REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL APPEAL NO. 28 OF 2018

AMANDARI LIMITED……..…….1ST APPELLANT

MAUREEN KADEIZA MURUNGA……..……..2ND APPELLANT

NANCY KAHOYA AMADIVA…….....3RD APPELLANT

VERSUS

NIC BANK LIMITED……...…..RESPONDENT

(Being an appeal from the Judgement and decree of Milimani Chief Magistrates' Court by Honourable Peter Muholi, Senior Resident Magistrate on 14th September 2018 in Milimani Civil Suit No. 1038 of 2014)

BETWEEN

NIC BANK LIMITED.....PLAINTIFF

VERSUS

AMANDARI LIMITED.....1ST DEFENDANT

MAUREEN KADEIZA MURUNGA.....2ND DEFENDANT

NANCY KAHOYA AMADIVA.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. This Appeal arise from a suit filed in the Lower Court on the 24th of February 2014 by Respondent/Plaintiff who sought the following orders against the Appellant/ Defendants:

   a. **Claim of Kshs 2,363,209.22.**

   b. **Interest thereon at the rate of 33% per annum from 27th November 2013.**

   c. **Cost of the suit.**

2. The claim was in respect of a banking facility of Kshs 1,724,000 advanced by Respondent to the 1st Appellant on 12th of March 2013. The 1st Appellant covenanted to repay the same over a period of 24 months together with interest at the rate of 21% per annum and an additional 1% in the event of default. The 2nd and 3rd Appellants separately guaranteed to indemnify the Respondent from any loss arising from the breach or default of the obligations under the banking facility.

3. The Appellants entered appearance in person on the 28th of March 2014 and filed their defences on the 16th of April 2014. On the 21st

May 2014, they instructed the firm of **M/s Issa & Co. Advocates** to represent them in the matter.

4. After hearing, the trial court made findings as follows:-

a. The interest rate was manifestly excessive and morally wrong.

b. The bank owed a statutory and fiduciary duty of care to the Appellants to the very least to inform them and especially Appellants on the change in material facts of the agreement.

c. No loan repayment was ever done to the bank of the principal amount of Kshs. 1,724,000. The amount owing shall attract interest at the contractual rate of 22% from the date it fell into arrears which is 24th April 2013 until payment in full.

5. The Appellant being aggrieved by the said determination filed this appeal on the following grounds:-

a. That the Learned Trial Magistrate erred in holding that the Respondent had proved its case against the Appellants.

b. That the Learned Trial Magistrate erred and misdirected himself in law and in fact in disregarding the evidence on record in holding that the loan advanced by the Respondent to the 1st Appellant was secured by the guarantees of the 2nd and 3rd Appellants contrary to the evidence on record.

c. That the Learned Trial Magistrate erred in law in disregarding the evidence on record that the guarantees issued by the 2nd and 3rd Appellants predated the loan to the 1st Appellant and that the Respondent was therefore non suited against the 2nd and 3rd Appellants and could not seek to enforce the said guarantee on the facility to the 1st Appellant.

d. That the Learned Trial Magistrate erred and misdirected himself in law in failing to uphold the plea by the 2nd and 3rd Appellants that they had been discharged as guarantors on settlement of the first loan facility by the 1st Appellant.

e. That the Learned Trial Magistrate erred in law and misdirected himself in fact in holding that the 2nd and 3rd Appellants as guarantors could not escape liability to the Respondent and that they were jointly and severally liable to the extent of their guarantees.

f. That the Learned Trial Magistrate erred and misdirected himself in law in admitting evidence and considering the statement of accounts tendered by the Respondent contrary to **Section 177 (1) of the Evidence Act.**

g. That the Learned Trial Magistrate erred in failing to determine all the issues placed by the Appellants and the judgement and decree was made in violation of the provisions of **Order 15 and Order 21 of the Civil Procedure Rules, 2010.**

h. That the Learned Trial Magistrate misdirected himself in the evaluation of evidence tendered thereby making contradictory finding and arriving at a wrong decision.

i. That the Learned Trial Magistrate misdirected himself on the applicable law and principles thereby arriving at a wrong decision.

6. The Appeal proceeded by way of written submissions. Counsels for the parties herein highlighted submissions on 6th September 2019.

