



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL**

**CIVIL SUIT 379 OF 2005**

**FINA BANK LIMITED.....PLAINTIFF**

**VERSUS**

**MAIZENA MILLERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**DINESH KUMAR ZAVERCHAND JETHA.....2<sup>ND</sup> DEFENDANT**

**AVINASH PREMACHAND SHAH.....3<sup>RD</sup> DEFENDANT**

**RAJESH ZAVERCHAND JETHA.....4<sup>TH</sup> DEFENDANT**

**RASHMKANT ZAVERCHAND JETHA.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. The Plaintiff herein filed this claim against the Defendants by way of Plaint dated **17<sup>th</sup> of March 2014** seeking the following prayers:-

**a. Kshs 45,163,373/35.**

**b. Interest on (a) above at 10% per annum from the 1<sup>st</sup> day of June 2005.**

**c. Costs of this suit.**

2. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants entered appearance and filed the defence.

**PLAINTIFF'S CASE**

3. It is the Plaintiff's evidence that by Letter of Offer dated 25<sup>th</sup> November 1997, it offered to the 1<sup>st</sup> Defendant an overdraft facility of Kshs.5,000,000/- on the conditions set out in the letter. That the 1<sup>st</sup> Defendant counter signed the letter of offer in acceptance of the terms set out therein.

4. That one of the conditions of the offer was the execution of a guarantee by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants in favour of the Plaintiff on the 8<sup>th</sup> of December 1997, the Plaintiff offered to the 1<sup>st</sup> Defendant an increased overdraft facility of Kshs 20,000,000/- on the conditions set out in the letter. The 1<sup>st</sup> Defendant accepted the terms of offer by counter signing the letter of offer.

5. PW 1 **Charles Mwangi** testified that he was the **Credit Risk Analyst** with the Plaintiff having joining in 2007. He stated that the letter of offer dated 25<sup>th</sup> of November 1997 was properly executed. He produced a bundle of documents in support of Plaintiff's case. In cross examination, he stated that he joined the Plaintiff after the loan had been given but he was present when the matter was brought to Court; that he worked in the Industrial Area Branch where the debt arose.

6. He further stated that the 1<sup>st</sup> Defendant had a loan account, current account and hire purchase account. He stated that when an account is

opened a statement is issued for each account to enable someone to ascertain the exact amount owing in any particular account and when a corporate wants to open an account, it is a condition that a board resolution was necessary. He stated that he was not present when the 1<sup>st</sup> Defendant executed the credit agreement mentioned in the plaint or when the guarantee was executed neither did he see the executing of the Memorandum of Understanding.

7. He stated that a Limited Liability Company, which the 1<sup>st</sup> Defendant was and the 2<sup>nd</sup> to 5<sup>th</sup> Defendants were its directors, when opening an account, it is required to submit the Memorandum and Articles of Association. The purpose of depositing this is to ensure that the Company is as per the Articles of Association. He further stated that it was not his duty to ensure that all the documents were sealed as this was done by other departments. He added that if any document was signed but not sealed it was for the department to send it back for sealing. He however confirmed that the 1<sup>st</sup> Defendant was the holder of the Account.

8. PW1 further stated that the statements were only given to account holders and not 3<sup>rd</sup> parties in hard copies and they could be sent to the directors and guarantors on request. He said he did not know if it was sent to the 2<sup>nd</sup> to 5<sup>th</sup> Defendants. He said that the statements started from 18<sup>th</sup> September 2001 which started with Kshs 2,918,126.21 DR with the last entry being Kshs 42,975,481 DR. He testified that he retrieved the statements from the system and checked these against the original and entries and these would trigger abnormality if there was an entry made. He said he did not go to check the original entries in Industrial Area Branch.

9. PW2 further testified that several guarantees were executed on the 11<sup>th</sup> of December 1997, 8<sup>th</sup> December 1997 and 25<sup>th</sup> of October 199... he stated that he did not know the sum Kshs 118,126.21 DR was originated from. He stated that if he had checked the original documents he would have known where the amount came from. He said the vast debits in that account related to transfer from OD 91 and the narration 'OD 91' means that there is an overdraft by an account holder; that ordinarily there would be a statement showing the overdraft account. .

