



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 636 'B' OF 2009
CONSOLIDATED WITH HCCC NO 419 OF 2010

VIRCHAND VIRPAL & SONS LIMITED..... PLAINTIFF

VERSUS

NIC BANK LIMITED.....DEFENDANT

AND

NIC BANK LIMITED.....PLAINTIFF

VERSUS

HASMUKHLAL VIRCHAND SHAH.....1ST DEFENDANT

SUNIL CHANDULAL SHAH.....2ND DEFENDANT

ATUL CHANDULAAL SHAH.....3RD DEFENDANT

CHANDULAL VIRCHAND SHAH.....4TH DEFENDANT

JUDGMENT

1. The judgment herein relates to two consolidated cases; HCCC 636 “B” of 2009 and HCCC 419 of 2010. It involves basically three parties Virchand Virpal & Sons Limited (herein “the Principal debtor”), NIC Bank Limited (herein “the Bank”) and Hasmukhlal and 3 others (herein “the Guarantors”).
2. The Principal debtor filed suit; HCCC 636 “B” of 2009 vide a plaint dated 28th August 2009 and amended on 2nd September 2009, seeking for judgment against the Bank for: -
 - a) *A permanent injunction to restrain the defendant, either through itself, servants or agents from further selling, disposing of, or alienating the plaintiff’s shares pledged as security or otherwise enforcing the personal guarantees executed by the plaintiff’s directors for the overdraft;*
 - b) *A declaration that the plaintiff is not indebted to the defendant over the overdraft facility;*
 - c) *Special damages for Kshs. 87,438,687.95 with interest at commercial rates;*
 - d) *Costs of the suit and interest*
3. In the same vein, the Bank filed the suit; HCCC 419 of 2010 vide a plaint dated 2nd June 2010, seeking for judgment against the Guarantors for a sum of Kshs 152, 864, 660.31, plus interest thereon till payment in full and costs of the suit.
4. By an order of the court dated 2nd March 2012, the two suits were consolidated for hearing and determination and ordered to be treated as

a test suit for the other suit, inter alia; HCCC 420 of 2010.

5. The background facts of the case are that, the Principal debtor requested the Bank for an overdraft facility and the bank agreed to grant the same. Consequently, by a letter of offer dated 27th September 2006, the Bank advanced the Principal debtor an overdraft facility in the sum of; Kshs 60,000,000, as working capital. By a letter of offer dated 27th October 2006, the Bank, at the request of the Principal debtor, enhance the overdraft facility to; Kshs 120,000,000.

6. By a further letter of offer dated 1st October 2007, the facility was enhanced to; Kshs 180,000,000 and by a letter of offer dated 20th February 2008, the facility was enhanced to; Kshs. 210,000,000. The facility was subject to review by 30th September 2008 and was reviewed accordingly, whereupon the parties executed a letter of offer dated, 15th September 2008, but the facility amount remaining was retained at; Kshs 210,000,000. All the letters of offer and the Forms of acceptance were signed by the Directors of the Principal debtor and supported a Board of Directors' resolution.

7. The bank overdraft facilities were secured by the securities listed under Annexure II of the letter as follows: -

a) Lien over shares listed at the Nairobi Stock Exchange (NSE) at 60% of current market value of the listed shares. The proposed shares are to be blue chip companies acceptable to the bank;

b) Personal joint and several guarantees of the directors for Kshs. 210, 000, 000.00, to support the company borrowing.

8. Pursuant to the aforesaid, the directors of the Principal debtor executed Guarantee and Indemnity contracts dated 14th February 2008, to secure the overdraft facility. Further, clause 1 and 2 of Annexure I, of the letter of offer stipulated that: -

(1) It is a requirement that at all times 60% of the Current Market Value of listed shares held as security should exceed outstanding on overdraft.

(2) Borrower will be required to provide additional shares within 5 days should security cover deteriorate so as the 60% of Current Market Value of shares held falls below the outstanding overdraft. If no shares would have been provided or overdraft balance reduced within this period, this will trigger an immediate sale of shares to bring back cover to 60%."

9. The Principal debtor avers that, the availability of the drawings from the overdraft ceiling was subject to the Bank permitting drawings up to 60% of the value of shares held as security. That the Bank had clear rights to dispose of the tradable securities, immediately within five (5) days, if the drawings just exceeded 60% margin. Thus, the Bank was not only bound contractually but also enjoined by conventional prudential guidelines to modern banking practice to exercise prudence and act in its interest.