APPELLANTS' SUBMISSIONS

7. The Appellants submitted that the guarantee and indemnities given by the 2nd and 3rd Appellants dated **5th April 2012** did not secure the loan disbursed pursuant to the letter of offer dated **12th of March 2013**. The Deeds of Guarantee predate the loan agreement and letter of offer to the 1st Appellant. Counsel submitted that the Guarantee and Indemnity dated **5th of April 2012** were signed and executed to secure the **first loan facility of Kshs 3,100,000.00** and that the same has been fully settled.

8. Counsel further submitted that the Learned Trial Magistrate erred in law and misdirected himself in fact in holding that the Appellants as guarantors could not escape liability. That the letter of offer was clear that their guarantee was only limited to a sum of Kshs 1,724,000.00; and in the absence of the guarantee the facility was unsecured.

9. Appellant's drew Courts attention to:-

i. **Halsbury laws of England Vol. 20 4th edition 2001 (reissue).**

ii. **Koloba Enterprises Limited v Shamshudin Hussein Varvani & Another [2015] eKLR**, the gist is that a guarantor is limited to the liability set out in the guarantee.

iii.**Kenya Planters Cooperative Union Limited v Stephen Nyaga Kimani [2005] eKLR** the gist being that when one undertakes to be a guarantor that undertaking must be evidenced in writing. Appellant submitted that there was no written document of guarantee that was submitted in evidence by the Plaintiff and accordingly the Plaintiff's claim against the 2nd and 3rd Defendant

must on that account fail.

iv. **David Haris v Middle East Bank Kenya Limited & 3 others [2019] eKLR.**

10. As to whether the statement of accounts tendered by the Respondent are admissible under **Section 176 and 177 of the Evidence Act**, the Appellants submitted that the handwritten computation and the Statement of Accounts used to support the Respondent's claim on the outstanding amount due does not meet **Section 176 and 177 (1) of the Evidence Act.** On cross examination, PW1 confirmed that the hand written documentation was not how the Respondent did its computations or kept accounts.

11. Appellants further submitted that without a Statement of Account, neither the Appellants nor this Honourable Court can ascertain the total amount allegedly owed, the interest applied and the levies charged.

12. Appellants drew courts attention to several authorities which include **Kenya Commercial Bank Limited v James Kuria Njine [2002] eKLR,** where the gist of the case was that the statement of accounts had not been verified as required and **National Bank of Kenya Limited v Patrick Simiyu Kimoi [2006] eKLR,** the gist of the case being that **Section 177 of the Evidence Act** requires a party invoking **Section 176** to state that the bankers book is one the ordinary book of the bank, that the book was in the custody and control of the bank and that the entry was made in the usual and ordinary course of banking business and that the copy has been examined with the original entry and is correct and **Scholastica Nyaguthii Muturi v. Housing Finance Co. of Kenya & Another [2017] eKLR** where the court stated that a Court of Law could not determine issues of Accounts on guess work and any bank which fails to keep proper accounts cannot make a calculable claim against a customer.

13. As to whether the Trial Magistrate misdirected himself in the evaluation of evidence and the Applicable law in holding that the case against the 2nd and 3rd Appellants**,** the Appellants submitted that it is the Respondent's legal and evidential burden to strictly prove that the term loan of Kshs 1,724,000 was advanced to the 1st Appellant and that the Learned Trial Magistrate failed to consider the issues raised and cited the case of **Chandaria v Njeri (1982) KLR 84**, where the court held that failure to deal with all issues and give reasons for believing the witness amounted to a mistrial.

RESPONDENT'S SUBMISSIONS

14. The Respondents submitted that the guarantee and indemnities by the 2nd and 3rd Appellants are valid and enforceable; that they signed a guarantee and indemnity though it did not secure the loan facility.

15. Further that the Appellants admitted the loan. The Respondent cited several authorities which include **Coast Brick & Tiles v Premchand [1966] EA 154**, where the court held that a challenge to the validity of securities had to be raised early and not long after the facility had been utilized and was now being demanded and **Al-Jalal Enterprises Limited v Gulf Bank Limited [2014] eKLR,** where the court stated that the Court finds no sympathy for debtors who after executing valid security instruments later turn around and challenge the validity years later when the bank commences the sale of the securities and **Ecobank Kenya Limited v Solution Wizards Limited and 2 Others [2017] eKLR** where the Court relied on the case of **Ebony Development Bank Company Ltd v Standard Chartered Bank Ltd [2008] eKLR**, the gist of the case being that the obligation of a guarantor was clear and they become liable upon default by the Principal debtor.

