing the disbursement, repayment history, all credits and debits so as to arrive at the balance claimed by the Bank to be outstanding on the first facility account.
 - iii. In default of compliance with order (ii) above, the defendants shall stand discharged from all claims by the Bank.



- iv. Upon compliance with this order, the matter shall be mentioned for any final orders.
- v. The Bank's claim in respect of the second facility is dismissed for want of proof.
- vi. Given that the plaintiff has only partially succeeded in its claim, the defendants shall bear half of the plaintiff's costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF MAY 2025.

F. MUGAMBI

JUDGE

