



Kcb Bank Kenya Limited v Charingcross Communication Agency & another (Civil Suit E460 of 2023) [2025] KEHC 12291 (KLR) (Civ) (27 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12291 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT E460 OF 2023

RC RUTTO, J

AUGUST 27, 2025

BETWEEN

KCB BANK KENYA LIMITED PLAINTIFF

AND

CHARINGCROSS COMMUNICATION AGENCY 1ST DEFENDANT

SHUKRI ADAN MOHAMED 2ND DEFENDANT

JUDGMENT

1. The plaintiff is a financial service provider registered under the *Banking Act* and incorporated under the *Companies Act*. The 1st defendant is a private limited liability company incorporated under the *Companies Act* with its offices registered in Kenya. The 2nd defendant is described as an adult domiciled in Kenya and a director of the 1st defendant.
2. By a plaint dated 30th August 2023, the plaintiff averred that on 25th February 2022 it entered into a Murahaba financing agreement with the 1st defendant through which the plaintiff undertook to place a Safaricom dealership facility to the 1st defendant. Under the facility, the plaintiff financed the 1st defendant's Safaricom dealership in the sum of Kshs.50,511,840.00 (Kenya shillings fifty million five hundred and eleven thousand eight hundred and forty). The facility was to be serviced in monthly installments of Kenya Shillings Eight Hundred and Forty-one Thousand Eight Hundred and sixty-four (Kshs 841,864.00/-) over a period of sixty months.
3. The plaintiff avers that the 2nd defendant executed a personal guarantee and indemnity for Kenya Shillings ThirtySeven Million (Kshs 37,000,000/-). He made an undertaking that in the event of default by the 1st defendant he would make full payment of the losses, damages and expenses of such default.



4. The facility was further secured by a letter of assignment from the 1st defendant to Safaricom undertaking that the proceeds and or commission shall be remitted through an account held by the 1st defendant with the plaintiff for the duration of the facility and a chattel over the letters of assignment to Safaricom Limited was registered in compliance with the Moveable Property Security Rights Act.
5. The plaintiff avers that it honoured and fulfilled its obligations under the Murabaha Agreement. That vide a letter dated 8th March 2023, the 1st defendant requested for a 3-month moratorium and restructuring of the facility citing financial constraints. The plaintiff acceded to this request and vide a letter dated 22nd May 2023, informed the 1st defendant to start servicing the facility in June in line with their agreement. That in spite of the above, the 1st defendant has been in breach of the agreement therefore, causing financial loss and suffering to the plaintiff.
6. The plaintiff thus seeks the following reliefs:
 - a. A declaration that the 1st defendant has breached the agreement through its failure to service the said facility under the Murahaba Agreement;
 - b. A declaration that the 2nd,^h defendant has breached the terms of the guarantee by failing to pay the entire amount owed to the plaintiff by the 1st defendant under the Murahaba Agreement despite being notified of the default by the 1st defendant for breach of the said agreement;
 - c. An order directing the defendants jointly and severally to pay to the plaintiff a sum of Kenya Shillings forty five million eight hundred and two shillings (Kshs. 45,800,002.65) being the outstanding debt under the facility issued to the defendants as at 7th July 2023;
 - d. Costs of the suit;
 - e. Interest on costs and damages from the date of filing until the date of payments in full;
7. The court was satisfied that in spite of proper service of the pleadings and summons to enter appearance the defendants, failed to enter appearance and to file their statement of defence. Consequently, an interlocutory judgment was entered in terms of prayer (c) of the plaint against those defendants. The matter then proceeded for formal proof hearing.
8. This court now has a duty to establish if the plaintiff through its evidence has established a prima facie case that warrants the grant of orders sought.
9. The plaintiff's case was supported by the testimony of Ferdinand Kalafweri PW1, the plaintiff's credit recovery manager. He adopted his witness statement dated 1st August 2023 together with the plaintiff's list and bundle of documents dated 30th August 2023. His evidence mirrored what is contained in the plaint as to the terms of the Murahaba financing agreement dated agreement dated 25th February 2022. A copy of the agreement was produced as plaintiff's exhibit 1. He also referred to the personal guarantees and indemnity executed by the 2nd defendant's directors as part of the securities produced as plaintiff's exhibit 2.
10. PW1 also adduced and relied upon: an extract of the plaintiff's minutes of the Board meeting held on 7th June 2023 in relation to the loan facility produced as plaintiff's exhibit 3; the letter of assignment from the 1st defendant to Safaricom Limited undertaking that the proceeds and/or commission be remitted in an account held by the 1st defendant with the plaintiff for the duration of the facility produced as exhibit 4; copies of demand letter from safaricom confirming the assignment of proceeds to the plaintiff exhibit 5. A copies of demand letters exhibit 5 and 10 He also referred to the request for moratorium and restructure of the facility and acceptance produced as exhibit 7 and 8 respectively; and the 1st