16. Respondent further submitted that the relationship between the Appellants and Respondent was that there had been an earlier loan facility which was secured by the guarantees and indemnity dated 5th of April 2012; that the loan facility was partly redeemed and upon the application by the 1st Appellant, the Appellants did not need a further Guarantee and Indemnity as **Clause 2.1** provided that it was a continuing security.

17. Respondent cited the case of **Hosea Mundui Kiplagat v Kenya Commercial Bank [2012] eKLR**, where the court held that a guarantee is a continuing security and shall remain in force until the subject debt is satisfied.

18. As to whether there was admission of the debt**,** the Respondent submits that the Appellants admitted that the loan was not settled in full and quoted the Appellants letter "**Debt owed to NIC Bank Kshs 1,724,000 + interest."**

19. As to whether the statement of accounts are admissible, the Respondent stated that the total amount was adduced from amalgamation of the loan amount outstanding and current account. Respondent stated that the statement of account is *prima facie* evidence of the Appellants indebtness.

ANALYSIS AND DETERMINATION

20. This being the first appellant court, I am obligated to re-evaluate evidence adduced in the trial Court and arrive at an independent determination. This I do with the knowledge that unlike the trial court, I never got the opportunity of taking evidence first hand and observe demeanour of witness. The principles guiding the first appellate court was set out by the the Court of Appeal for East Africa **in Peters –vs-Sunday Post Limited [1958] EA 424** where **Sir Kenneth O'Connor** stated as follows:-

> **"… An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."**

21. In view of the foregoing, I have considered and perused the Trial Court record and considered submissions by parties herein. From

evidence adduced in the Trial Court that they advanced to the Plaintiff a loan facility of kshs 1,724,000 on 12th March 2013. The interest rate agreed by the parties was 21% per annum and in addition 1% on arrears in the event of default. The maximum interest that the plaintiff could charge as per contract signed on 12th March 2013 was 22% when there arose default.

22. PW1 admitted that when the 1st Defendant defaulted, interest rate of 33% was charged on the loan arrears. The defendants do not deny the default but their argument is, that the minister did not approve interest rate of 33% as required by **Section 44 of the Banking Act.**

23. Further, the Defendants deny guaranteeing loan advanced to 1st defendant on 12th March 2013. The 2nd and 3rd Defendants' argument is that they guaranteed loan advanced on 5th April 2012 and by 12th March 2013 when Plaintiff advanced loan to 1st defendant, they had been discharged; that they are not therefore liable to pay loan arrears owed by the 1st Defendant to the Plaintiff.

24. I consider the following to be issues for determination:-

a. Whether the loan advanced to the 1st Defendant on 12th March 2013 was guaranteed by the Appellants (2nd and 3rd defendant). Whether the Respondent is entitled to indemnity from the 2nd and 3rd appellants.

b. Whether the 1st loan facility advanced to the 1st Appellant was settled and if so whether the 2nd and 3rd Appellants were discharged on settlement of the first loan facility/Whether interest rate charged by the Plaintiff was legal.

c. Whether at the loan advanced to the 1st Defendant on 12th March 2013 was guaranteed by the Appellants (2nd and 3rd Defendant)/ Whether the respondent is entitled to indemnity from the 2nd and 3rd Appellant/Whether the 1st loan facility advanced to the 1st Appellant was settled and if so whether the 2nd and 3rd Appellants were discharged on settlement of the first loan facility.

25. The Appellants (2nd and 3rd Defendant) contend that at the time the plaintiff advance loan of kshs 1,724,00 was due to the 1st Defendant, the first loan issued on 5th April 2012 had been settled and they had been discharged from guarantee obligation; that they are not therefore obligated to indemnify the Plaintiff.

26. The 2nd and 3rd Appellant's argument is that they guaranteed the 1st bank facility advanced on 5th April 2012 and agreed to indemnify the Respondent for the said bank facility. That the said facility had been settled at the time the Plaintiff advanced 1st Defendant loan facility of Kshs 1,724,000 on 12th March 2013.

27. From evidence on record, the plaintiff's claim as per paragraph 6 of the plaint relate to loan facility of Kshs 1,724,000 advanced on 12th March 2013; plaintiff's argument is that the said loan was secured separately by the 2nd and 3rd Defendants/Appellants who are directors of the 1st Appellant by personal written guarantees and indemnities dated 5th April 2012.

