



KCB Bank Kenya Limited v Talk Cell Technologies Limited & 5 others (Civil Suit E453 of 2023) [2025] KEHC 12263 (KLR) (Civ) (27 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12263 (KLR)

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

CIVIL

CIVIL SUIT E453 OF 2023

RC RUTTO, J

AUGUST 27, 2025

BETWEEN

KCB BANK KENYA LIMITED PLAINTIFF

AND

TALK CELL TECHNOLOGIES LIMITED 1ST DEFENDANT

AHMED SHEIKH KOSSIN 2ND DEFENDANT

KHADAR HASSAN HAJI 3RD DEFENDANT

MOHAMED ABDI FARA 4TH DEFENDANT

MOHAMED AHMED GEDI 5TH DEFENDANT

ZAKARIYAH AHMED FARAH 6TH DEFENDANT

JUDGMENT

1. The plaintiff is a financial service provider licenced 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 – 5th defendants are all described as adults domiciled in Kenya and directors of the 1st defendant. The 6th defendant is not described.
2. By a plaint dated 30th August 2023, the plaintiff averred that it entered into a Murahaba financing agreement with the 1st defendant by way of a facility granted to it on 3rd January 2022. Under the facility, the plaintiff financed the 1st defendant’s Safaricom dealership business to purchase Safaricom products in the sum of Kshs.54,607,380.00 (Kenya shillings fifty-four million six hundred and seven thousand three hundred and eighty). As part of the agreement, the 1st defendant would service the facility within



- 60 months by paying Kshs.910,123.00 (Kenya Shillings nine hundred and ten thousand one hundred and twenty-three) per month.
3. The plaintiff stated that in this agreement, the defendants executed a personal guarantee with it. They undertook that in the event the 1st defendant was unable to pay the full sums due, they would settle in full, payment for losses damages and expenses arising out of such default. The plaintiff further averred that the facility was secured by a personal guarantee and indemnity executed by the 1st defendant's directors for a sum of Kshs.40,000,000.00 (Kenya shillings forty million) for each individual director.
 4. The facility was further secured by a letter of assignment from the 1st defendant to Safaricom Limited undertaking that the proceeds and/or commission from the dealership be remitted through an account held by the 1st defendant with the plaintiff for the duration of the facility. In addition, a chattel over the letters of assignment to Safaricom Limited was registered in compliance with the Moveable Property Security Rights Act.
 5. Later on, the 1st defendant requested for a 3-month moratorium and restructuring of the facility. The plaintiff acceded to this request and vide a letter dated 4th February 2022, informed the 1st defendant to start servicing the facility in March 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 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, 3rd, 4th, 5th and 6th defendants have 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-seven million two hundred and nine thousand six hundred and forty-one (Kshs. 47,209,641.20) being the outstanding debt under the facility issued to the defendants as at 6th June 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. On 16th February 2024, the court was satisfied that in spite of proper service of the pleadings and summonses to enter appearance to the 1st, 2nd, 3rd and 4th defendants, they 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 court was not satisfied that the 5th and 6th defendants were duly served. The matter was directed to proceed for formal proof hearing as undefended.
 8. 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 30th August 2023. His evidence mirrored what is in the plaint as to the financing arrangement and the terms of the Murahaba financing agreement dated 3rd January 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 1st defendant's directors as part of the securities which were



produced as plaintiff's exhibit 2. The plaintiff 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 3, a copy of the KCB SAHL Mpesa facility application form produced as plaintiff's exhibit 4.

