



Shah & another v Fidelity Commercial Bank Limited & 2 others (Civil Case 212 of 2011 & Civil Suit 130 of 2012 (Consolidated)) [2022] KEHC 10743 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10743 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 212 OF 2011 & CIVIL SUIT 130 OF 2012 (CONSOLIDATED)**

PJO OTIENO, J

MAY 25, 2022

BETWEEN

MAHENDRAKUMAR CHANDULAL SHAH 1ST PLAINTIFF

KIRTIBALA MAHENDRAKUMAR SHAH 2ND PLAINTIFF

AND

FIDELITY COMMERCIAL BANK LIMITED 1ST DEFENDANT

MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS 2ND DEFENDANT

ARYAN LIMITED 3RD DEFENDANT

JUDGMENT

1. This suit arises from a contractual relationship between the plaintiffs and the 1st defendant on one hand and the 1st defendant and the 3rd defendant on the other. The 1st defendant advanced a loan facility to a company called Mahek Limited, not a party to this suit. The loan was guaranteed by the plaintiffs. It is a default in the repayment of the loan that brings rise to this suit.
2. Following the default, the 1st defendant is said to have disposed the property offered by the Plaintiffs as security to the 3rd Defendant by private treaty rather than by public auction. The Plaintiffs obtained a court order to the effect that the rental income obtained from the property sold be deposited in an escrow account pending determination of the suit. The 3rd defendant felt disgruntled by the court order and amended their amended defence and counter-claim in this suit by largely and unequivocally admitting that the property was sold to it by private treaty by the 1st defendant and thus sought the transfer to it and nullification of the transactions between it and the 1st defendant to secure a loan toward finance of the purchase price. Prior to such amendments, the 3rd defendant had filed Civil Suit No. 130 of 2012- Aryan Limited & another vs Fidelity Commercial Bank Limited.



3. At the request of and with consent of the parties, this suit was consolidated with HCCC No. 130 of 2012 and the plaint in HCCC No. 130 of 2012 deemed a counterclaim in this suit while HCCC No. 34 of 2013 was kept in abeyance to await and be bound by the decision in the consolidated matter. It is also important to highlight that to the defence and counter-claim in this suit, no defence or replies were filed by the 1st defendant and the other parties save that the plaintiff had filed a reply to the defence by the 3rd defendant on the January 30, 2012

The Case As Pleaded

4. By an amended plaint dated December 5, 2011, the plaintiffs plead that they guaranteed a loan advanced by the 1st defendant to Mahek Limited (“borrowers”) and secured by a charge dated April 6, 2009, executed between the Plaintiffs and the 1st defendant over property in Title No. Mombasa/Block XII/45 (“suit property”) as security for the loan. The plaintiffs allege that due to the default by the borrowers in repaying the loan facility, the 1st defendant sought to realise the security in the suit property. The plaintiffs then obtained a loan facility from another financial institution to offset their loan balance with the 1st defendant but before they could do so they requested for their loan statement from the 1st defendant. It was at this point that they discovered anomalies in the statement which amounted to a variation of the terms of the charge including the expansion of the facilities guaranteed.
5. As a consequence, there was a stalemate in the proposed settlement by finances provided by the new financier and the 1st defendant then staged a public auction which did not meet the reserve price. The property was subsequently sold to the 3rd defendant in a transaction the Plaintiffs alleges was not by public auction but by private treaty contrary to the terms of the charge and the provisions of section 77(1) of the *Registered Land Act*, cap 300 (now repealed) Laws of Kenya, and it was thus an illegality.
6. On the basis of such alleged impropriety, the plaintiffs thus impugns the sale of the suit property and pray for the following Orders: -
 - “ a. Spent.
 - b. A permanent injunction to restrain the defendant whether by itself, its servants, agents, auctioneers or employees from selling, transferring, disposing of or in any way dealing or interfering with the Plaintiffs Property Title No. Mombasa/Block XII/45.
 - c. A declaration that the plaintiffs have been discharges from their obligations under the charge contract dated April 6, 2009.
 - d. A declaration that the charge dated April 6, 2009 is in valid and unenforceable.
 - e. An order that the defendant do forthwith execute a discharge of the charge dated April 6, 2009 and deliver the same to the plaintiffs for registration and failing compliance by the defendant within fourteen (14) days from the date of the order, the Deputy Registrar of this honourable court do execute such discharge in place of the Defendant.
 - f. Costs of and incidental to this suit and interest thereon.
 - g. Any other relief or remedy that this honourable court may deem fit to grant.As against the 3rd defendant



- h. A temporary injunction to restrain the 3rd defendant whether by itself, its servants, agents, auctioneers or employees from taking possession or in any way dealing or interfering with property Title No. Mombasa/Block XII/45 pending the hearing and determination of this application.
- i. A permanent injunction to restrain the 3rd defendant whether by itself, its servants, agents, auctioneers, or employees from taking possession or in any way dealing or interfering with property Title No. Mombasa/Block XII/45
- j. An order that the transfer of property Title No. Mombasa/Block XII/45 to the 3rd defendant entered in the title to the said property be cancelled and removed from the register.
As against the 1st defendant
- k. A declaration that the plaintiffs were discharged from their obligation under the charge contract dated April 6, 2009.
- l. A declaration that the charge dated April 6, 2009 was invalid and unenforceable.
As against the 2nd defendant
- m. A declaration that the 2nd defendant failed in his duty as an auctioneer.
As against the defendants jointly and severally:-
- n. General damages for fraudulent sale of property Title No. Mombasa/Block XII/45.
- o. Costs of and incidental to this suit and interest thereon.
- p. Any other relief or remedy that this honourable court may deem fit to grant.”