10. The Principal debtor contends that, any purported sale of the pledged securities by the Bank, when its exposure had exceeded far more than the 60% trigger point, was mainly due to lack of timely action by the Bank. The resultant application of interest on the drawings would therefore be, in complete breach of contract, unlawful, usurious and calculated at literally robbing it.

11. The Principal debtor further contends that, in so far as the Bank is seeking to recover monies advanced under a past letter of offer, the entire claim or such portion of the claim cannot lie, as the same is barred by the principle of past consideration. It is further averred that, by reason of the Bank's acquiescence, in the exercise of its rights, the Principal debtor has suffered immense loss and damage. It claims for special damages owing to fluctuation in share price between the period of; 7th October 2008 to the date of filing the suit in the sum of; Kshs. 87,438,687.95, being amount of 40% margin lost and accruing interest at commercial rates. Further, it stands to suffer immense actual and potential losses in business opportunities which cannot be compensated by award of damages.

12. That, on the 28th August 2009, the Bank served the Principal debtor with a demand letter for immediate repayment of a sum of; Kshs.159, 254,031.51, as the amount owing. However, it is not liable to pay the sum claimed.

13. In the same vein, the Guarantors reiterated the averments by the Principal debtor and argued that in view of the breach of the contract by the Bank, the Guarantors are discharged/or released from liability. That they cannot be held more than the Principal debtor by reasons of the Bank's neglect in dealing with the pledged shares.

14. However, the Bank filed a statement of defence dated 25th September 2009 and amended on 4th November 2010; to include a counter claim. It joined issues with the Principal debtor on the various overdraft facilities granted on various dates as aforesaid and the securities offered to cover the same.

15. The Bank conceded that the terms of the contract, on 60% margin and sell of the pledged shares are as stated under clause 1 and 2 of Annexure 1 to the letter of offer. However, the Principal debtor in breach of contract, defaulted in repayment of the debt, fell into arrears and the Bank in exercise of its rights under the letters of offer sold the shares.

16. That acting in good faith, exercise of its fiduciary duty to secure its interest and in compliance with the terms of the facility, the Banking Act and the customary rights of a banker and customer, the Bank; delayed the sale of the shares, in view of the low share prices at the Nairobi Stock Exchange. However, when no amends were forthcoming the bank exercised its rights under clause 2 of Annexure 1 of the letters of offer and proceed to sell the pledged shares, thereby reducing the debt from Kshs. 210,000,000, to Kshs. 124,350,512.75 as at 20th May 2010.

17. The sale of the shares was only commenced by the Bank after it issued the Principal debtor with a notice dated 12th February 2009 and the sale conducted in terms of the letter of offer.

18. The Bank denied that, the Principal debtor has suffered immense loss of business opportunity or potential losses and averred that, if there was such loss, it is remote and not recoverable under the contract. That the Principal debtor's claim, is brought in bad faith with unclean hands and the Principal debtor is not entitled to the reliefs sought.

19. Further the Principal debtor has admitted its indebtedness in writing and sought for indulgence. It is estopped from denying liability. Finally, the plaint as drawn together with the verifying affidavit, are incurably defective and should be struck out.

20. The Bank through the counter claim, seeks for judgement against the Principal debtor for a sum of; Ksh 124,350,512.75 plus interest thereon from 21st May 2010, till full payment and the cost of the suit.

21. However, the Principal debtor filed a statement of defence to the counter claim denying that it was in breach of the contract and/or in default of the repayment of the facility. The Principal debtor further, pleaded that, in the alternative and without prejudice to the aforesaid, the Bank failed to obtain a court order to sell the shares. Finally, that it is entitled to set off its claim against the bank's claim.

22. The case proceeded to full hearing wherein the Principal debtor, called two witnesses, Sunil Chandulal Shah, who testified on the 23rd day of July 2012 and relied on the witness statement dated 12th March and filed on 13th day of March 2012. He reiterated the averments in the amended plaint. However, he maintained that, the Principal debtor fulfilled its contractual obligations by not only pledging the shares listed at the NSE but also procuring joint and several guarantees of its directors.

23. The witness stated that, the Bank did not sell the shares within the stipulated 5 days, at the breach of the 60% trigger limit, which occurred on or about 7th October 2008 and neither did they pledge additional shares to bring the cover within the limit. The essence of the terms and conditions on safety margins were set not only to secure the facility advanced but also to ensure that, the Principal debtor did not suffer loss.

