



REPUBLIC OF KENYA



**Uba Kenya Bank Limited v Farm Transport and Technical Services Ltd & 5 others (Civil Suit 286 of 2013) [2024] KEHC 2805 (KLR) (Commercial and Tax) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2805 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 286 OF 2013  
FG MUGAMBI, J  
MARCH 20, 2024**

**BETWEEN**

**UBA KENYA BANK LIMITED ..... PLAINTIFF**

**AND**

**FARM TRANSPORT AND TECHNICAL SERVICES LTD ..... 1<sup>ST</sup> DEFENDANT**

**TOM OTIENO ONYANGO ..... 2<sup>ND</sup> DEFENDANT**

**NAHASHON HANNINGTON OBIERO ..... 3<sup>RD</sup> DEFENDANT**

**PHILIP JADON ..... 4<sup>TH</sup> DEFENDANT**

**MUMIAS SUGAR COMPANY LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**FREDRICK OTIENO ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. This suit was instituted through an amended plaint filed on 13<sup>th</sup> May 2014, All the defendants participated in the trial save for the 5<sup>th</sup> defendant against whom the plaintiff subsequently elected to discontinue proceedings.
2. The dispute is premised on the breach of a credit facility agreement. It is uncontroverted that on 18<sup>th</sup> September, 2011, the 1<sup>st</sup> defendant, acting through the 2<sup>nd</sup> and 6<sup>th</sup> defendants, submitted a request to the plaintiff bank for a credit facility amounting to USD 250,000. This request was to facilitate the execution of a contract purportedly awarded to the 1st defendant by Mumias Sugar Company Limited (Mumias), for the supply of 60,000 bags of urea fertilizer, in a contract valued at Kshs 45,000,000/=.



3. In response, the plaintiff assessed and subsequently approved the credit facility request, formalizing this decision through the issuance of a Letter of Offer dated the 26<sup>th</sup> September, 2011. This offer was formally accepted by the 2<sup>nd</sup> and 6<sup>th</sup> defendants.
4. A specific condition of the Letter of Offer was that the credit advancement would be structured as an invoice discounting facility, with a maximum duration of 12 months. The 2<sup>nd</sup> and 6<sup>th</sup> defendants fulfilled all requisite conditions precedent for the disbursement of the facility.
5. These conditions included, among others, a contractual assignment form with Mumias concerning Contract No 450004499 (the contract), dated the 5<sup>th</sup> July, 2011, which contract had been ostensibly awarded to the company for the supply of fertilizer, the irrevocable domiciliation of contract proceeds executed by the 2<sup>nd</sup> and 6<sup>th</sup> defendants, a board resolution by the 2<sup>nd</sup> and 6<sup>th</sup> defendants, and the provision of delivery notes and receipts for confirmed and accepted invoices, purportedly endorsed by the 6<sup>th</sup> defendant.
6. Following the apparent satisfaction of these prerequisites, the plaintiff disbursed the credit facility of USD 250,000 to the 1<sup>st</sup> defendant, which then converted and utilized these funds for its benefit. Subsequently, the 1<sup>st</sup> defendant failed to meet its repayment obligations for the facility, with the initial due date for repayment being the 13<sup>th</sup> December, 2011.
7. The plaintiff's further dispute was based on the fact that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants had failed to honor the terms of their guarantee and indemnity by refusing to settle the debt upon maturity, leading to the present action. The plaintiff's case was articulated by one (1) witness during the trial.

#### **The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendant's case**

8. DW1 who was Tom Otieno Onyango, testified on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants. From his testimony the credit facility extended to the 1<sup>st</sup> defendant was not denied by the defendants. Their bone of contention is that they were discharged from further contractual obligations with the plaintiff and are therefore not liable for breach of contract.
9. They specifically alleged that upon delivering the fertilizers to Mumias, the 1<sup>st</sup> defendant was discharged from any further contractual obligations arising from the letter of offer and the subsequent indemnities and guarantees executed by the 2<sup>nd</sup> and 4<sup>th</sup> defendants' who were the 1<sup>st</sup> defendant's directors.
10. The 2<sup>nd</sup> and 4<sup>th</sup> defendants also confirm that the 1<sup>st</sup> defendant had been pre-qualified by Mumias to supply fertilizers. Following the grant of the credit facility, the 1<sup>st</sup> defendant acquired the fertilizers from Afri Ventures and engaged Mutai Enterprise for the transportation of the goods to Mumias Sugar Company Limited. The goods were duly received by Mumias, as evidenced by a Delivery Note produced as evidence.
11. Later, the 1<sup>st</sup> defendant signed a Notice of Assignment between it and Mumias Sugar, with the full knowledge of the plaintiff under the terms that the 1<sup>st</sup> defendant would assign to later, the contracts rights and receivables sent by Mumias Sugar Co. Ltd as a means to offset the loan issued to the 1<sup>st</sup> defendant as per Clause 1 and 2 of the said agreement.