7. By a statement of defence dated November 12, 2011, the 1st defendant denied the claim and asserted that the plaintiffs offered the suit property and executed a charge to secure monies advanced to the borrower, who later defaulted in repaying the loan facilities necessitating the 1st defendant to issue the plaintiffs with a statutory notice requiring the plaintiffs to settle the outstanding loan balance failure to which the 1st defendant would exercise its statutory power of sale. The 1st defendant then pleads that the reserve price for the suit property was Kshs. 59,000,000/-, denies that the suit property was valued at Kshs. 75,000,000/- and contends that the Plaintiffs were aware of the public auction and subsequent sale.
8. The 2nd defendant did not enter appearance nor file a defence and therefore, a request for judgment on default was made and a default judgment entered on the March 26, 2012.
9. By way of an amended defence filed on August 30, 2012, The 3rd defendant’s case and position has kept changing from the initial position in the defence and plaint in HCC 130 of 2012 that it had lawfully acquired title to the property as an innocent purchaser for value without notice of any illegality and prayed that the plaintiffs’ suit be dismissed with costs to a wholly different position after the plaint in the later suit and the further amended defense and counter-claim dated 2.7.2017 introduced by which the sale was denounced as being illegal, null and void together with all agreements flowing and being founded on the said sale.



10. The position taken in that pleading is that on June 15, 2011, the 1st defendant acting through the 2nd defendant caused to be published an advertisement of an intended exercise of a statutory power of sale in respect of the suit property at an auction which was scheduled on 24/6/2011. The 3rd defendant attended the auction and placed a bid but its bid of Kshs. 53,000,000/- did not satisfy the reserve price of Kshs. 59,000,000/- hence no sale was concluded. However, it was later approached by the 1st Defendant with a proposal that it buys the property at the set reserve price on promise that it pays 19 million and the 1st Defendant advances to it a facility of Kshs. 40,000,000/- on the security by a charge over another property of the 3rd defendant. The 3rd Defendant agreed to the proposal and a deal was sealed culminating in a transfer and charge now contested and challenged by the Plaintiffs in HCCC No. 212 of 2012. The contention by the 3rd Defendant is that despite the challenge on the sale of the suit property occasioned by the subject suit, the 1st Defendant unreasonably withheld the challenge from it and without right continued to insist on the full performance of the Plaintiffs' obligations under the charge for the Kshs. 40,000,000/- executed between the 1st and 3rd Defendant, which it contends was an illegality and prays for the orders that :-

- “ 1. A declaration that the Memorandum of sale purporting to accept a successful bid from Aryan limited for LR. Mombasa/Block XII/45 to Aryan Limited, was unprocedural, illegal and unlawful ab initio and that it should be repudiated and/or rescinded forthwith.
2. An order that the registration of a transfer of LR. Mombasa/Block XII/45 by Fidelity Commercial Bank Limited to Aryan Limited be cancelled and expunged from the Register.
3. A declaration that the fundamental purpose for which a charge dated 19th September, 2011 was given by the Plaintiffs and registered over Mombasa/Block XX/265A has otherwise become frustrated as a consequence thereof.
4. An order of the restitution of Aryan Limited to the position it was prior to the execution of the memorandum of sale by ;
 - i. The unconditional discharge of the charge registered in favour of Fidelity Commercial Bank Limited dated 19th September 2011 over LR Mombasa/Block XX/265A and the return of the Original Certificate of Title to the Plaintiffs free of any encumbrances.
 - ii. The Cancellation of any guarantees given by Mahesh KS Shah and Asheet MS Shah to the Defendant for the purpose of and or towards the purchase of Mombasa/Block XII/45.
5. Special damages as set out below;
 - a. Deposit of 25% paid Ksh. 19,000,000.00
 - b. Stamp duties (Transfer & Charge) Ksh. 2,420,000.00
 - c. Land Rates (Transfer) Ksh. 69,048.00
 - d. Advocates Fees (Transfer & Charge) Ksh 725,000.00
 - e. Commitment Fees Ksh 300,000.00



- f. Ledger Fees and penalties Ksh. 50,778.00
- g. Insurance Premium Ksh 137,154.00
- h. Interest paid on the loan of Ksh 6,382,368.00
Kshs 40,000,000.00 as at 31.5.2012)
(Fidelity Bank) (which continues to accrue
At 32% pa)
- i. Interest on loan of Kshs 19,000,000.00 Ksh 3,844,367.00
As at 31.5.2012 (Giro Bank)(which
continues to accrue at 32% p.a)
Total Ksh 32,938,715.00
Plus interest thereon at commercial rates from the date of
payment of deposit until payment in full.
- j. Costs of the suit.
- k. Special damage for loss of profit in the sum of Kshs.
134,830,227.00.
- l. General damages.
- m. Any such order or further relief a this Honourable Court may
deem appropriate to be made.”