24. Accordingly, the Bank was under a duty to use reasonable care to obtain the best possible price of the pledged shares. It should not be allowed to profit from the breach of the contract. He stated that the sum of; Kshs. 87,438,687.95, which was amended to read Kshs. 84,331,066.00, is the amount of loss in monetary terms, in respect of the 40% margin which the Principal debtor would have retained upon prompt sale of the pledged shares.

25. However, he conceded that, the Principal debtor requested the Bank to delay the sale of the shares but argued strongly that, the Bank had no obligation to indulge the Principal debtor. He further stated that, the delay in selling the shares, constitutes a variation of the terms of the contract between the Principal debtor and the Bank and is variance with the contract of Guarantee and Indemnity. Mr. Sunil admitted in cross examination, that upon being allowed to sell off shares worth Kshs. 40,000,000 and the Principal debtor did not remit the proceeds of sale to the Bank.

26. The Principal debtor's 2nd witness, Mr. Wilfred Abincha Onono, testified on the 17th day of September 2015 and relied on his witness statement filed in court on the 7th day of August 2012 and an affidavit filed on, the 14th April 2015. He testified that, he is a qualified, Certified Public Accountant (K) and the Managing Consultant of; Interest Rates Advisory Center Ltd (herein "IRAC"). That, he is an expert in forensic examination of contractual relations between banks and customers, particularly in so far as interests, charges, penalties are concerned.

27. He testified that, he was instructed by the Principal debtor, to prepare a share portfolio statement in relation to the subject matter herein. He prepared a valuation report of all the shares pledged to the Bank, using the daily share prices at the NSE. He filed a sampled chart of the shares and total holdings of the Principal debtor's pledged shares, from September 2006 up to March 2009.

28. That, he relied on the share portfolio statements provided by the Principal debtor and the various letters of offer. He took note of the provisions of clause 1 and 2 of Annexure I on the 60% margin and realization of the shares. The Bank did not execute the sale of shares when the trigger action occurred which led to the Principal debtor suffering loss.

29. That the 60% trigger limit was breached on the 7th day of October 2008, when the total value of the shares was;

Kshs 210,827, 665, wherein 60% thereof was; Kshs 126,496,599. The overdraft then stood at; Kshs 213,935,286.95. However, the bank did not commence the sale of shares on 7th day of October 2008, until on or about 26th February 2009, 6 months well over time limit.

30. He stated that, the Bank owed the Principal debtor a duty founded in equity to act in good faith while selling the shares to protect in its interest and save the Principal debtor monumental losses. Hence, the Principal debtor is entitled to a sum of; Kshs. 83,331,066.00 which is equivalent to the 40% of the total value of shares as at 7th October 2008.

31. Mr. Onono stated in cross examination that, his area of expertise was interest recalculation. In this matter, he did not prepare a report on interest recalculations or highlighted a single instance where the bank had charged the Principal debtor interest beyond the contractual rate. That, the main issue was whether or not the shares were sold off at the right time. That the initial trigger of 60% mark was first reached on the 16th October 2006, but it was cured the following day with the share value going up.

32. He conceded that, his report does not show the shares of; Stanbic Bank Uganda and ICDC, but conceded that, they were pledged to the Bank. Further the report does not indicate shares pledged after the 31st January 2008. That, his report would have read differently had he

included all the shares pledged. However, he maintained that his report is exhaustive save for one or two shares that he could not trace.

33. He confirmed in re-examination that, Sameer Group Shares in the name of; Hasmukhlal Virchand Shah valued at; Kshs. 3,731,250 has been omitted in his report. Similarly, the shares of; Standard Chartered Bank Kenya Ltd, in the names of Sunil Chandulal Shah and Atul Chandulal Shah, valued at; Kshs. 666,600 and Kshs. 6,060,000 respectively are also omitted in his report.

34. Further, the shares of Kenya Commercial Bank Ltd in the names of, Chandulal Virchand Shah and Hasmukhlal Virchand Shah valued at, Kshs. 6,817,500 and Kshs. 4,456,625 respectively had been omitted in his report. The CMC Shares in the name of; Atul Chandulal Shah valued at Kshs. 1,892,325 have been omitted too. Finally, the Stanbic Uganda Shares in the name of; Chandulal Virchand Shah, Hasmukhlal Virchand Shah, Sunil Chandulal Shah and Atul Chandulal Shah all valued at; Kshs. 2,200,000, Imiraly are omitted from the report.

