



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 282 OF 2000**

VICTORIA COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

DEVCHAND SHAH PUNJA.....1ST DEFENDANT

NANSUKHLAL SHAH PUNJA.....2ND DEFENDANT

JUDGMENT

The plaintiff is a limited liability company incorporated in the Republic of Kenya and carrying on business as a bank having been duly registered as such pursuant to the provisions of the Banking Act Cap 488 Laws of Kenya while the defendants are male adults of sound mind residing and working for gain at Thika and were the sole directors of a company known as SHAH PUNJA HIRA CO LTD.

By an Agreement made in writing dated 24th August, 1994 between SHAH PUNJA HIRA LTD (therein referred to as the debtor) and the plaintiff at the request of the debtor the plaintiff granted an overdraft facility to the debtor. The Agreement stipulated inter alia that:-

- (a) The facility was repayable on demand.
- (b) The amount of the facility was Kshs.30,000,000/=
- (c) The debtor would pay interest on all the monies advanced and liability from time to time due and payable at the rate of 27% per annum or at such rate of interest the plaintiff would in its absolute discretion from time to time determine.
- (d) Security for the advances under the said facility would include eleven motor vehicles pledge to the plaintiff.

Pursuant to the said Agreement and in consideration of the plaintiff making advances to the Debtor under the said facility the 1st and 2nd defendants (herein referred to as the Defendants) executed a Document of Guarantee dated 24th August, 1994 by which they guaranteed due repayment, within 2 days after demand of all the monies and liabilities which would be due to the plaintiff from the debtor to a maximum of Kshs.30,000,000/= together with interest, charges and costs from the date of demand until payment in full.

This loan was repaid in full by 31st October, 1994 and by its letter dated 15th November, 1994 the debtor requested the bank for a renewal of the facility and requested for a further loan of Sh.25,000,000/= in favour of SHAMAS AND BROTHERS LTD. The letter was signed by only one director, the 1st defendant. The bank accepted the request and advanced Shs.30,000,000/= in favour of SHAMAS AND

BROTHERS LTD. There was default in the repayment of this second loan and is the subject matter of this suit. The debtor defaulted to make the scheduled repayment under this credit facility in or about August 1998. A demand was made to the 2 defendants in their capacity as guarantors for the repayment of the debt but there was no response. The defendants were sued for their personal guarantee. The 1st defendant has since passed away and the plaintiff elected to pursue the 2nd defendant for the entire amount of the claim.

The plaintiff called one YOSEPH PATTNI (PW1) to testify on its behalf. He told the court that he has worked with the plaintiff bank for over 15 years, and in the course of his duties he dealt with SHAH PUNJA HIRA CO. LTD and the two defendants were the sole directors of that company. That company did approach the plaintiff for a loan facility for working capital. The bank granted the company a loan of Shs.30,000,000/=.The loan Agreement was signed between VICTORIA FINANCE COMPANY LIMITED and SHAH PUNJA HIRA LIMITED. The same was signed by the defendants as the directors of the company and the seal of the company was affixed to the Agreement. The Agreement was also witnessed and signed by one YAKSHA BABUBHAI on behalf of the bank. He also produced the Directors resolutions dated 24th August, 1994 in which it was resolved that the company do borrow Shs.30,000,000/= from the bank. There was also Letter of Offer and Acceptance which was signed by the Manager of the bank as well as the two Directors of the company dated 24th August 1994.

b Apart from the securities offered by the company the two directors also signed a personal guarantee dated 24th August, 1994. It read in part: “In consideration of your making or continuing advances or otherwise giving or continuing credit or accommodation at my/our request to SHAH PUNJA HIRA LTD (hereinafter called the principal), I/We jointly and severally guarantee to you due repayments, within two days after demand, of all the monies and liabilities which shall at any time be due to you from the principal, whether certain or contingent now hereafter owing to or incurred by you from or by you, together with interest charges costs etc., provided that the total amount recoverable from me/us jointly and severally under this guarantee shall not at any time exceed the principal sum of THIRTY MILLION ONLY (KSH.30,000.000/=)”.