Testimonies By Witnesses

11. The plaintiffs called two witnesses with the defence equally calling two witnesses, one each for the 1st and 3rd defendant, who testified in support of the respective cases.
12. For the plaintiffs, PW1, Joel Kioko testified that he is a salesman with Aloka Ltd, a family business of the Plaintiffs and that in that capacity he attended the auction for the suit property which was held on April 26, 2011. At the auction, the 2nd defendant announced the reserve price to be Kshs. 59,000,000/- and that the highest bid achieved was Kshs. 53,000,000. He later came to learn that there was a Memorandum of Sale dated 6th July 2011 alleging that the suit property had been disposed for Kshs 59,000,000. On cross examination PW1 stated his only role at the auction was to observe the auction.
13. PW2, Mahendra Chandulal M. Shah and the first plaintiffs herein testified that he owns the suit property together with his wife. He stated that he gave out the suit property to Mahek Ltd, to be used as security. Sometime in 2012, he received a demand of Kshs 42,000,000 from the 1st defendant being the debt in respect of three accounts namely; 91100005, 90200007 and 915000012. According to the letter of offer from the 1st Defendant, the facility guaranteed by the Plaintiffs was an aggregate of Kshs 28,000,000 comprising a term loan of 18,000,000 and an overdraft of Kshs. 10,000,000. It was his testimony that he was not aware of the account ending with 007 and that account 915000012 was added to his obligations contrary to the charge agreement. PW1 further claimed that he did not agree to his security being used to obtain money for hire purchase contending that his liability was contractually limited to 28M and that the 1st Defendant merged debts without his consent.



14. DW1, Sukesha Dha Bhokar, the Deputy General Manager of the 1st Defendant, Coast region took the stand and testified that the 1st Defendant advanced an initial loan of Kshs 28,000,000; a term loan of 18,000,000 and overdraft of Kshs 10,000,000 to the borrowers which amount was guaranteed by the Plaintiffs and secured by a charge over the suit property. In May 2010, the limit was enhanced to Kshs 38,000,000 and an additional security, being a residential property, pledged by the Plaintiffs. Since the title to the residential house was misplaced, the 1st Defendant registered a caveat against the title. On cross examination, DW1 stated that the Plaintiffs were not guarantors to the hire purchase loan but the balances of the loans were loaded together. At the time of the sale of the suit property the balance stood at over Kshs 40,000,000 and as at 15th November, 2016, the loan balance was Kshs 191,692,415. DW1 stated that the suit property was sold by private treaty for Kshs 59,000,000 after the public auction failed and surplus after recovery of the debt was sent to the Plaintiffs's account at prime Bank.
15. DW2, Mahesh K Shah, Managing Director of the 3rd Defendant testified that sometime in June 2011, he saw an advertisement of an intended sale of the suit property scheduled on 24/6/2011 to which he instructed his manager Boniface Wanyonyi to attend and bid an amount of Kshs 53,000,000. The bid did not meet the reserve price but later on, the Managing Director of the 1st Defendant, Mr Kimji, called him and offered to sell the suit property to the 3rd Defendant at a sum of Kshs 59,000,000. It was agreed that the 3rd Defendant pays Kshs 19,000,000 cash and the 1st Defendant to finance the remaining Kshs 40,000,000. He testified that he purchased the suit property with a view of earning an income of Kshs. 450,000/- per month which amount would be used to pay for the loan instalments. It is for the reason that the court directed that monthly rent from the suit properties be deposited in an escrow account that necessitated the filing of HCCC No 130 of 2012 in which the 3rd Defendant is claiming against the 1st Defendant, a sum of Kshs 32,938,715 being the deposit paid, duties and legal fees and a further sum of Kshs 134,830,227 being lost profit by way of special damages together with costs of the suit.

Plaintiffs' Submissions

16. The plaintiffs raised the following issues in their submissions;
 - a. Did the Plaintiffs offer Title No Mombasa/Block XII/45 as security to the bank to secure various facilities for the benefit of a 3rd party; Mahek Logistics International Limited and if so, for how much.
 - b. Was the bank entitled to claim for the amounts as stipulated in the letter of 7th June 2011 (pg 63) and the Statutory Notice of the 16th February 2011 (pg 132)
 - c. Whether the bank has a right to auction the suit property and if so was there a successful auction of the property on June 24, 2011
 - d. Whether the bank committed fraud
 - e. What's the effect of the 1st Defendant's failure to file Amended Defence and a reply to the counter claim
 - f. Whether the 1st defendant blatantly disobeyed court orders
 - g. Is the Plaintiffs entitled to the prayers as sought
17. On the first issue, the Plaintiffs submitted that they guaranteed the borrower to a maximum borrowing of Kshs 28,000,000.00. The 1st Defendant thereafter increased the guaranteed facility by Kshs 10,000,000.00 to cover a hire purchase arrangement between the borrower and the 1st Defendant without the consent or knowledge of the plaintiffs. It is the submission of the plaintiffs that this action



amounted to a variation of the charge thus discharging the plaintiffs from their obligation under the charge. They relied on the case of *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR where the court held:-

“Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they are at liberty to negotiate and even vary the terms as and when they choose. This they must do together with the meeting of the minds.”