35. Mr. Ellie Mwamburi, the 1st Defendant's General Manager, Coast Region, testified on its behalf and relied on his statement dated 26th September 2012 and filed on 8th October 2012, together with documents filed on; 7th December 2011, 18th May 2012 and 6th July 2016. He reiterated the averments in the defence and counter claim and stated that, in writing the Principal debtor pledged all subject shares in the Nairobi Stock Exchange and the pledge was formalized by the Central Depository & Settlement Corporation.

36. That, it was an express term of the agreement between the Principal debtor and the Bank that, no delay by the Bank in exercising any right, power or privilege under the contract would impair or operate as a waiver of the Bank's right.

37. The overdraft sum exceeded the 60% of the value of pledged shares sometimes in late 2008. Subsequently, the parties held various meetings and exchanged correspondence as evidenced by the letters dated; 12th and 25th February 2009, and 30th January 2009, wherein the Principal debtor, sought for and was indulged and the sale of shares suspended. On or about 13th January 2009, Hasmukhlal Virchand Shah pledged a further 1,400,000; in line with the Principal Debtor's undertaking to address the shortfall in the security value.

38. He testified that, the total value of the shares omitted from the Principal debtor's valuation report exceeded Kshs. 85,000,000. That, as at 8th October 2008, the balance on the overdraft stood at; Kshs. 213,935,287, the total value of the shares pledged stood at; Kshs. 329,250,942, and the total value of the shares in the names of the directors stood at; Kshs. 180,000,000, giving a total of; Kshs. 377,550,565.20.

39. He reiterated that, the Bank indulged the Principal debtor in good faith with the express reservation of the right to sell pledged shares in the event of failure to pay any proposed installment. However, the Principal debtor did not honour the promise to pay, save for payments made in the period of; 29th October 2008 to 16th January 2009, in the sum of; Kshs. 13,175,501.50.

40. That, the bank sold the shares but was restrained when the Principal debtor obtained an injunction order. The sale resumed after the order was discharged by the court and the shortfall of Kshs. 124,350,512.75, was realized after the sale of the shares in May 2010.

41. The witness testified that, IRAC report was inaccurate, in that whereas the total value of the shares as at 31st March 2008, indicated Kshs. 257,364,872, that figure is at variance with the figure Kshs. 215,063,440, in the Principal debtor's documents filed in court on 17th January 2012.

42. In cross examination, he reiterated that, the Bank started becoming grossly under-secured in December 2008. That all the changes to the contract were made with the consent of the Principal debtor and after the trigger point. He denied that the pledging of shares by directors was done as a one-off affair to replace shares allegedly sold in error.

43. Finally, the Bank called its Assistant Manager Kenneth Mawira, who testified on 12th March 2018 and relied on his statement dated 21st September 2017 and filed on the same date. His evidence was similar to the evidence of Ellie Mwambure in all aspects, save to add that the sale of shares was only commenced after requisite notices were given vide; letters of; 12th February 2009 and reiterated in the letter of 28th August 2009.

44. That the Bank then called up the guarantees issued by the directors and demanded the repayment of the outstanding balance, which they failed or refused to pay compelling the Bank to file a suit; HCCC No 419 of 2010, seeking to recover a sum of; Kshs. 152,864,660.31, plus interest from the Guarantors.

45. In cross examination, he stated that, the period of 1 ½ years given to the Principal debtor before selling the shares was not reckless on the part of the Bank, as the Bank is entitled to indulge the customer based on their contractual relationship. According to him, the actual trigger point was on the 12th February 2009. In re-examination, the witness stated that clause 2 of the Annexure (1), does not impose on the bank a mandatory provision.

46. At the close of the main hearing, the parties filed their final submissions which I have considered herein. The Principal debtors filed the following issues for determination: -

a) Was it expressly agreed between the parties that in the event the balance outstanding on the overdraft exceeded the 60% value of the shares pledged as security, the defendant was contractually bound to immediately dispose of the pledged shares within a period of 5 working days, if the plaintiff failed to provide additional shares;

b) What action if any, did the defendant bank take to vindicate its rights pursuant to the repayment clause set out of the letter of offer;

c) Whether in breach of the contract between the parties and conventional banking practice, the defendant failed to exercise proper diligence and reasonable degree of care not only to itself but also to the plaintiff in deciding the right time to sell the pledged shares in order to stem further losses for itself and the plaintiff once the 60% loan to value ratio was exceeded on the 7th day of October 2009;

d) In purporting to sell the pledged shares sometimes on or about the 26th February 2009, a period of 6 months after the defendant's exposure had long exceeded the 60% trigger point and when the shares had plunged to an all-time low, was the defendant in breach of contract?