10. He further stated that any repayment of the loan is not deposited directly in the loan, it is deposited directly in the current account and the system will retrieve the exact amount to be debited from that account. He said the letter of offer does not indicate the account number. None of the documents show the account number.

11. He denied seeing the board resolution to open Account No. 022-4011526. He stated that he saw the opening forms in the bank. He stated that there were several accounts that 1<sup>st</sup> Defendant was operating with the Plaintiff and it was pursuant to the letters of offers that the credit agreement and subsequent guarantees were created; that these were pursuant to a request of overdraft facilities. He further added that at the time, there were short-term loans and overdraft facilities being enjoyed by the customer.

12. PW1 further stated that there was a letter dated 16<sup>th</sup> March 2005 from their advocates to the customer's advocates and that the bank's Advocates forwarded statements of 1355 pages up to the period of 28<sup>th</sup> March 2003 for the amount outstanding, he said they were not however submitted in this matter. He stated that when an account goes into arrears, the bank charges penalties and the amount indicated in the statement does not differentiate between interest and penalties; that whatever amount is shown in the statement includes the contractual and penalty interest. The penalty interest would apply from the date of default. He further stated that he was not able to tell when the 1<sup>st</sup> Defendant defaulted from the statement.

13. PW1 further stated that the entry of 18<sup>th</sup> September 2001 show loan proceeds of Kshs 2,800,000 and the capitalized interest was the interest that was agreed upon by the Plaintiff and the 1<sup>st</sup> Defendant for this account. He could not confirm if the document of Kshs 2,800,000 is in the bundle but there were statements for the overdraft of Kshs 10,000,000.

14. PW1 testified that the Bank had a base lending rate until recently. He further stated that he did not know if the bank applied for approval from the Central Bank to charge the base lending rate. He stated that the Plaintiff's claim is for Kshs 45,163,373.35. He admitted that he had given a different figure in his witness statement and stated that the sum of Kshs 40,000,000 is premised on the memorandum of understanding dated 18<sup>th</sup> of February 2004.

15. In reference to a meeting between **Mr. Fazal** and **Mr. Jetha**. He stated that he did not know **Mr. Jetha** and he was not aware of his relationship with the 1<sup>st</sup> Defendant. He further stated that he could not confirm if **A. D. Jetha** was part of the directors and if **A. D. Jetha** had executed any of the documents and he did not have a specimen of his signature neither did he know whose signatures those were.

16. He stated that the Memorandum of acceptance was not sealed and that it was not a requirement. He further added that he did not know whether the terms of Memorandum were approved. He stated that the loan was not because of the consolidated account. There were other guarantees for monies which were not from overdraft facilities. This guarantee was premised on a letter of offer. The Credit agreement was the letter of offer to the borrower was for Kshs 20,000,000. The Guarantees and credit agreement are supported by the Credit agreement which is a letter of offer for Kshs 5,000,000; that the 2 letters are based on an overdraft facility. He further added that he was not able to break down the Kshs 30,000,000 as he did not have the statements. He reiterated that he could confirm if the guarantors were aware unless he knew where the signatures were from.

17. He stated that guarantees are sent to customers with amounts already filled. He said the credit agreement and the letter of offer is one and the same thing. He stated that if they remitted any money as receiver managers and the fact that the statements were truncated in 2004, he stated that he would not know if more monies were paid into the 1<sup>st</sup> Defendant.

18. In reexamination, PW1 stated that **A. D. Jetha** had authority to enter into the memorandum of understanding based on the initials **R. Z. Jetha**; and this was the 4<sup>th</sup> Defendant. He said the 3<sup>rd</sup> Defendant is the one who executed the memorandum of understanding on the right and by signing the Memorandum of understanding; and that meant the Defendants accepted the terms. He added that the monies were advances to the 1<sup>st</sup> Defendants who made use of the money. The guarantees were continuing guarantees and did not require the approval from the minister of finance to charge interest.