.....

“It is well accepted that any material variation of the terms of a contract between debtor and creditor, which is prejudicial to the guarantor and which is made without the guarantor’s consent, will discharge the guarantor.... An increase in the rate of interest and an extension of the time for payment are both material changes to the loan agreement sufficient to discharge a surety.”

18. The plaintiffs then cited the case of *Co-operative Bank of Kenya Ltd V Washington Otieno Ogindo* [2012] eKLR for the proposition that a variation to a contract affecting a guarantor is unenforceable if not consented to by the guarantor.
19. On the second issue, the plaintiffs submitted that there was no meeting of minds between the plaintiffs and the 1st defendant on the additional facilities and as such the 1st defendant was not entitled to claim for the amounts stipulated in the letter dated June 7, 2011.
20. On the third issue, the plaintiffs submitted that the sale of the suit property by way of public auction was a contravention of section 77 of the *registered Land Act*, cap 300 Laws of Kenya.
21. On the fourth issue, it was the submission of the plaintiffs that the Memorandum of Sale was marred with fraud as it depicted the suit property to have been sold on June 24, 2011 by way of a public auction which was not the case.
22. On the Fifth issue, the plaintiffs submitted that failure by the 1st defendant to file an amended defence and a defence to the counter claim amounted to admission of facts.
23. On the Sixth issue, the plaintiffs submitted that the 1st defendant disposed the suit property during the existence of injunctive orders prohibiting the sale.
24. On the Seventh issue, the plaintiffs simply submitted that they are entitled to costs.

1st Defendants’ Submissions

25. The 1st defendant noted the following issues for determination by this court: -
 - a. Was there default?
 - b. Was there notice issued?
 - c. Did the plaintiffs act on the notices?
 - d. Was there a sale by public auction?
 - e. How much was fetched from the auction?
 - f. Was there a surplus? If so how much was it?
 - g. Who is currently benefiting from the proceeds from the sale of the charged property?



26. On all of the above issues, the summary of the the 1st defendant’s submissions is that the borrowers failed to service their loan as a result of which the 1st defendant issued the plaintiffs with a statutory notice vide a letter dated February 16, 2011 where after the suit property was disposed by way of public auction and the surplus channeled to the joint account in the names of Messrs. Oyatta & Co. advocates and Messrs. E.W. Njeru Advocates.
27. The 1st defendant further submitted that debtors ought not to seek protection from the courts when they fail to service their loans and relied on the decision in *Equip Agencies Ltd vs I&M Bank*, Civil Appeal No. 2 of 2017, Nyeri where the court held: -
- “...it would appear that this appellant did not service the loans as required..... The appellant was not entitled to protection of an interim orders of injunction and the learned Judge was right to so hold.”
28. They further relied on the case *Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others* [2003] eKLR where the court observed;
- “If courts are going to allow debtors to avoid paying their just debts by taking some of the defenses I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters.”
29. The 1st defendant lastly submitted that the plaintiffs should not use the court to re-write a contract. They relied on the case of *National Bank of Kenya Limited vs Pipe Plastic Samkolit K Ltd & another* (2002) E.A. 503

Submissions by the 3rd Defendant

30. The 3rd defendant did not specifically isolate any issues for determination but offered submissions on a couple of issues the first being fraud and the auction process. It was their submission that the allegations by the plaintiffs that the 3rd defendant colluded with the 1st defendant was unfounded since the same was not distinctly alleged and proved as was stated in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR and the case of *Central Bank of Kenya v Trust Bank limited & 40 others* [1996] eKLR
31. The 3rd defendant also submitted on the process leading to sale by stating that the entire process of sale and transfer of the suit property was null and void and that every proceeding and action founded on the sale is incurable in law for having not been a public auction. It cited to court the decision in *Republic V Chairman, Lands Dispute Tribunal Kirinyaga District & another ex-parte Peter Maru Kariuki* [2005] eKLR for the proposition of the law that a void act bestows no benefit on any of the parties for it is a nullity and automatically null and void. It further relied on the case of *Maina Wanjigi & another v Bank of Africa Kenya Ltd & 2 others* [2015] eKLR for the law that an irregularly conducted auction results into no valid sale and a resultant sale is amenable to being set aside.

Issues

32. The court has considered the pleadings, evidence and submissions offered by the parties and therefore the issues proposed by the plaintiffs and the 1st defendant. This court has equally taken into account the fact that it directed parties on the 1.9.2015 to file agreed issues but they did not and the Plaintiff and 1st defendant filed separate issues. On failure by parties to settle on agreed issues, it rests at the laps



of the court to isolate the issues it deems sufficient to finally resolve the dispute in the suit. The court appreciates its duty and thus discerns the following issues to present themselves for determination:

- a. Whether the amalgamation of debts by the 1st defendant to include those not covered by the guarantee rendered the charge dated April 6, 2009 unenforceable?
- b. Whether the sale of the suit property was by way of a public auction or a private treaty?
- c. If not by public auction, was the same was contractual and legal?
- d. Is the plaintiffs entitled to any of the remedies sought?
- e. Is the 3rd defendant entitled to any of the remedies sought in the counterclaim?
- f. What orders should be made as to costs?