28. The letter of offer dated 12th March 2013 indicate that it is a bank facility to the 1st respondent. Purpose of the facility is indicated as:

"to finance restructure of existing loans to be secured by director's personal guarantee of 1,724,000.00"

29. The restructuring of the loan confirm that the loan guaranteed by the 2nd and 3rd appellants on 12th April 2012 had not been settled. The bank facility of 12th March 2013 was a restructure of the existing loan and not a new loan. Acceptance form was signed by two directors on the same day 12th March 2013.

30. The Guarantee and Indemnity signed on the 5th of April 2012 under clause 2. headed "Continuing Security", states as follows:

"2.1.The Guarantee is a continuing guarantee and shall secure the ultimate balance from time to time owing to the bank by the Principal in any manner whatsoever notwithstanding the death, bankruptcy, insanity, liquidation, administration or other incapacity or any change in the constitution of the Principal of in the name or style thereof (or retirement or death of any partner or the introduction of any further partner of the Principal or the Guarantor) or any settlement of account or other manner whatsoever until 3 months after the receipt by the Bank of notice in writing to determine the same signed by the Guarantor PROVIDED ALWAYS that such notice shall not affect the liability of the Guarantor for moneys obligations or liabilities present or future actual or contingent due owing or incurred prior to the expiration of such 3 months period"

31. It is evident that the 2nd and 3rd Appellants agreed to the term of continuing security for the balance of the loan. Having found that the facility signed on 12th March 2013 was for restructuring of existing security, there was no requirement for another guarantee and indemnity to be signed by the directors as they bound themselves to guarantee the banking facility and indemnify the respondent for balance of the loan, which was being restructured.

32. Further, by a letter dated 21st of January 2014 the Appellants acknowledged the debt, their inability to pay and proposed a payment plan. The existence of the loan was not rebutted by the Appellants in the lower court; there is no doubt that the 2nd and 3rd Defendants were aware that the initial debt which they guaranteed the 1st Appellant and committed to indemnify the respondent had not been settled. It is true that the guarantee predates the bank facility of 12th March 2013 but from appellants pleadings the facility was intended to restructure the existing facility whose guarantee and indemnity was to continue until it was cleared.

33. In **Robert Njoka Muthara & Another v Barclays Bank of Kenya Limited & Another [2017] eKLR Judges of Court of appeal sitting in Nyeri** pronounced themselves on the issue of continuing securities as follows:-

> **"The 1st Respondent relied on Lingard's Bank Security Documents, 3rd Edition at page 179 wherein it is stated,**
>
> **Bank security documents should contain a continuing security clause to avoid a contention that the security is discharged if, subsequent to its creation, the accounts of the customer are in credit."**

34. The 1st respondent also cited "**The Law of Guarantees" 2nd Edition by Geraldine Andrew and Richard Millet** where the nature of a continuing guarantee was discussed at page 90:-

> **"A continuing guarantee is one which covers liabilities or transactions which continue to occur between the principal and creditor, such as the debts which fall due from time to time on a running account between a supplier of goods and a regular purchaser, or between a banker and a customer."**

As defined in "**The Law of Guarantees" (supra) at page 156:**

> **"A guarantee is a pledge by a person (guarantor), other than a party upon whom the contractual or other legal obligation is imposed, to the effect that if the party so bound (principal) fails to perform the act in question, the guarantor, will either perform or make good any loss or claim arising from the non-performance. The pledge is ordinarily made to a creditor. The essence is that the guarantor agrees not to discharge the liability in any event, but to do so only if the principal debtor fails to honour his duty."**

35. What were the terms of the relationship created by the guarantee herein? The terms of guarantee are contained in **clause 1.1:-**

> **"The guarantor hereby guarantees on demand to pay to the bank all monies and discharge all obligations and liabilities whether actual or contingent now or any other time hereafter due owing or incurred to the bank by principal…Any statement of account of the principal signed as correct by any duly authorized officer of the bank shall be conclusive evidence against the guarantor of indebtedness of the principal to the bank."**

36. Based on the foregoing, the Appellants' obligation was to pay on demand any outstanding amount under the bank facility.

b) Whether variation of interest rate by the bank (without informing the Appellants) was proper.

37. It is not disputed that the Plaintiff charged interest of 33% this was admitted by PW1, the Plaintiff/respondent's legal officer, variation of interest rate is provided for under **Section 44 of the Banking Act.** It states as follows:-

> **"No institution shall increase its rate or other charges except with the prior approval of the Minister."**

38. As rightfully observed by the trial magistrate, the Plaintiff never adduced any evidence of approval by minister nor notification of the changes to the parties involved. Instead, the Plaintiff argued that the contract allowed the Plaintiff to vary interest at its discretion and failure to notify the customer will not prejudice the Plaintiff in its recovery of arrears.