## DEFENDANTS' CASE

19. By 11<sup>th</sup> September 2019 when this matter proceeded with defence hearing, the 4<sup>th</sup> and 5<sup>th</sup> defendants had passed on; the 5<sup>th</sup> defendant died on 3<sup>rd</sup> August 2015 and the 4<sup>th</sup> defendant 22<sup>nd</sup> June 2016. The case against the 4<sup>th</sup> and 5<sup>th</sup> defendants therefore abated.
20. In the defence filed on the 13<sup>th</sup> of September 2005, the 1<sup>st</sup> defendant denied the claim and stated that if there was a letter of Offer dated 25<sup>th</sup> of November 1997, which it denies, the letter is null and void as it was not executed in accordance with the provisions of the 1<sup>st</sup> Defendant's Articles and Memorandum of Association.
21. In addition, if the Letter of offer was properly executed the 1<sup>st</sup> defendant avers that the terms of offer and the relationship between the Plaintiff and the 1<sup>st</sup> defendant was to be governed by law relating to a banker and its customer including the **Banking Act** and the **Central Bank of Kenya Act**.
22. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly filed defence dated 13<sup>th</sup> of September 2005. They denied having executed guarantees and if they executed any the guarantees are unenforceable having been statute barred by virtue of the **Limitation of Actions Act**. They further denied that any monies were made available to the 1<sup>st</sup> defendant and the Plaintiff is put to strict proof thereof.
23. The 2<sup>nd</sup> defendant testified as director of 1<sup>st</sup> defendant, as 2<sup>nd</sup> defendant and on behalf of the 3<sup>rd</sup> defendant. He stated that the plaintiff is in breach of duty of care expected between a bank and its customer; that the Plaintiff negligently managed the 1<sup>st</sup> Defendant's account so that an amount of Kshs 2,000,000 was debited from the 1<sup>st</sup> Defendant's Account without the 1<sup>st</sup> Defendant's Authority; that the Plaintiff's claim and in particular penalties levied are time barred by virtue of the **Limitation of Actions Act**.
24. While being cross-examined by Mr. Fraser for the plaintiff, DW1 Mr. Dinesh confirmed that the letter of offer is dated 27<sup>th</sup> October 1997 was an overdraft facility. He also confirmed overdraft facility dated 8<sup>th</sup> December 1997 for Kshs 10M. He confirmed account number as Overdraft facility CA 022100091. On further cross examination, he confirmed that in the plaintiff's documents has a different account number which reads 022-4011526.
25. He said he does not recall signing for Kshs 2.8M on 18<sup>th</sup> September 2001 and Kshs 10M on 6<sup>th</sup> November 2001 and Kshs 15M on 14<sup>th</sup> February 2002 and Kshs 34,055,507 on 18<sup>th</sup> March 2004.
26. He confirmed that the 1<sup>st</sup> defendant company was placed under receivership on 28<sup>th</sup> October 2004 and **Mr Kamache** appointed receiver manager. He said the company's was valued at Kshs 44 Million; and stated no amount credited from the receivership to the account.
27. He further confirmed that after the company being placed under receivership, it never reverted to its shareholders and directors; and that they never received any equipment or machinery back. He said receiver manager disposed of all of it.
28. He confirmed that the 1<sup>st</sup> defendant owed the Plaintiff Kshs 45,163,373 demanded in June 2005; he stated that in the Memorandum of understanding, the amount was reduced to Kshs 42 Million as Kshs 4.745, 208.23 M was written off. He further said that their property in Riverside was to be rented out; he said they never received rent for the property
29. DW1 further stated that fresh personal guarantees were to be delivered by directors of the company and were to be supported board resolution. He said no fresh guarantees were signed. He however confirmed signing Memorandum of understanding and that his brother **Rasmi Kham** who was a director of 1<sup>st</sup> defendant signed. He added that he used to sign guarantee before Memorandum of understandings and that they used to receive blank guarantees from the bank which they used to sign and forward to the bank. He confirmed signing guarantee for 5M and for 20M, 30M.
30. In further cross-examination, DW1 confirmed that the company entered into the facility letters with the bank. He admitted that they include various credit agreements also signed by the 1<sup>st</sup> Defendant's company though not properly executed. He confirmed that the first facility is at page 20 of Plaintiff's bundle, credit agreement at page 23 to 25 is Kshs 5M. He confirmed having signed the documents and forwarded to the bank. He confirmed signing guarantee on page 26 to 28. He also confirmed that other directors signed guarantees of Kshs 5M. He confirmed that he is familiar with their handwritings. He further confirmed that he signed document on page 38 on behalf of the company. He said he signed it in his capacity as director.
31. DW1 further confirmed that he signed guarantee for Kshs 20M as shown on page 43 to 45 of Plaintiff's documents and that at page 46 to 54, other directors signed guarantee for Kshs 20M; that from 55 to 57 credit agreement for Kshs 30M was executed by the company and at page 58 to 60 he signed guarantee for Kshs 30M. He also confirmed that from page 327 to 335 are guarantees were signed by other directors.
32. In further cross-examination, the 2<sup>nd</sup> defendant stated that the bank had accepted to reduce the loan to Kshs 42M and that they were still negotiating.
33. On receivership issue, he denied that machinery were removed from the premises before receivers were appointed and there was therefore nothing to receive; he said he wouldn't know when asked if he saw advertisement for sale of assets and on rent, he said 1<sup>st</sup> defendant never paid him.
34. In re-examination by **Mr. Issa**, DW1 confirmed that memorandum of understanding on page 266 show Ac 022100091 and amount Kshs 35,538,651.81. He said the plaintiff has not produced the statement. He further stated that LBD for Kshs 5,805,1935 statement is not