Analysis

33. In settling on the above issues for determination, the court is guided by the fact that the settlement of the agreement to secure the debt between the Plaintiffs and the 1st defendant is not contested and that the contest is all but about whether the realisation of the security was in tandem with the law and if therefore the 3rd defendant ever obtained a valid title to the suit property.
34. The pleadings by the plaintiffs and 1st defendant agree that the plaintiffs secured the borrowing of Mahek Limited by a charge over the suit property and guaranteed the debt up to an aggregate debt of Kshs. 28,000,000.00. It is also not disputed that the statutory demands made to the plaintiffs included the debt on hire purchase obligation which challenged to have not been expressly envisaged to be secured in the Charge dated April 6, 2009 and the guarantee. The questions which then arise are whether the actions of the 1st defendant to consolidate the borrowers' loans without concurrence of the plaintiffs was lawful and binding upon the plaintiffs and if there was liberty to sell by private treaty.
35. It appears to me that Clause 8(k) on page 18 of Charge dated April 6, 2009 allowed for consolidation of accounts. The clause provides: -

“That the bank may at any time and without notice to the Chargor and /or the borrower combine or consolidate all or any of the accounts of the Borrower with any liabilities to the Bank and set off or transfer any sum or sums standing to the credit of any one or more of such accounts in or towards satisfaction of any of the liabilities of the Borrower to the Bank on any other accounts or in any other respect whether such liabilities be actual or contingent primary or collateral joint or several and whether such accounts and liabilities be at or to one or more branches of the Bank;”
36. This court thus finds that consolidation was contractually agreed and it will thus not interfere with the terms of the charge which were freely agreed to and negotiated to by the parties. In *Halsbury Laws of England*, 4th Edition, Volume 16, Para. 144 the author write:

“....The court will not interfere with the freedom of contract and will not....merely because a man has made an improvident contract, relieve him from its consequences.”



37. That position of the law has been reiterated by the superior courts in Kenya and one may only cite National Bank of Kenya Limited vs Pipe Plastic Samkolit K Ltd (supra) where the court said: -

“A Court of law cannot re-write 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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge”.

38. However, over and above the charge, the plaintiffs and the defendant equally executed a guarantee with terms the court deems to have the effect of improving or amending the contract between them. In the guarantee signed by both Plaintiffs, and as much as the Charge allowed for consolidation of accounts, the liability of the Plaintiffs was capped and limited by Clause 7 to an aggregate maximum amount not exceeding the sum of Kshs. 28,000,000.00. the clause was worded thus: -

“7. Notice to Determine Guarantee and Limit on Recoveries

7. 1.....

7. 2 The aggregate maximum amount recoverable by the Bank from the Guarantor (s)(or any one or more of them) under clauses 3.1 and 4.1 shall not exceed the aggregate of:

a. Kenya Shillings Twenty-Eight Million Only (Kshs. 28,000,000/=);

b. The amount of interest accruing at the date of demand; and

c. The total amount of all interest, fees, costs, commissions, liabilities, taxes, charges and expenses which, at the date of an relevant calculation hereunder, form part of the Principal's Obligations and are unpaid and whether such interest, fees, costs, liabilities, taxes, commissions, charges and expenses have fallen due for payment prior to the date of any relevant demand or fall due thereafter.c For avoidance of doubt, any receipt or recovery under this Guarantee in respect of interest, fees, taxes, costs, charges, commissions, expenses and other liabilities as aforesaid shall be taken out of account in any subsequent calculation made for the purposes of this clause 7.2”

39. The above covenant between the parties did limit the obligations to a specific and known sum only subject to interests and other usual bank charges. The court sees no window allowing the 1st defendant to burden the plaintiffs to bear the obligations subsequently incurred behind their backs.

40. The liability of a guarantor in the indebtedness of a borrower was addressed in [Rajnikantkjetsbi Shab v Habib Bank A.G. Zurich](#) [2016] eKLR where the court held;

“In such situation, the law is that, unless otherwise provided, where a guarantee limits the guarantor's liability to a fixed sum, the guarantors will be liable to the extent of the guarantee only and not to the entire debt of the principal debtor. This is due to the nature of guarantee whose terms are normally interpreted strictly. Therefore, in such case it will not make any legal sense to merge the principal debtor and the guarantor into one person or merge the guarantee with the borrower's contract of the debt. The guarantee is quite separate from the



principal debtor's contract for the debt and it is desirable they are kept separate. In the case before me, the guarantee was given in form of a Legal Charge and was for a fixed amount of money Kshs. 5,000,000 together with interest. As such, whether the chargor is a guarantor, or both guarantor and principal debtor, his liability is to sum fixed in the Charge."

41. This holding was reiterated by the court in *Kolaba Enterprises Ltd v Shamsbudin Hussein Varvani & another* [2015] eKLR where the court observed;

"Liability of guarantor

[10] In my earlier ruling, I re-stated the law on this legal issue and I will state it again. Guarantee is a separate contract from and distinct from that of the borrower. Liability of guarantor is therefore based on the guarantee to pay the debts of the principal debtor should he not pay or be unable to pay. However, liability of guarantor is limited to the liability set out in the guarantee. See Halsbury's Laws of England, 4th Ed that:

101 "A guarantee, being merely an accessory contract, does not, even when under seal, cause a merger with that of the principal debtor's simple contract debt to which it relates.....