- defendant's board of director's resolution sanctioning security and facility was produced as plaintiff's exhibit 12, a copy of the change form for the 1st defendant bank account details exhibit 11 and the copy of the defendant undertaking dated 25th February 2022 produced as exhibit 13.
11. PW1 testified that the plaintiff honored its obligations by furnishing the facility to the 1st defendant who periodically serviced the facility until it deliberately stopped channeling its entire Safaricom dealership commission to it contrary to the facility agreement.
 12. At the close of hearing, the plaintiff filed submissions its submissions dated 4th December 2024. It submitted that the 1st defendant had failed to comply with the terms of the letter of offer and the Murahaba facility agreements which parties consensually entered into.
 13. The plaintiff sets out two issues for determination namely whether the 1st defendant has failed to comply with the terms of the letter of offer and Murabaha facility agreement and whether the loan advanced to the 1st defendant on various dated was guaranteed by the 2nd defendant and if so, whether the plaintiff is entitled to indemnity from the defendant.
 14. It was submitted that there was no dispute regarding the existence and validity of the Murabaha Facility agreements between the plaintiff and the 1st defendant. That given the contractual nature of the agreements, the parties were bound by the terms of their contract. To support this assertion the plaintiff relied on the case of *National Bank of Kenya limited v Pipeplastic Samkolit (k) Limited and Another* NRB CA Civil Appeal No 95 of 1999(2001)eKLR; *Puis Kimaiyo Langat v Co-operative Bank Kenya Limited* (2017)eKLR and *Housing Finance Co of Kenya Limited v Gilbert Kibe Njuguna*, Nairobi High Court Civil Case Number 1601 of 1999. They urged the court to find that the letter of offer, Murabaha Agreement and Personal indemnity are in the nature of contractual agreement and the parties are bound by them.
 15. They urged that the defendants were in total breach of the Murabaha agreements, since they have refused, failed and or neglected to service the aforementioned facility as and when it became due thereby occasioning untold financial loss and suffering to the plaintiff.
 16. They relied section 176 of the *Evidence Act* to urge that the statement of account provided is prima facie a true reflection of the defendants debt position. The statement indicated that the defendant loan account is in arrears with a debit balance of kshs 45,642,009.65 as at the time of instituting this suit.
 17. As to whether the loan was guaranteed by the 2nd defendant, and whether the plaintiff is entitled to indemnity it was submitted that; the 2nd defendant executed personal guarantees, committing to cover any losses incurred by the plaintiff due to the 1st defendant's default. That the guarantee provided the plaintiff with the right to seek indemnity from the guarantor should the 1st defendant fail to fulfil its repayment obligations. That the guarantee explicitly state that the defendant liability extends to all amounts due, thereby reinforcing the legal basis for the plaintiff claim against them. To support this argument reference was made to the case of *Amandari Limited & 2 others v Nic Bank Limited* (2000) eKLR.
 18. It urged that a contract of guarantee becomes enforceable once the principal debtor defaults in making payment as per the contract and the creditor has notified the guarantor of the default. Reference was made to the case of *Rose Chepkirui Mibei v Jared Mokua Nyariki & 2 Others* eKLR.
 19. Since the defendants were in breach, the plaintiff submitted that the directors were personally liable under the indemnity of guarantee and the law supports the lender's right to recover the outstanding loan by compelling the directors to pay. They urged the court to grant the reliefs sought.



Analysis and determination

20. Based on the pleadings, the plaintiff's evidence and submissions the issues that arise for determination is as set out by the plaintiff namely whether the 1st defendant has failed to comply with the terms of the letter of offer and Murabaha facility agreement and whether the loan advanced to the 1st defendant was guaranteed by the 2nd defendant and if so, whether the plaintiff is entitled to indemnity from the defendants.
21. It is not in dispute that the parties entered into a Murabaha financing agreement. The plaintiff through its witness PW1 the credit recovery manager testified to that effect and produce in evidence the agreement marked as exhibit 1. According to the agreement, the plaintiff financed the 1st defendant to purchase Safaricom products in the sum of Kshs. 50,511,840/=.
22. This Court has carefully examined the Letter of Offer and the Murabaha Agreement, which together constitute the contractual relationship between the parties. The Letter of Offer explicitly states that its terms and conditions, along with those contained in the Murabaha Agreement, must be read together. The documents bear the signatures of the duly authorized signatories of both the Plaintiff and the 1st Defendant, including the signature of the 2nd Defendant on the acceptance page. This demonstrates a clear meeting of the minds and a voluntary acceptance of the terms.
23. Further, in line with this agreement, the 2nd defendants entered into a guarantee and indemnity agreement, plaintiff exhibit 2 where liability of the guarantor was limited to the principal sum of Kshs. 37,000,000.00.
24. The above documents adduced in evidence indeed confirm that the plaintiff entered into a legally binding agreement with the 1st defendant. It is also confirmed that by a guarantee and indemnity agreement, the 2nd defendants guaranteed the facility in their personal capacity as guarantors. I therefore find that there was a legally binding contract between the plaintiff and the 1st defendant on the one part as well as the plaintiff and the 2nd defendant on the other part.
25. As to whether there was a breach by the 1st defendant this court has considered the events as presented by the Plaintiff. The agreement stipulated payments by monthly instalments and a condition precedent was that the 1st Defendant would channel its entire Safaricom dealership commissions to the Plaintiff's account. Subsequently, the 1st Defendant requested for a three-month moratorium and restructuring of the facility in March 2023, which was granted by the Plaintiff. Thus, by seeking and obtaining this temporary reprieve, the 1st defendant created a new obligation to resume payments as per the revised arrangement in June 2023.
26. The plaintiff has averred that the 1st defendant subsequently refused, failed, and/or neglected to service the facility and deliberately stopped channeling its entire Safaricom dealership commission through the account held by the plaintiff. The failure to adhere to the revised terms, is a fundamental breach of the agreement. This breach is further evidenced by the plaintiff having to issue formal demand letters on 10th January and 10th July 2023. In the absence of any defence or contradictory evidence, the Plaintiff has established a clear case of breach of contract by the 1st Defendant. The Court finds that the Plaintiff proved its case to the required standard.
27. As to the validity of the 2nd defendant's guarantee, this court notes that the guarantee and indemnity forms provided in evidence as exhibit no 2 confirm that the 2nd Defendant, executed a personal guarantee and indemnity in favour of the Plaintiff. This document creates a secondary obligation on his part to make good any losses or damages resulting from the 1st Defendant's default. The Plaintiff