also part of record; same to statement for Ac.40022-4011525 at page 11; he said that in clause 7 of the memorandum of understanding it states that the company will submit to the bank the necessary consent from guarantors for the revised terms above; and the consents from the guarantors. He confirmed that recalculation was done and amount owing reduced to Kshs 42M.

35. He further said 1<sup>st</sup> defendant had machinery in Mombasa and Nairobi and bulk were in Mombasa Kshs 36M and Nairobi Kshs 7.8M; he confirmed that the receiver never deposited any amount to their account.

#### **SUBMISSIONS BY PLAINTIFF**

36. In submissions dated 1<sup>st</sup> of October 2019 submitted that the plaintiffs claim is against the 1<sup>st</sup> defendant as principal debtor and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as guarantors; that it is unfortunate that the 4<sup>th</sup> and 5<sup>th</sup> defendants who were both 1<sup>st</sup> defendant's guarantors passed on before this matter was concluded and the case against therefore abated.

37. The plaintiff submitted that its relationship with defendant started with letter of 25th November 1997; that the facility was an overdraft of kshs 5 Million; supported by letter of credit dated 21<sup>st</sup> November 1997 executed by the 1<sup>st</sup> defendant under seal; and that the 2<sup>nd</sup> to 5<sup>th</sup> defendants each executed guarantees for the Kshs 5 Million.

38. In the written submissions plaintiff listed facilities which followed up to the year 2004 when on 18<sup>th</sup> February 2004 after detailed negotiations a memorandum of understanding was prepared in which the debt was crystalized at Kshs 42 Million as at 4<sup>th</sup> February 2004. plaintiff submitted that in the negotiations Kshs 4,756,208.23 was written off.

39. Plaintiff submitted that there is no requirement in **Table A of the repealed Companies Act or Article 12** of the first defendant's Articles of Association for executing under seal; that executing under seal is only required where there is an express statutory provision or provision in the Articles requiring execution under seal. Plaintiff referred to Palmer's company Law 21<sup>st</sup> Edition at page 231 and 232.