e) Whether in the totality of the circumstances the defendant is in breach of its fiduciary duty of care, skill and diligence in its dealing with the plaintiff;

f) In the alternative and strictly without prejudice, did the defendant's bank act illegally in failing to obtain an order of this Honourable court for the sale of the pledged shares?

g) Has the plaintiff suffered a loss of Kshs. 87,438,687.97 being the loss owing to fluctuation in the share price between 7th October 2008 as a direct result of the defendant's acquiescence in the exercise of its rights under the contract;

h) If failing to live up to the sell-off clause in the letter of offer to sell the pledged shares once the 60% level was breached should the defendant be permitted to take advantage of its wrong;

i) Whether the plaintiff together with the guarantors are indebted to the defendant in the sum of; Kshs. 124,350,512.75;

j) In the alternative and strictly without prejudice is the plaintiff entitled to set off against the defendant's claim of Kshs. 124,350,512.75, the sum of Kshs. 87,438,687.95 being the loss suffered by the plaintiff as a result of non-action by the defendant bank;

k) Have the guarantors been discharged from liability;

l) Is the plaintiff entitled to the relief sought; and

m) Who should bear the costs of this suit.

47. The Bank on its part filed the following issues for determination: -

a) Was there a contract between the parties herein;

b) What were the specific terms of the contract between the parties herein on the appropriate and procedure to be followed by the defendant when selling the pledged shares;

c) Did the defendant breach the foregoing terms and any conventional banking practice as alleged by the plaintiff;

d) Was the defendant under an obligation to obtain a court order prior to selling the pledged shares;

e) Does the conduct of the plaintiff at the material time in question estop it from accusing the defendant of delay;

f) In the circumstances, is the plaintiff entitled to the reliefs sought in the plaint;

g) Was the plaintiff indebted to the defendant in the sum of Kshs. 124,350,512.75. as at 21st May 2010;

h) Whether the plaintiff is entitled to a set off in the sum of Kshs. 87,438,687.95; and

i) Who ought to bear the costs of the suit.

48. Having considered the subject issues, I have condensed the issues for determination as follows: -

a) whether the principal debtor and the bank entered into an agreement for the provision of the overdraft facility to the principal debtor;

b) If the answer to (a) is in the affirmative, what were the terms and conditions of the agreement;

c) Did each party perform its contractual obligations;

d) If the answer to (c) above is in the negative, which of the parties breached the contract;

e) Are the guarantors liable to the bank to pay the sum claimed;

f) Is either party entitled to the relief sought for, in their respective claim; and Who will bear the costs of the suit?

49. I have considered the 1st issue in the light of evidence adduced and the submissions and I find that, there is no dispute that, the parties herein entered into the aforesaid agreements, whereby the Bank offered and the Principal debtor accepted banking facilities in the form of overdraft vide letters of offer as follows: -

a) Letter dated 27th September 2006, for provision of an overdraft facility in the sum of; Kshs; 60,000,000

b) Letter dated 27th October 2006, for provision of an overdraft in the sum of; Kshs 20,000,000;

c) Letter dated 1st October 2007, for provision of an overdraft in the sum of; Kshs, 180,000,000;

d) Letter dated 20th February 2008, for provision of an overdraft in the sum of; Kshs 210,000,000

e) Letter dated 15th September 2008 for provision of an overdraft in the sum of; Kshs 210,000,000

50. It is also not in dispute that; all the borrowing was supported by Principal debtor's board of directors' resolution and the Forms of Acceptance of the facility signed by them. Indeed, there is no dispute among the parties that the subject contracts were executed. In that regard the first issue is settled.

51. The second issue relates to the terms of the agreement between the parties and in particular the last agreement dated 15th September 2008. However, it is important to appreciate that the central issues herein are; when did the trigger point occur and what provisions guide the realisation of the securities. In that regard, the relevant terms are stipulated under clauses (1) and (2) of Annexure I of the letter of offer referred herein. The above provisions clearly reveal that; the bank was covered at any given time, to the extent of only 60% of the value of the total shares held and/or pledged.

52. To appreciate the 60% of total value of the shares held as securities, it is important to establish the shares covered under the security and their total value at any given time. There is a dispute as to whether, the shares pledged held were purely held by the principal debtor or they included the shares held by the individual directors. This issue is very important as it goes to the root of the matter.