#### **The 3<sup>rd</sup> defendant's case**

12. The 3<sup>rd</sup> defendant in his testimony maintained that he is a complete stranger to the dealings between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants and that he has no knowledge of the dealings between them nor was he privy to them. He particularly denies having signed the purported guarantee and indemnity



alleged to have been signed by him and maintains that he never appeared before any Advocate to sign any document in pursuit of business between the plaintiff and the 1<sup>st</sup> defendant or at all.

### **The 6<sup>th</sup> defendant's case**

13. The 6<sup>th</sup> defendant, Fredrick Okeyo in his testimony asked the Court to find that the suit does not disclose any cause of action against him as he did not sign any instrument of guarantee and indemnity in favour of the plaintiff for the facilities extended to the 1<sup>st</sup> defendant. This position is not denied by the plaintiff. The 6<sup>th</sup> defendant adds that at the time the loan disbursements were made, he had already resigned as a director and shareholder of the 1<sup>st</sup> defendant and the changes effected with the Registrar of Companies.
14. It is his case that the fact that he executed the Board Resolution for the facility of the 1<sup>st</sup> defendant as a director then of the 1<sup>st</sup> defendant does not amount to assuming liability and neither does it create a legal contractual relationship with the plaintiff.
15. In response to this the plaintiff avers that the 6<sup>th</sup> defendant ceased being a director of the 1<sup>st</sup> defendant company on 3<sup>rd</sup> October 2011, which is way past the date of issuance of the resolution and the necessary security documents prior to the issuance of the loan facility.

### **Analysis**

#### **Whether the 1<sup>st</sup> defendant is liable:**

16. The parties have referred this Court to a number of decisions the effect of which are to confirm that parties to a contract are bound by the terms of their contract and I couldn't agree more. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another*, [2001] eKLR the Court of Appeal held that:

“ A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
17. Going back to the present case, the letter of offer dated 26<sup>th</sup> September 2011 contains the terms of the facility, which identifies the 1<sup>st</sup> defendant as the obligor in an invoice discounting (receivables discounting) facility. The essence of invoice discounting in commercial transactions is that it is a form of borrowing where the invoices serve as collateral. The borrower is still ultimately responsible for repaying the advanced funds to the financing company.
18. The assignment of invoice proceeds or benefits to the financing company facilitates the mechanism of repayment but does not eliminate the borrower's obligation to ensure that the financier is repaid in full, including any fees or interest accrued. The argument by the 1<sup>st</sup> respondent that it was discharged from its liability is therefore untenable from the start. It remained an obligor as described in the letter of offer and was not discharged from liability. I say this noting that neither the offer letter nor the notice of assignment contained any express provision that would have released the 1<sup>st</sup> defendant from his obligation to pay the amounts due, by way of the assignment.
19. The defendants claim that the plaintiff should pursue Mumias would also fail on account of the doctrine of privity of contract. The only party with which the plaintiff had privity of contract for purposes of the borrowing agreement was the 1<sup>st</sup> defendant even if the contract between them was intended to benefit Mumias.



20. I refer to the holding of this Court in *City Council of Nairobi v Wilfred Kamau Gitbua T/A Gitbua Associates & another*, [2016] eKLR, which cited the case of *Agricultural Finance Corporation v Lengetia*, 1982-88 I KAR 772. The Court held as follows:

“As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. ...”

21. Further, the plaintiff submits that the default by the 1<sup>st</sup> defendant was as a result of the fact that the fertilizers were not supplied to Mumias as anticipated. This is a risk that as an obligor, the 1<sup>st</sup> defendant undertook to take in case Mumias defaulted on its payments and as such the 1<sup>st</sup> defendant must make good on its obligation to the plaintiff and then claim from Mumias.

22. DW1 was hard pressed to explain the purposes for which the funds were applied. The fact that the proceeds were not applied to the actual purpose means that there are no receivables (or assigned rights to receivables) for the bank to claim against. This is a fact that the 1<sup>st</sup> defendant was well aware of.

23. The record shows that the 1<sup>st</sup> defendant wrote several letters to the plaintiff dated 27<sup>th</sup> February 2012, 21<sup>st</sup> and 30<sup>th</sup> March 2012 and 16<sup>th</sup> April, 2023 which this Court finds to be an acknowledgment of the debt to the tune of Kshs 27,194,096.75. The letters also indicate promises to make monthly payments which constitutes a clear and unequivocal admission of debt. The authenticity of these letters has not been denied.

24. That said, in an arrangement such as that between the plaintiff and the 1<sup>st</sup> defendant, despite executing a Notice of Assignment, the responsibility for ensuring that the financier receives the payment as per the agreed terms often still lies with the borrower. In the absence of any express terms to the contrary, this Court takes the view that the Notice of Assignment does not also absolve the 1<sup>st</sup> defendant of its liability to repay the funds advanced by the plaintiff. The assignment of benefits is just part of the repayment mechanism.