40. Plaintiff submitted that in cross examination, the 2<sup>nd</sup> defendant admitted the defendants entered into various facility credit agreements and guarantees and that all the documents were executed and signed.

41. The Plaintiff referred to the case of **Transnational Bank Limited v Swift truckers Ltd and 3 others** where the court that there is no requirement in law for each page of guarantee be initialed or signed.

42. On receivership, the plaintiff submitted that report from milestone Auctioneers indicated that the machines were removed on 20<sup>th</sup> and 21<sup>st</sup> October 2004 a week before appointment of receivers; plaintiff submitted that there is no allegation in 1<sup>st</sup> defendant's documents that its assets had been seized by receivers or that they had been sold.

43. Plaintiff submitted that demand were issued by **Hamilton, Harrison and Mathews** on 18<sup>th</sup> November 2004 and that the claim on guarantors arose on demand and plaint was filed on 11<sup>th</sup> July 2005, which is 6 months after demand and well within the statutory period

#### **SUBMISSIONS BY 1<sup>ST</sup> DEFENDANT**

44. The 1<sup>st</sup> defendant filed submissions dated 13<sup>th</sup> November 2019 .It submitted that the plaintiff has not discharged the legal and evidentiary burden of proof to establish that the 1<sup>st</sup> Defendant owed the sum of Kshs 45,163,373.35 as claimed in the Plaintiff. It referred to **Section 107 of the Evidence Act** and urge the Court to take note of the facility letters and contractual documents the Plaintiff tendered.

45. As to whether the Memorandum of understanding dated 18<sup>th</sup> February 2004 created a binding and enforceable contract in law between the Plaintiff and the 1<sup>st</sup> Defendant, the 1<sup>st</sup> defendant drew Court's attention to the case of **Ezekiel Osugo Angwenyi & Another v National Industrial credit bank limited [2017] eKLR** where the Judge stated the bank has a duty to keep and maintain proper records of Accounts.

46. And in **Margaret Njeri Muiruri v Bank of Barod (Kenya) limited [2014] eKLR** the court held that the statements would have shown a distinction between the Loan account and the overdraft account; what charges being levied on each of the accounts, any commission charged, and the interest component of the outstanding balance.

47. And in **Givan Okallo Ingari & Another v Housing Finance Co. (K) Ltd Nairobi (2007) 2 KLR 232** where the court held that the Charges debited in the Plaintiff's account were done without any legal basis... such debits could have only have been made with the consent of the Plaintiff's or being a provision in the charge document that allowed the Defendant to do so.

48. On whether the failure by the Plaintiff to file a statement of affairs by the receiver manager to disclose what recovered by the Receiver Manager discharges the 1<sup>st</sup> Defendant of any claims, if any, owed to the Plaintiff. The 1<sup>st</sup> defendant submitted that the Plaintiff having appointed a receiver, had the duty to make sure that the Receiver maintained a proper statement of Accounts of the 1<sup>st</sup> Defendant's assets. In **Surya Holdings Limited & 2 others v CFC Stanbic Bank [2015] eKLR** which was in regards to the duty of the receivers and manager to maintain a proper statement of account.

49. As to whether the claim by the Plaintiff for the sum of KShs 45,163,373.35 is in violation of the provision of **Section 44 of the Banking Act** and therefore unenforceable, the 1<sup>st</sup> defendant cited the case of John **Gata Nderitu v Kenya Commercial Bank [2011] eKLR** where the court held that the bank is enjoined to provide documentary evidence to the Court to the effect that it had complied with Section 44 of the Banking Act.

50. As to Whether the Plaintiff has any valid claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as guarantors of the 1<sup>st</sup> Defendant company the defendants cited the case of **Surya Holdings Limited & 4 others v ICICI Bank Limiter & another [2015] eKLR** where the court held that where no funds are disbursed no liability will attached to the guarantor.