103 "...although sometimes bound by the same instrument as his surety, the principal debtor is not a party to the surety's contract to be answerable to the contract; there is not necessarily any privity between the surety and the principal debtor; they do not constitute one person in law, and are not as such jointly liable to the creditor, with whom alone the surety contracts."

42. The court reads the law to dictate, and this is not alien to the basic law of contract, that parties are in charge of their affairs and they remain the best custodians of their right under such contracts. The court's only duty is to interpret same in case of a disagreement and to enforce the agreed terms. The court does interpret the clause limiting the liability under the guarantee to have set the limit to include the quantified sum of Kshs. 28,000,000/- together with the other sums listed as b) and c) in the same clause. The court considers the sum of Kshs. 28,000,000/- not to have been the absolute upper limit because the clause enumerates what constitutes the maximum debt to include interests and other charges. However, it must remain the principle debt not to be consolidated with debts subsequently incurred without concurrence with the Plaintiff. The court therefore finds that the liability of the Plaintiff was limited to Kshs. 28,000,000/- as the principle sum advanced plus interests and other usual bank charges disclosed in the document of guarantee. For avoidance of doubt, the sum advanced after the legal charge and guarantee by the plaintiffs had been executed by the parties did not form part of the plaintiff's obligations to the bank and must be excluded from computation of liability of the Plaintiff to the 1st Defendant.

43. The court thus finds that the claim by the plaintiffs to find the Charge dated 6th April, 2009 as unenforceable not to be plausible because it would amount to the Plaintiffs getting the nod from the court to run away from the obligations they had knowledge of. In *Machakos HCCC No 215 of 2008-Jopa Villas LLC Vs Private Investment Corp & 2 others* the court in addressing the same question held and reiterated the age old position that parties are bound by their bargain and that the court ought not take the duty to rewrite a contract for the parties.

44. The court therefore finds that there was no variation to or breach of any terms of the charge by the 1st defendant consolidating other debts for purposes of being secured by the said charge, provided such



debts were in existence and thus known by the plaintiff and the aggregate thereof capped at Kshs. 28,000,000/-. In addition, the court finds and holds that the Plaintiffs' indebtedness though limited to a disclosed aggregate sum of Kshs. 28,000,000/-, the same contract was unequivocal that the same sum would attract interest and other bank charges. The particulars of such other charges and interest was contained in the letter of offer dated 3.4.2009 at clauses 6 and 8. In fact, the wording of clause 7 is same in meaning to recital c in the charge. If there is a dispute on the sum due under the agreement between the parties, it is not whether the disclosed sum was to be subjected to interest and other charges, rather the dispute may be about the computation of the exact sum which the court may not be suited to calculate.

B. Whether the Sale of The Suit Property Was By Way of a Public Auction or Private Treaty and If the Same was Unlawful?

45. A perusal of the Charge dated April 6, 2009 makes no provision of a sale of the security by private treaty. Clause 8 of the Charge dated 6th April, 2009 provides for exercise by the bank of its statutory power of sale and invite the provisions of The Registered Land Act. Under the statute, section 77 (1) decreed that the sale in exercise of the chargee's power of sale be by auction. No window was provided by law to sell by private treaty and it matters not that clause 8(n) was crafted to suggest that one could proceed by private treaty. It matters not because the law does not countenance any agreement by the parties that runs contra statute. The law stipulated: -

“S. 77. (1) A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction through a licensed auctioneer for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby, and may himself bid at any auction.”

46. It is to this court indubitable that realisation of the security had to be by public auction conducted by a licensed auctioneer. The evidence by the Plaintiffs and the 1st and 3rd defendant was in agreement that on the date set for the auction no acceptable bid was received, none was accepted and therefore no sale was concluded. In those circumstances, if another sale was to be staged, fresh publication under the auctioneers Act was mandatory and there was no allusion to a later auction properly convened and concluded. On the evidence on record, particularly that by the 3rd defendant, the court does find that the sale between the 1st and 3rd defendant was by private treaty and in violation and affront to the dictate of the law under section 77(1), Registered Land Act. If not in compliance with the law, then it was neither lawful nor procedural and thus could not bestow any right nor obligation on any of the parties.

47. Justice Ogola in Maina Wanjigi & another v Bank of Africa Kenya Ltd & 2 others [2015] eKLR in addressing the conduct of public auction pursuant to statutory power of sale had this to say: -

“The auctioneer cannot conduct an auction in a manner to leave the impression that he expects hitherto none present bidders to offer better bids. Once the 2nd defendant Auctioneer herein ascertained, as he did soon after 12.00 noon, that the bids were not competitive and called it off, he had no right to start it again without giving the public knowledge of the future date. The morning session was not responsive, and was closed for that reason. The afternoon session, to gather validity, ought to have been advertised. One may argue that the plaintiffs' representatives, by agreeing to attend, and to participate in the afternoon session, had ratified and validated the afternoon process. That may appear to



be correct, but only as between the present bidders, and not the public. There is a reason why the auction is called Public Auction and not private auction. A public auction is a process open to the public. The public only come to learn about it when it is advertised. The moment the advertised day and time comes, and the auction is not responsive and it is stoooped for that reason, a valid similar process can only start with a fresh advertisement. In this instance, the public was not aware of the afternoon session. Whatever transpired in the afternoon was a private arrangement shared into by the parties before the court, and for all intents and purposes, was not a public auction. So, in my view, no public auction took place on 3rd June 2014 involving the suit property.