has correctly submitted that this guarantee constitutes a continuing security, thus the 2nd Defendant is liable to make good any outstanding sums by the 1st defendant.

28. The Court makes reference to the Court of Appeal case in *Peter Munga v African Seed Investment Fund LLC*, HC ML IC No. 2 of 2016 [2017] eKLR where it was held that a secured creditor with multiple remedies is entitled to elect which one to enforce, at what time, and in what order. The mere existence of another security, such as the chattel over the letter of assignment in this case, does not compel the creditor to first seek its enforcement before pursuing the guarantor.
29. Furthermore, the language of the contract itself strengthens the plaintiff's position. The document is titled Personal Guarantee and Indemnity. The inclusion of the term "indemnity" creates a primary obligation, allowing the creditor to pursue the guarantor independent of any action against the principal debtor. The primary condition for the 2nd Defendant's liability is the default by the 1st Defendant which has since been proved.
30. The Court notes that the personal guarantee by the 2nd Defendant was for "Kshs.37,000,000.00/= for each director. While the Plaintiff's Plaint prays for judgment against the 2nd Defendant for the full outstanding amount of over Kshs. 45 million, the liability of a guarantor is legally capped by the value of the guarantee they signed. Therefore, while the 2nd Defendant is indeed liable jointly and severally with the 1st Defendant, her liability is limited to the guaranteed amount. The Court finds that the 2nd Defendant is liable as a guarantor, however this liability cannot exceed the limit stipulated in the Personal Guarantee and Indemnity agreement. This limitation ensures that the liability is consistent with the precise terms of the contract.
31. The Plaintiff relied on Section 176 of the *Evidence Act*, which makes a statement of account prima facie evidence of the debt to prove its debt. The court also notes the discrepancy between the amount stated in paragraph 20 of the Plaint (Kshs. 45,642,009.00/=) and the amount in paragraph 18 and the prayer (Kshs. 45,800,002.65/=). The Court will place more weight on the figure presented in the prayer, which is the specific amount the Plaintiff is seeking from this Court and which is also corroborated by the Witness Statement. Thus, the Court finds that the quantum of the debt has been sufficiently proven, and judgment should be entered for the amount specified in the prayer.
32. Based on the foregoing analysis, the court finds that the plaintiff has establish a prima facie case against the defendants, the evidence being uncontroverted. demonstrates that a valid and binding contract existed between the parties, which was subsequently breached by the 1st Defendant. The 2nd Defendant is also liable for the breach by virtue of the Personal Guarantee and Indemnity he executed
33. The upshot of the above is that, this Court enters judgment in favour of the Plaintiff as follows;
 - a. A Declaration is hereby issued that the 1st Defendant has breached the Murabaha Financing Agreement dated 25th February, 2022.
 - b. A Declaration is hereby issued that the 2nd Defendant has breached the Personal Guarantee and Indemnity Agreement by failing to pay the entire amount owed by the 1st Defendant following the default.
 - c. An Order is hereby issued directing the 1st and 2nd Defendants, jointly and severally, to pay the Plaintiff the sum of Kenya Shillings Forty-Five Million Eight Hundred Thousand and Two (Kshs. 45,800,002.65/=), which represents the outstanding debt under the facility as at 7th July 2023.



- d. The liability of the 2nd Defendant under this judgment is hereby capped at Kenya Shillings Thirty-Seven Million (Kshs. 37,000,000.00/=) as per the terms of her Personal Guarantee and Indemnity Agreement.
- e. The Defendants shall pay interest on the judgment sum at the Court rate from the date of filing the suit until payment is made in full.
- f. The Defendants shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 27TH DAY OF AUGUST, 2025

RHODA RUTTO

JUDGE

In the presence of;

.....Plaintiff

.....Defendant

Peter Court Assistant