## **2<sup>ND</sup> AND 3<sup>RD</sup> DEFENDANTS' SUBMISSIONS**

51. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's in their amended submissions dated 20<sup>th</sup> November 2019 referred to. They refer Section 176 and 177 of the Evidence Act on whether the failure to provide valid statement fatal to the bank's claim and stated that failure to meet the requirements under section 176 and 177 makes the bank statements inadmissible.

52. As to whether guarantees are enforceable, they referred to the case of **Mercantile Life & General Assurance Company & Another v Dilip M. Shah & 3 others [2008] eKLR** where the court held that where Liability is denied, the Plaintiff must prove indebtedness before they can call in the indemnity. It is not enough to merely say that the fourth Defendant has defaulted.

53. As to whether the signing of the Memorandum of Understanding was tantamount to rescission of the old Agreements thereby discharging the Guarantors under the Doctrine of novation, they referred to the case of **James G. K. Njoroge t/a Baraka Tools & Hardware (a firm) v Kenya Cement Making Marketing Co. Ltd & 2 other [2019] eKLR** where the court held that parties may enter into valid contract but the contract would become unenforceable by a parties' failure to comply with a condition precedent and the case of **Wachengo v Gerald [1988] eKLR** where court held that there is breach and the guarantor has suffered loss, the guarantor's liability would be reduced to the extent that the security is diminished

54. As to whether the bank violate section 44 of the Banking Act, they referred to the case of **John Gitau Nderitu v Kenya Commercial bank** where the court held that the evidential burden of disproving that the Charges were not Contrary to the requirements of the **Central Bank Act and Banking Act** was squarely on the Defendant.

55. In respect to the effect of appointed receivers failing to submit a statement of affair, they draw Court's attention to the case of **Surya Holding & others v CFC Stanbic Bank** where by the court state that the Bank's failure to hold the Receiver Managers to account was in breach of duty of care to both the 1<sup>st</sup> Defendant in particular and to the Guarantors and the case of **Webstar Investment Pty Limited v Anderson (2016) VSL 620** the creditors contractual equitable duties were as follows:

“1. Duty to take reasonable care and not to act in neglect or default when dealing with security

2. A duty not to diminish or release security.”

56. They conclude that the Bank's case was poorly pleaded and evidence tendered is discordant with the Plaintiff.

## **57. ANALYSIS AND DETERMINATION**

### **i. Whether 1<sup>st</sup> defendant executed letter of offer dated 25<sup>th</sup> November 1997**

58. While being cross-examined by counsel for the plaintiff, the 1<sup>st</sup> defendant Dinesh confirmed that he executed letter of offer in his capacity as the director of 1<sup>st</sup> defendant. He also confirmed that he signed document on page 38 of plaintiff's documents on behalf of the company. He said he signed it in his capacity as director.

59. In his testimony 1<sup>st</sup> Defendant said he does not recall signing for Kshs 2.8M on 18<sup>th</sup> September 2001 and Kshs 10M on 6<sup>th</sup> November 2001 and Kshs 15M on 14<sup>th</sup> February 2002 and Kshs 34,055,507 on 18<sup>th</sup> March 2004.

### **ii. Whether 2<sup>nd</sup> to 5<sup>th</sup> defendants executed guarantees and if so whether the guarantees executed are valid**

60. The 1<sup>st</sup> defendant herein testified as director of the 1<sup>st</sup> defendant and as 2<sup>nd</sup> defendant and on behalf of the 3<sup>rd</sup> to 5<sup>th</sup> defendants. The 2<sup>nd</sup> to 5<sup>th</sup> defendants have been sued as the guarantors of 1<sup>st</sup> defendant. The facilities alleged to have been advanced are Kshs 5M, 20M and 30M. Dw1 confirmed that he signed memorandum of understanding and that he used to sign guarantees before signing memorandum of understandings. This therefore confirm that he executed guarantees. While being taken to the form of guarantees by counsel for plaintiff he confirmed his signature and that of his brother who was also a director of the 1<sup>st</sup> defendant company.