...Since there was no auction as deemed by the law, whatever transpired on 3rd June 2014 purported to be a public auction, was not a public auction, was an unlawful process which was incapable of conferring any title or proprietary rights to the alleged successful bidder - the 3rd Defendant. I therefore reject the submission that the Third Defendant had acquired title which needs to be protected by law. A title can only be acquired through a lawful process which this was not.”

48. The court shares the views expressed by the judge in the above cited decision and fully persuaded that in this case there was no public auction that could lead to a valid sale to confer a valid title upon the 3rd defendant. The evidence is that, the auction aborted and it was not until the July 7, 2011, when the 1st defendant approached the 3rd defendant with an offer for sale, that the deposit of 25% was paid but again paid against no agreement to evidence sale in that the auctioneer never signed the memorandum which was equally never witnessed. That was in violation of rule 18(3), *Auctioneers Rules*, 1997.
49. Being a country that has chosen to be governed by the rule of law, a violation of a statute or circumventing it, must, by dictates that citizenry live and operate by and within the law, attract a consequence. The wrongdoer must be reminded that the law is for obedience and not to be violated or ignored. The court considers the desire to sell the security at all costs including feigning an action that never was to be a design to defeat the equity of redemption. It is what one would consider arbitrary deprivation of property. The court considers that for the wrong the plaintiff is entitled to a recompense in general damages which the court assesses in the sum of Kshs 3,000,000.
50. In any event, the agreement is admitted by both witnesses for the 1st and 3rd Defendant to have been negotiated on the July 6, 2011 between the two and in the absence of the auctioneer. On that evidence alone, the court finds no wrongdoing against the auctioneer and hold that any impropriety was far removed from him. For that reason, the court finds that no liability attaches on him even though he opted not to defend the suit.
51. The court equally applauds the 3rd defendant in appreciating and accepting the circumstances of the sale to have vested upon him no valid title. The court therefore declares that there was never a valid sale to the 3rd defendant and that any and every transaction on the title and register of the suit property done pursuant of the invalid sale were all invalid, null and void and must all be set aside.
52. Having found that the sale was invalid, null and void together with transactions flowing from it, it is now the time to decide on the right between the plaintiffs and the 1st defendant as parties to the charge and guarantee as well as what remedies are appropriate in the circumstances of the case. The invalidity of the sale and the finding that the charge between the Plaintiff and the 1st defendant has not been invalidated basically defeats all the prayers specified and sought against the 1st defendant save for remedy of general damages and costs. The court does find that on account of the invalidated sale to the 3rd defendant, the entries in the register as at the date of the invalidated sale be restored together with all the rights and obligations of the parties as at that date. It thus follows that the sale and transfer of



- Mombasa/Block XII/45 in favour of the 3rd defendant together with all/ any subsequent dealings and entries are declared null and void and must be reversed and deleted so that the status of the register be restored as at the date of the invalidated sale.
53. On the same note every transaction founded on the invalidated agreement for sale of the suit property including the agreement for financial facilities to enable finance the sale culminating in the execution of the legal charge over the 3rd defendants property, Mombasa/BlockXX/265A have no legal nor just basis to stand upon and are equally invalidated, declared null and void to be deleted from the register so that the 1st and 3rd defendants are restored to respective positions prior to the alleged memorandum of sale executed only by the 3rd defendant on the 6.7.2011.
54. There was a claim in the counter claim for special damages described as the costs of the acquisition of the suit property in the sum of Kshs 32,938,715 as well as loss of profits in the sum of Kshs 134,830,227. The court has no doubt that the deposit of Kshs 19,000,000 as well as the related transaction cost and interests charged on the loan account were not only specifically pleaded but also strictly proved. However, having invalidated the transaction including the lending one between the two Defendants, and being minded to reconstitute the parties to respective positions preceding the transaction, the court finds that interest charge on the account of the 3rd defendant held with the 1st defendant is not due for award as part of special damages consequent to the transaction. That interest is not recoverable because having been charged on a nullified transaction, it stands reversed and not a burden upon the 3rd defendant. The sum for interests pleaded in the sum of 6,382,368 is therefore excluded from the particulars of special damages leaving a sum of Kshs 26,555,859 which sum is hereby awarded to the 3rd defendant as special damages.
55. There is then the sum claimed as the loss of profits. The only pleading that relates to that sum is at paragraphs 66 and 67 of the counter-claim. The two paragraphs differently and ambivalently claim a monthly loss in rental income of 450,000 and 1,500,000 respectively. No other pleading is made on how the aggregate figure of kshs 134,830,227 is calculated. That notwithstanding, in evidence, there was no cogent evidence to strictly prove the sum as the law demands. The court finds that sum not strictly proved and unable to make an award on it.
56. On account of the fact that the 3rd defendant felt lured into a transaction that was potentially challengeable by representations by senior officers and agents of the 1st defendant of a good deal in rental income, that the fact of challenge of the transaction by this suit was kept away from the 3rd defendants for months, the 3rd defendant asserts that he has suffered loss and damage and is entitled to general damages. No specific genre of general damages has been identified and sought. The prayer 8 simply seeks general damages and passes as those claims just thrown at the court without more. The court finds that prayer undeserved on account of inadequate pleading but also on the principle of the law that general damages is normally not available on breach of a contract¹ and when available it is limited to taking back the offended party to its position prior to the contract. In this matter the court has made an award considered to reconstitute the parties to respective positions and it would be a double award to award general damages.
57. While this matter has been pending in court, for now slightly over a decade, the rental income from the suit property the court has decreed to have been unlawfully sold, has been kept into an escrow account on the basis of a litigation instigated by wrongful conduct by the 1st defendant. The consequence is that the plaintiff has been unlawfully deprived of access to that income by the same wrongful conduct. It is the courts finding that that wrong is remedied by an order that the entire deposit together with all the interests earned be paid to the plaintiff forthwith.