9. It was the plaintiff's testimony that the 1st defendant ratified the facility and securities in its board resolution meeting, a copy of the 1st Defendant's Board of directors resolution ratifying the facility securities was marked as exhibit no 5. He also referred to the request for moratorium and restructure of the facility which was acceded to vide a letter dated 4th February 2022 marked as plaintiff's exhibit 7. Further, that the plaintiff informed the 1st defendant to service the facility as from March in line with their Murabaha agreement.
10. 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 financial loss and suffering to the plaintiff. 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.
11. The plaintiff further stated that by letters dated 22nd May 2023 and 10th July 2023, produced as plaintiff's exhibits 6 and 8 respectively, they formally demanded that the defendants remit the outstanding sums due. However, the defendants have failed to make any payments. Notably, while reference has been made to the letter dated 22nd May 2023 produced as plaintiff's exhibit 6, no such letter was availed in the plaintiff's list of documents.
12. The plaintiff further established that a search at the Registrar of Companies revealed that as at 20th January 2022, the 4th, 5th and 6th defendants were registered as the 1st defendant's directors. The search was produced and marked as plaintiff's exhibit 9. He also produced proof of service and a photostat of the demand letter produced as plaintiff's exhibit 10 and a statement of accounts as at 6th March 2024 produced as plaintiff's exhibit 11. He prayed that the plaint be granted as prayed.
13. At the close of hearing, the plaintiff filed submissions dated 4th December 2024, the plaintiff abridged the facts giving rise to the suit to submit 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. Given the contractual nature of the agreements, the parties were bound by the terms. Since the defendants were in breach, the plaintiff submitted that it was entitled to the reliefs sought.

Analysis and Determination

14. I have considered the pleadings, the evidence and the submissions. This is an undefended suit. Nonetheless, the court remains obligated to determine it on its merits or otherwise bearing in mind the interlocutory judgment entered on 16th February 2024. In doing so, the onus remains on the plaintiff to prove its case. Based on the pleadings, the plaintiff's evidence and submissions, the issues that arise for determination are: whether the 1st defendant has failed to comply with the terms of the letter of offer and Murahaba facility agreement and whether the loan advanced to the 1st defendant on various dated was guaranteed by the defendants and if so, whether the plaintiff is entitled to indemnity from the defendant
15. It is not in dispute that the parties entered into a Murahaba financing agreement. The plaintiff through its witness PW1 the credit recovery manager testified to that effect and produced in evidence the marked as plaintiff exhibit 1. According to the agreement, the plaintiff financed the 1st defendant to purchase Safaricom products in the sum of Kshs. 54,607,380.00. PW1 also produced a Company's search which



- was marked as plaintiff's exhibit 9 to show that the 4th, 5th and 6th defendants were directors of the 1st defendant at the time of the agreement.
16. Further, in line with this agreement, the 2nd and 3rd defendants entered into a guarantee and indemnity agreement dated 4th January 2022 marked as plaintiff exhibit 2. The liability of the guarantors was limited to the principal sum of Kshs.40,000,000.00 for each guarantor. It is instructive to note that it is only the 2nd and 3rd defendants who executed this agreement.
 17. 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 and 3rd Defendant on the acceptance page. This demonstrates a clear meeting of the minds and a voluntary acceptance of the terms. The above documents adduced in evidence indeed confirm that the plaintiff entered into a legally binding agreement with the 1st defendant.
 18. It is also confirmed that by a guarantee and indemnity agreement, the 2nd and 3rd defendants guaranteed the facility in their personal capacity as guarantors. Notably the 4th, 5th and 6th defendants did not execute the guarantee. I therefore find that no contract was directly entered between the plaintiff and the 4th, 5th and 6th defendant as directors or in their personal capacity.
 19. 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 and 3rd defendants jointly on the other part.
 20. In addition, the plaintiff has sued the 4th, 5th and 6th defendants however upon perusal of the plaint it does not disclose the cause of action against them. It merely refers to the notice of intention to sue and recover damages and expenses of the 1st defendant's default to the extent that the plaintiff is entitled to recover from the 1st defendant. It also sought a declaration that the 2nd to 6th defendants have breached the terms of the guarantee by failing to pay the entire amount owed to the plaintiff by the first defendant despite being notified of the default by the 1st defendant.
 21. While they have been described as directors of the 1st defendant it appears they have been sued in their capacity as the directors of the 1st defendant as revealed by the company's search marked as exhibit 9.
 22. Moreover, while the plaintiff argued that the facility was to be secured by personal guarantee of all directors however the guarantee and indemnity adduced in evidence was only signed by the 2nd and 3rd defendants.
 23. I make reference to the locus classicus decision of *Salomon vs. Salomon & Co. Limited* [1897] AC 22, a company enjoys corporate personality. It is a separate entity distinguishable from its shareholders and directors. To therefore sue a director in his capacity as such, one must first initiate the process of lifting the corporate veil to hold them personally liable on behalf of the company. In this case, the 4th, 5th and 6th defendants as per the search revealed that they are directors of the 1st defendant. The plaintiff's case is that the said directors executed personal guarantees as directors of the 1st defendant. It is on this basis that the plaintiff brought suit against the 4th to 6th defendants in their own capacity as personal guarantors and in their capacity as directors of the company.
 24. There are no other documents executed by them other than the Murabaha agreement on behalf of the 1st defendant which was executed by the 2nd and 3rd defendant. I therefore find that no contract was directly entered between the plaintiff and the 4th, 5th and 6th defendants as directors or in their personal