61. The 2<sup>nd</sup> defendant having admitted that the facilities advanced add up to Kshs 45,163,373. The amount in the memorandum of understanding was made up of the facilities already guaranteed. The guarantees had not been discharged as the facilities advanced were still in arrears. Clause 3 of the guarantees filed by plaintiff provide that the guarantees shall be continuing security. The amount in the memorandum of understanding were consolidated amounts of facilities already guaranteed.

### **iii. Whether defendants were issued statements**

62. While adducing evidence in chief Dw1 denied having received statements of the account in his capacity as guarantor. He however confirmed that the 1<sup>st</sup> defendant owed the plaintiff Kshs 45,163,373 demanded in June 2005. He said Kshs 4,745,208.23 was written off from the entire debt what remained was 42M. He also confirmed that the receiver wrote indicating that no assets were found in the 1<sup>st</sup> defendant's premises as they had been moved. The question is if they were not issued with statements, what was the basis of recalculation.

63. The 2nd Defendant who testified on behalf of defendants stated that no statements were issued to them. However in cross examination, he admitted that the documents in respect to facilities of Kshs 5 Million, Kshs 20 Million and 30 Million were executed by him as director of the 1<sup>st</sup> Defendant, he also confirmed that the guarantors who include him signed.

64. He however admitted that the Defendant signed letters of and credit agreements for amount stated by plaintiff as advanced, he admitted that he signed Memorandum of understanding for Kshs 42 Million. He said it's reduced from 47 Million after negotiations and that they were still negotiating further after the Memorandum of understanding. He also admitted that kshs 2,000,000 Million which was debit was credited back to the account.

65. One would wonder how they were negotiating without statements. Statement is defined as summary of transaction activity during the period. It gives status of account. It is unlikely that a party will be able to negotiate without having summary of account, the fact that they not have been attached does not mean they were not supplied, how DW1 would know account was credited with 2M if not from statements.

**iv. Whether plaintiff acted contrary legal provisions regulating relationship between customer and bank.**

66. Plaintiff argued that the plaintiff did not properly manage defendants account. Incident cited was debit of Kshs 2,000,000. Dw1 while being cross-examined by counsel for the plaintiff, he confirmed that Kshs 2,000,000 was credited back to the account.

67. on defendant's argument that the Plaintiff bank owed duty of care to both the 1<sup>st</sup> Defendant in particular and to the Guarantors, I agree with determination in the case of **Webstar Investment Pty Limited v Anderson (2016) VSL 620** where the court held that the creditor has duty to take reasonable care and not to act in neglect or default when dealing with security. However, the 2<sup>nd</sup> Defendant confirmed that the receiver wrote indicating that no assets were found in the 1<sup>st</sup> Defendant's premises as they had been moved. The Plaintiff was not therefore in breach of duty in dealing with security.

68. From the foregoing, I find that the Plaintiff advanced facilities which were consolidated to kshs.45,163,373.35 DW1 who is the 1<sup>st</sup> Defendant's director confirmed executing documents in respect of the said facilities on behalf of the 1<sup>st</sup> defendant and that he together with the 3<sup>rd</sup> to 5<sup>th</sup> defendants guaranteed the credit facilities advance to the 1<sup>st</sup> defendant.

69. He also confirmed that before signing memorandum of understandings he would sign guarantee forms. He confirmed the amount claimed by plaintiff as owing and stated that upon negotiation Kshs 4,745,208.23 was written off to reduce the figure to Kshs 42M.

**70. FINAL ORDERS**

1. I enter judgment for the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants jointly and severally for Kshs 42,000,000.
2. Interest on 1 above at court's rate from the date of filing this suit.
3. Costs to the plaintiff.

**Judgment dated, signed and delivered at Nairobi this 21<sup>st</sup> day of February, 2020.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Langat: Court Assistant

Mr. Fraser for Plaintiff

Ms. Njoki h/b for Kimathi for 2<sup>nd</sup> & 3<sup>rd</sup> Defendant

Mrs. Anomo h/b for Issa for 1<sup>st</sup> Defendant