And I/we jointly, further agree as under:-

“The guarantee shall be a continuing security binding on me/us and my/our personal representative(s) until receipt by you of written notice of discontinuance thereof and notwithstanding such discontinuation or any release or granting of time or other indulgence by you to any one or more of us, this guarantee shall remain a continuing security as regards the other or others “.....”.

The loan was fully repaid by 31st October, 1994.

By their letter dated 15th November, 1994 the company requested for a further loan of Shs.25,000,000/= in favour of SHAMAS AND BROTHERS LTD. The letter was allegedly signed by one director. The bank accepted this request but the amount of advance was Sh.30,000,000/= instead of Sh.25,000,000/= in favour of SHAMAS AND BROTHERS LTD. This second loan is the one which is the subject matter of this suit.

The 1st defendant had passed away. It is only the 2nd defendant MANSUKHLAL PUNJA who appeared to defend the suit. In his evidence he told the court that SHAH PUNJA HIRA CO. LTD started in 1937. He became involved since 1955 and became a director in 1978. He admits that on 24th August, 1994 the company did apply for a loan from VICTORIA FINANCE CO. LTD. The letter of request dated 24th August, 1994 was signed by both directors and the amount requested for was Sh.30,000,000/=. This amount was advanced and the letter of Offer and Acceptance of Advance was signed by the two directors on 24th August, 1994. This loan was repaid in full by 31st October, 1994. He denied any knowledge about the letter of renewal of the facility by letter dated 15th November 1994 and the same does not bear his signature. The writer of that letter requested Victoria Finance Co. Ltd to disburse Shs.25,000,000/= in favour of SHAMAS AND BROTHERS LTD but instead the amount disbursed was Shs.30,000,000/= Shs.5,000,000/= more than what was requested for. The witness further told the court that the letter of

renewal for the loan facility was a private arrangement between the 1st defendant and the bank since the same was signed by the 1st defendant alone. It was a requirements by the company that the two directors must sign.

The defendant denied that his company SHAH PUNJA HIRA CO LTD had applied for a loan from the plaintiff and that he had guaranteed for the repayment of the same. Mr. James Singh submitted that all the exhibits produced by the plaintiff clearly show that the alleged loan arrangement was between VICTORIA FINANCE CO. LTD and SHAH PUNJA HIRA CO. LTD and not VICTORIA COMMERCIAL BANK, the plaintiff herein. Mr. James Singh further submitted that the plaintiff is a stranger to the alleged contract and therefore has no cause of action against the defendants. Mr. Njoroge Regero in reply submitted that all the parties knew as a fact that VICTORIA FINANCE CO.LTD is the same entity as VICTORIA COMMERCIAL BANK. All that happened was that on 7th March, 1996 there was a change of name from VICTORIA FINANCE CO. LTD to VICTORIA COMMERCIAL BANK.

The defendants themselves being aware of the change of name continued to deal with the plaintiff in the new name of VICTORIA COMMERCIAL BANK which succeeded VICTORIA FINANCE CO. LTD. But Mr. JAMES SINGH submitted that since the defendant denies to have entered into an Agreement with the plaintiff, the plaintiff ought to produce a certificate of change of name to prove that VICTORIA COMMERCIAL had succeeded VICTORIA FINANCE CO. LTD.

I agree with Mr. James Singh that change of name can only be established by producing a certificate of change of names. To change the name of the company one has to comply with the provisions of Section 20 of the Companies Act Cap 486. Printing the letter heads of the change of the name of the company on paper is not enough. Section 20 of the Companies Act (Cap 486) provides:-

“20 (1) A company may by special resolution and with the approval of the registrar signified in writing change its name. (2) (3) Where a company changes its name under this section it shall within fourteen days give the registrar notice thereof and the registrar shall enter the new name on the register in place of the former name and shall issue to the company a certificate of change of name and shall notify such change of name in the Gazettee.”

Compliance of this provisions is mandatory before change of name of the company can be effected and the change be reflected in the register The plaintiff having failed to produce a certificate from the registrar to establish that it succeeded VICTORIA FINANCE CO LTD and that that change is reflected in the register, it cannot sue in the new name and therefore its claim against the defendant must fail.

Accordingly the plaintiff suit against the defendants is dismissed with costs.

Dated at Nairobi this 11th day of June, 2004.

J.L.A. OSIEMO

JUDGE