capacity at this. This cannot be cured by the board resolution which was executed by the 4th 5th and 6th defendants in the wake of the existence of an actual guarantee and indemnity executed by the 2nd and 3rd defendants.

25. As to whether the defendants were in breach of the contract, PW1 testified that in light of the Murahaba agreement, the plaintiff honored its obligations by furnishing the facility that the 1st defendant needed to run its business. The 1st defendant in turn ratified the facility and securities in its board resolution meeting held on 22nd February 2022 produced and marked as plaintiff exhibit 5. Later on, the 1st defendant requested for a 3-month moratorium with a view to restructure the facility. The plaintiff acceded to this request and vide a letter dated 4th February 2022 produced as plaintiff exhibit 7, wherein the plaintiff informed the 1st defendant to service the facility in March in line with their agreement.
26. PW1 testified that the 1st defendant has been in total breach of the agreement causing financial loss and suffering to the plaintiff. As a consequence, the plaintiff served the 1st defendant with a notice to settle the outstanding sum cautioning the 1st defendant that the failure to pay would lead to their disclosure on their inability to pay to the Metropol Credit Reference Bureau. 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.
27. The plaintiff further sent letters dated 22nd May 2023 and 10th July 2023 marked plaintiff exhibit 8 to the 1st defendant to remit the sums due. However, the letters were not honoured. The plaintiff particularized the terms of breach of the facility agreement in the plaint. It stated that as at 6th June 2023, the outstanding debt stood at Kshs. 47,209,641.20 (Kenya Shillings forty-seven million two hundred and nine thousand six hundred and forty-one) inclusive of interest.
28. It is settled law that the court cannot rewrite a contract entered into by parties. In *William Kazungu Karisa vs. Cosmas Angore Chanzera* [2006] eKLR the court went further to hold as follows:

“The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them.”
29. In this instance, it is apparent from the evidence before us that the 1st defendant has failed to honor its financial obligations. A demand letter was sent to the 1st defendant dated 10th July 2023. The agreement cites instances of default including but not limited to an instance where the customer does not pay on the due date the amounts payable under or pursuant to the agreement. It provides that in the event of a default, all or any part of the aggregate outstanding becomes immediately due and payable. I therefore find that despite a demand letter being sent to the 1st defendant, the same was not honored necessitating the filing of this suit. I therefore find that the 1st defendant breached the contract between itself and the plaintiff.
30. As to whether the validity of the 2nd and 3rd defendant guarantee, this court notes that the guarantee and indemnity forms provided in evidence as exhibit no 2 confirms that the 2nd and 3rd 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 and 3rd Defendant are liable to make good any outstanding sums by the 1st defendant.
31. 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.
32. 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 and 3rd Defendant's liability is the default by the 1st Defendant which has since been proved.
 33. It is also noted that the 2nd and 3rd defendant the personal guarantee was for Kshs.40,000,000.00/= for each director. While the Plaintiff's Plaint prays for judgment against the 2nd and 3rd 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 and 3rd defendant are indeed liable jointly and severally with the 1st Defendant, their 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.
 34. The Plaintiff relied on Section 176 of the Evidence Act, which makes a statement of account prima facie evidence to prove its debt. 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.
 35. 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.
 36. 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.
 - b. A Declaration is hereby issued that the 2nd and 3rd Defendant have 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-seven, million two hundred and nine thousand six hundred and forty one (47,209,641.00) which represents the outstanding debt under the facility as at 6th July 2023.
 - d. The liability of the 2nd and 3rd Defendant under this judgment is hereby capped at Kenya Shillings forty Million (Kshs.40,000,000.00/=) as per the terms of her Personal Guarantee and Indemnity Agreement.
 - e. The 1st 2nd and 3rd 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 1st 2nd and 3rd 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