#### **The liability of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants under the guarantee and indemnity:**

25. The plaintiffs referred to the Court of Appeal decision in *Fidelity Commercial Bank Limited v Kenya Grange Vehicles Limited*, [2017] eKLR, on the enforceability of guarantees. The Court stated as follows:

“This Court explained in *Kenindia Assurance Company Ltd v First National Finance Bank Ltd*, Civil Appeal No 328 of 2002 that:

It is in the nature of a covenant by the appellant to pay upon the happening of a particular event. It is a form of security guaranteeing payment by a third party. In such cases the most important factor to consider before liability can attach is whether there has been default. Once default is established and that there has been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security.”

26. A cursory look at the record reveals that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants executed personal Guarantee and Indemnity contracts dated 29<sup>th</sup> September 2011 and 11<sup>th</sup> October 2011. By clause 2.1 of the



said guarantees, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants agreed to discharge the 1<sup>st</sup> defendant's (the debtor's) obligations to the bank upon demand by the bank. The parties specifically agreed that:

“The guarantor further agrees that if any of the debtor's obligations are at any time void or unenforceable against the debtor for any reason whatsoever, the guarantor will be liable to the bank as a principle debtor by way of indemnity for the same amount as that for which the guarantor would have been liable had the debtor's obligations not been void or unenforceable.”

27. The 3<sup>rd</sup> defendant denies having signed the guarantee and claims to be a stranger in the arrangement between the plaintiff and the 1<sup>st</sup> defendant. The plaintiff produced the guarantee that was signed by the 3<sup>rd</sup> defendant. It was up to the 3<sup>rd</sup> defendant to put up a defense by questioning the veracity of the document. He claims not to have signed the document but he did not produce any evidence to show that the signature appended on the document was not authentic. As such, this ground cannot hold.
28. It is my view that the plaintiff discharged the burden of proof on a balance of probability to demonstrate that the 3<sup>rd</sup> defendant signed the guarantee and indemnity document. It was up to the 3<sup>rd</sup> defendant to produce evidence to shift the evidentiary burden of proof as required under sections 107, 108 and 109 of the Evidence Act.
29. Finally on this point, taking queue from the Fidelity Commercial Bank Limited [supra], what is important is that the default by the 1<sup>st</sup> defendant has been established and, on this basis, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are consequently liable.

#### **Is the 6<sup>th</sup> defendant liable?**

30. As far as the 6<sup>th</sup> defendant is concerned, the plaintiff avers in the plaint, which status was confirmed during hearing, by the plaintiff's own witness, that the 6<sup>th</sup> defendant was sued as he executed the board resolution relating to the borrowing and also the letter of offer. His presence at the meeting of 28<sup>th</sup> September 2011 is not in dispute. It is also not in dispute that the 6<sup>th</sup> defendant participated in signing the agreement and documents relating to the contract with Mumias.
31. It must be remembered that a Company, although it may claim legal personality, has no mind, hands or feet and acts through its directors as its agents. The celebrated case of Salomon v Salomon & Co Ltd, [1896] UKHL 1, [1897] AC 22 further buttresses the point that when acting as an agent of a company the company and its shareholders and directors are separate legal entities.
32. The 6<sup>th</sup> defendant thus performed the roles which are not in dispute, in his capacity as a director of the 1<sup>st</sup> defendant and within his rights to bind the Company. In Multichoice Kenya Ltd v Mainkam Ltd & another, (2013) eKLR, this Court (Mabeya, J) held as follows:

“I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it”.
33. It was not disputed that the 6<sup>th</sup> defendant resigned as a director and shareholder of the 1<sup>st</sup> defendant company. Indeed, the evidence produced by the 6<sup>th</sup> defendant confirms that he executed a transfer of his shares on 6<sup>th</sup> October 2011, a fact that was conceded by DW1. A notification of change of directors also dated 6<sup>th</sup> October 2011 was served on the Registrar of Companies.



34. There is also no record of an indemnity guarantee signed by the 6<sup>th</sup> defendant, a fact that was again conceded by DWI. In the absence of any evidence of fraud against the 6<sup>th</sup> defendant, this Court finds that the 6<sup>th</sup> defendant is not liable for the debt as a former director of the 1<sup>st</sup> defendant.

**Determination**

35. For the reasons that I have stated, the plaintiff's suit succeeds as against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

36. Judgment is hereby entered in favour of the plaintiff for the amount of Kshs 48,580,241.48 against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants jointly and severally together with interest at 30% per annum from 20<sup>th</sup> March, 2013 until payment in full plus costs of the suit with interest at court rates until payment in full. The suit against the 6<sup>th</sup> defendant is dismissed with costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH 2024.**

**F. MUGAMBI**

**JUDGE**

