



Kcb Bank Kenya Limited v Jatcom Agency Limited & another (Civil Suit E457 of 2023) [2025] KEHC 12292 (KLR) (27 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12292 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT E457 OF 2023
RC RUTTO, J
AUGUST 27, 2025**

BETWEEN

KCB BANK KENYA LIMITED PLAINTIFF

AND

JATCOM AGENCY LIMITED 1ST DEFENDANT

MOULID SHEIKH TAWANE 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 28th August 2023, the plaintiff averred that 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.54,607,380/- (Kenya shillings fifty four million six hundred and seven thousand three hundred eighty) which was to be serviced with monthly installments of Kenya Shillings Nine Hundred and Ten Thousand, one Hundred and Twenty-three Thousand (Kshs.910,123.00) over a period of 60 months.
3. The plaintiff avers that it granted an additional second facility of kshs.1,638, 240/- under a Murahaba agreement dated 8th April, 2022. This facility was to be serviced in monthly installments of Kenya Shillings Twenty Seven Thousand three Hundred and Four (Kshs.27,304/-) over a period of 60 months.



4. The 2nd defendant executed two personal guarantees and an indemnity for the two facilities as follows; Kenya Shillings forty Million (Kshs.40,000,000/-) and Kenya Shillings one million two hundred thousand (kshs.1,200,000/-) respectively for each individual director. That the 2nd defendant made an undertaking that in the event of a default by the 1st defendant he would make full payment of the losses, damages and expenses of such default as per the guarantee.
5. Further, the facility was 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.
6. The plaintiff avers that it honoured and fulfilled its obligations under the Murahaba Agreement by making available to the defendant the two facilities that the 1st defendant needed to run its business. However, the 1st defendant had refused, failed and /or neglected to service the aforementioned facility as and when it became due in total breach of the agreement thus occasioned financial loss and suffering to the plaintiff.
7. 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 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 1st and 2nd defendants jointly and severally to pay to the plaintiff a sum of Kenya Shillings forty-seven million sixty thousand five hundred and seventy eight (Kshs. 47,060,578.65/-) being the outstanding debt under the facilities 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;
8. 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.
9. 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.
10. The plaintiff 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 28th August 2023. His evidence mirrored what is contained in the plaint as to the terms of the Murahaba financing agreement dated agreement dated 20th December 2021 and 8th April 2022. Copies of the two agreements were produced as plaintiff's exhibit 1 and 2. He also referred to the personal guarantees and indemnity executed by the 2nd defendant's directors as part of the securities which were produced as plaintiff's exhibit 3.
11. 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 which were produced as plaintiff's exhibit 4. A copy of KCB



- Mpesa Facility Application produced as exhibit 5 and the letter of assignment from the 1st defendant to Safaricom Limited produced as exhibit 6.
12. Also produced as evidence was a copy of the defendant letter of undertaking dated 8th December produced as exhibit 8, a copy of the demand letter dated 28th November 2022 and 4th November 2022 as exhibit 9, 10 and 14 respectively. Further, it was the plaintiff's testimony that the 1st defendant ratified the facility and securities in its board resolution. It has produced the 1st defendant's director's resolution sanctioning security and facility to this effect marked as plaintiff's exhibit no 11.
 13. PW1 testified that the plaintiff honored its obligations by furnishing the facility to the 1st defendant to run its business however, the 1st defendant has been in total breach of the agreement causing it financial loss and suffering. It pointed out that the 1st defendant periodically serviced the facility until it deliberately stopped channeling its entire Safaricom dealership commission to it contrary to the facility agreement.
 14. At the close of hearing, the plaintiff filed 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 Murabaha facility agreements which the parties consensually entered into.
 15. 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 dates was guaranteed by the 2nd defendant and if so, whether the plaintiff is entitled to indemnity from the defendant.
 16. 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 vs 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.
 17. They urged that the defendants are 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.
 18. They relied on section 176 of the Evidence Act to urge that the statement of account provided was 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 47,060,578.65 as at 7th July 2023. Reference was made to the case of Prime Bank Limited v Tanna (commercial Case E039 of 2022) (2023)KEHC 1058 (KLR).
 19. 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 states 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.

20. 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 Mokuia Nyariki & 2 Others* eKLR.
21. 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

22. 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.
23. 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 produced in evidence the agreements marked as plaintiff exhibit 1 and 2. According to the agreement, the plaintiff financed the 1st defendant to purchase Safaricom products in the sum of Kshs.54,607,380/- and kshs.1,638,240/=.
24. 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.
25. Further, in line with this agreement, the 2nd defendants entered into a guarantee and indemnity agreement, plaintiff's exhibit 3 where liability of the guarantor was limited to the principal sum of Kshs. 40,000,000/- and 1,200,000/= respectively.
26. 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 defendant guaranteed the two facilities in its personal capacity as guarantor. I therefore find that indeed 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.
27. 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.
28. The plaintiff has averred that the 1st defendant subsequently refused, failed, and/or neglected to service the facility and deliberately stopped channelling its entire Safaricom dealership commission through the account held by the plaintiff. The failure to adhere to the revised terms, as agreed, is a fundamental breach of the agreement. This breach is further evidenced by the plaintiff having to issue formal demand letters on 8th November 2022, 28th November 2022 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.

29. As to the validity of the 2nd defendant's guarantee, this court notes that the guarantee and indemnity forms provided in evidence, 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.
30. 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.
31. 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.
32. It is noted that the personal guarantee by the 2nd Defendant was for "Kshs.40,000,000/= and kshs1,200,000/- for each director. While the Plaintiff's Plaint prays for judgment against the 2nd Defendant for the full outstanding amount of over Kshs.47,060,578.65/-), 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 and it 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.
33. The Plaintiff relied on Section 176 of the *Evidence Act*, which makes a statement of account prima facie evidence to prove its debt. 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 plaint.
34. Based on the foregoing analysis, the court finds that the plaintiff has establish a prima facie case against the defendants. Further 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.
35. 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 Agreements dated 20th December 2021 and 8th April 2022 by failing to service the said facilities.
 - b. A Declaration is hereby issued that the 2nd Defendant has breached the Personal Guarantee and Indemnity Agreement by failing to pay the amount owed by the 1st Defendant following the default by the 1st Defendant.
 - 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-Seven Million Sixty Thousand five Hundred and Seventy-Eight (Kshs.47,060,578.65), 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 Forty Million (Kshs.40,000,000.00/=) for the first facility and Kshs One Million Two Hundred (1,200,000/-) for the second facility 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