¹ [Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd](#) [2015] eKLR.



58. For the same wrongful acts, the stalemate has persisted since filing the suit up to now. The court considers that having reinstated the charge, the obligation to pay interest by the debtor and its guarantors would be as a matter of course and logic. But, would it be just? The court finds that it would be unjust to let the 1st defendant benefit from income on the debt for a period over which it was instrumental in creating. Prudence would have beckoned the 1st defendant to change tact as the 3rd defendant did by owning up to the impropriety of the transaction. Had that been done even at the level of negotiations or mediation, a middle ground or some amicable settlement would have been achieved and time for payment of such interests contained. In insisting on a transaction that was obviously improper, the 1st defendant acted inequitably and should not be allowed to benefit from such conduct by demanding and collecting interest for the period.
59. In addition, there is the regulator's guideline issued by Central Bank of Kenya and called Prudential Guidelines, January 2013. In those guidelines prudence is urged that a non-performing loan be provided for in the following words: -
- “ 3. 6 Provisioning Requirements
- (a) Suspension of Interest
- When a loan is classified to non-performing category, an institution should either cease the accrual of interest or continue to accrue interest suspended in accordance with the criteria set out in this guideline and should not be treated as income. Interest in suspense shall be taken into account in the computation of provisions for non-performing loans.”
60. It is clear by the guidelines that by the time there was default and realisation of the security initiated, the loan had become non-performing and the 1st defendant was bound to suspend application of interests. The court therefore finds and hold that having been so suspended, the same is not recoverable and that the Plaintiff's liability be limited to the debt outstanding as at the date of the auction if it pays forthwith. However, any delay after the date of this decision will entitle the 1st defendant to demand and recover interest at the contractual terms for such duration of delay.

Rendition and Final Orders

61. In the end, and in summary, the court finds that the plaintiffs have established a case of wrong doing against them by the 1st defendant but has failed to prove any against the 2nd and 3rd defendants. The plaintiff case against 2nd and 3rd defendants is therefore dismissed.
62. The court equally finds the counter-claim proved against the 1st defendant to the extent that the contract between the two over the suit property is unenforceable and thus nullified. Having done so in general terms, judgment is entered for the plaintiff on the suit and for the 3rd defendant, on the counter-claim as follows: -
- A: For the Plaintiff
- a. The sale of the suit property having been done by private treaty was null and void and is thus set aside, the transfer to the 3rd defendant was itself null and void and is equally set aside and an order issued that the entries in the register be accordingly cancelled so that the register is restored to its status as at the date of the aborted auction.



- b. The accounts of the plaintiffs with the 1st defendant be worked so that any obligation mounted upon the Hire purchase facility be excluded in whole and the 1st defendant be at liberty realise its security for the sum contractually secured by the charge and the guarantee.
- c. The accounts be worked and agreed within 30 days from the date hereof.
- d. For clarity purposes, the 1st defendant is not entitled to charge and recover interests for the period between the date of aborted auction and the date of this judgment.
- e. General damages 3,000,000
- f. The suit against the 2nd and 3rd defendant is dismissed.

B: For the 3rd defendant/counter-claimant

- a. A declaration that the memorandum of sale purporting to accept a bid of Kshs 59 million from the 3rd defendant for the suit property was unlawful, null and void, incapable of constituting a valid sale of the property and all dealing with the said property pursuant to the said sale was invalid hence the transfer in favour of the 3rd defendant is nullified and the entries in that regard expunged.
- b. On the basis of (a) above, declaration that that the purpose for which there was executed and registered a legal charge dated 19.9.2011 between the 1st and 3rd defendant was premised on illegality and the same is nullified and invalidated. The entry of that charge in the register be cancelled by the registrar if not discharged by the 1st defendant within 30 days from the date hereof.
- c. Special damages in the sum of Kshs 26,556,347/
- d. The costs of the suit are awarded to the plaintiffs and the 3rd defendant to be paid by the 1st defendant.
- e. The plaintiffs and the 3rd defendant, the decree-holders, get interest on the sums awarded at the prevailing commercial rates charged by the 1st defendant till payment in full. Interests shall be calculated from the date of the suit save for those on general damage which shall be computed from the date of this judgment.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 25TH DAY OF MAY 2022

Patrick J O Otieno

Judge