39. The regulation under **Section 44 of Banking Act** is by statute and my view is that parties cannot agree to act against statute.

40. The **Court of Appeal in Civil Appeal No. 282 of 2004 (Margaret Njeri Muiruri v. Bank of Baroda (Kenya) Limited [2014] eKLR,** is that **Section 44 of the Banking Act** is applicable to rates of interest as it is to other banking charges. And on the manner and burden of proving the compliance with the provisions of **Section 44**, the Court of Appeal held:-

This section requires banks to notify the Minister for Finance before any change in the rate of banking is effected. It provides as follows:

> **"Restrictions on increase in bank charges**
>
> **44. No institution shall increase its rate of banking or other charges except with the prior approval of the Minister."**

41. In the case of **Munyu Maina v Hiram Gathiha Maina [2013] eKLR (Civil Appeal No. 239 of 2009)** this Court, differently constituted held that:

> **"Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."**

42. In the Appeal before us, it was the Respondent bank which fell within **Section 112** and which had a duty to demonstrate that it had indeed sought approval to increase the interest rate because this would be a fact that would be within its knowledge. We find and hold therefore, that the burden remained on the bank to prove that the rate of interest that was being charged was charged with the consent of the Minister. This is especially so because **Section 44 of the Banking Act** places the burden on the bank to seek the approval. How would the

Applicant be able to tell if indeed the bank had sought approval from the Minister?

> **"To illustrate this point, we find persuasive authority in the High Court case of John Gatu Nderitu v Kenya Commercial Bank Ltd [2011] eKLR (Civil Case No. 55 Of 2001) where Sergon J found that it was the bank that is enjoined to provide documentary evidence to the Court to the effect that it had complied with Section 44 of the Banking Act. A failure to do so would attract the presumption that the bank did not comply with the statutory requirement to increase the interest rate. To our knowledge, the principle stated in that High Court decision was not challenged on appeal."**

43. The Plaintiff herein/Respondent having conceded that there was a variation of the rate of interest from 22% per annum to 33% per annum, the Bank shouldered the burden of providing proof that it had sought and obtained the prior approval of this variation from the Minister for the time being in charge of Finance. There was no effort by the Bank to discharge this onus. I therefore find that charge of interest at 33% was unlawful.

(c)Whether admission of bank statement met the required threshold

44. On the issue of production of the statements, the Appellants argued that the statements produced did not meet the threshold required as they were screen shots from computer; that **Section 177 of Evidence Act** was not complied.; that the Court failed to determine whether the statements of account were admissible

45. **Section 177, of the Evidence Act**, which reads as follows: -

> **177. (1) a copy of an entry in a banker's book shall not be received in evidence under section 176 unless it be first proved that:**
>
> **a) The book was, at the time of making the entry, one of the ordinary books of the bank; and**
>
> **b) The book is in the custody and control of the bank; and**
>
> **c) The entry was made in the usual and ordinary course of banking business; and**
>
> **d) The copy has been examined with the original entry, and is correct.**
>
> **(2) Such proof may be given by an officer of the bank, or, in the case of the proof required. Under subsection 1 (d), by the person who has performed the examination, and may be given either orally or by an affidavit sworn before a commissioner for oaths or a person authorized to take affidavits.**

46. Whereas I agree that the above position is correct, having made a finding on the interest rate that should have been applied, determination of statements admissibility of the statements is inconsequential in view of the fact that non-repayment of the loan is not disputed, and the loan owing will be calculated at the interest rate agreed by the parties and not 33% a rate admitted as applied by the plaintiff.

47. **FINAL ORDERS**

> **1. That the 2nd and 3rd defendants Appellants guaranteed loan advanced to the 1st Appellant on 12th March 2013 and are therefore obligated to indemnify Respondent.**
>
> **2. That the Respondent is entitled to indemnity from the 2nd and 3rd Appellant in respect to arrears of loan advanced to 1st Appellant on 12th March 2013.**
>
> **3. The interest rate of 33% charged on the loan was unlawful.**
>
> **4. Interest to be calculated at 22% from the date of default**
>
> **5. Costs of the appeal to the Respondent.**

Judgment dated, signed and delivered at Nairobi this 21st day of February, 2020.

……

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Langat: Court Assistant

Mrs. Ahomo h/b for Issa for Appellant

Mr. Muna h/b for Kabai for Respondent