53. I have considered the arguments advanced by the parties on this issue and the submissions and I agree with the Principal debtor's submissions that, indeed the plain reading of the provisions of; Annexure II, to the letter of offer, do not indicate that, the Guarantors shares form part of the security. The reference there under is made to "personal" joint and several guarantees.

54. However, the bank submitted that, based on the provisions of; clause 8, condition 12 of Annexure I and condition 1 of Annexure II, the Guarantors individual shares form part of the security. These contrary. That clause states as follows: -

"The Borrower shall create (and if appropriate, shall procure that the persons whose names appear in Annexure II hereto shall create) in favour of the Bank the security particulars of which are set out in the said Annexure or such other security as the Bank shall from time to time require to secure the Borrower's obligations"

Condition 12 of Annexure I provides that: -

"The security in such form as shall be approved by the Bank's Advocates, duly executed by the Borrower or such other person as may agree to create the security stamped as required by law and duly registered as required by law."

And condition 1 of Annexure II stipulates that: -

"Lien over shares listed at the Nairobi Stock Exchange (NSE) at 60% of current market value of the listed shares. The proposed shares are to be blue chip companies acceptable to the Bank".

55. To reconcile the varying position held by recourse has to be held on other evidence herein. The Bank has produced a bundle of documents filed in court on 6th July, 2015, being letters from the CDSC to the Bank notifying the Bank of the shares pledged in its favour by both the Principal debtor and the individual Guarantors.

56. The evidence reveal inter alia that, the following shares were pledged in favour of the Bank: -

a) On 22nd November, 2006, Mr Hasmukhlal Virchand Shah pledged 70,000 KPLC shares, vide reference number PLD000017176/2006; on 14th January, 2008, he pledged 176, 500 KCB shares, vide pledge reference number; PLD00023903/2008; on 23rd July 2008, he pledged 191,900 shares in MSC vide pledge reference number; PLD000024910/2008, on 14th November, 2008, he pledged 191,900 shares in MSC vide pledge reference number; PLD000025646/2008 and on 13th January, 2009, he pledged 1,400,000 SCOM shares under pledge reference number PLD000026036/2009.

b) On 18th July 2007, Sunil Chandulal Shah, pledged 375,000 FIRE shares vide pledge reference number; PLD000022496/2007; on 18th January 2008, he pledged 26,600 KPLC shares and 3,300 SCBK shares under pledge reference number, PLD00023932/2008; On 23rd July, 2008, he pledged 207,100 shares in MSC vide pledge reference number, PLD000024908/2008, on 13th February, 2008, he pledged 360,000 KCB shares under pledge reference number; PLD000024108/2008; and 16th October 2008, he pledged 207, 700 MSC shares vide pledge reference number; PLD000025465/2008.

c) On 30th January, 2008, Atul Chandulal Shah, pledged 109, 700 CMC shares and 30,000 SCBK shares, under pledge reference number, PLD00024004.2008; on 5th February he pledged 2008, 350,000 KCB shares vide reference number, PLD00024059/2008; on 23rd July 2008, he pledged 267,700 MSC shares vide pledge reference number, PLD000024909/2008 and on 16th October, 2008, he pledged 267, 700 MSC shares vide pledge reference number, PLD00005458/2008.

d) On 23rd July, 2008, Chandulal Shah pledged 226,600 shares in MSC vide pledge reference PLD00024911/2008, and 267, 700 in MSC vide pledge reference number; PLD00025458/2008, and on 23rd July, 2008 he pledged 226,600 MSC shares vide pledge reference number, PLD000025459/2008.

57. It is therefore clearly evident that, contrary to the arguments advanced by the Principal debtor and/or the Guarantors that the individual Guarantors shares were not pledged as security, they were actually pledged as aforesaid. In that regard I concur with the Banks's submission that the individual guarantor's shares pledged were part of the security and to arrive at the total value of the shares pledged, and the 60% margin thereof, the value of these shares must be taken into account.

58. To revert back to the matter, the next issue to consider is whether, there was breach of the contract and if so by which party. In that regard, the Principal debtor avers that, the Bank breached the contract by failing to dispose of the shares pledged once the security cover deteriorated beyond the 60% of the current market value of the shares held. To the contrary the Bank avers that, the delay in selling the pledged shares was occasioned by the Principal debtor who persistently requested for indulgence.

59. However, it suffices to note that, clause 11, of the letter of offer deals with events of default and in particular clause 11.2 2 states that; in the event of default by the borrower, the Bank shall declare the security has become enforceable, whereupon all amounts payable shall become immediately due and payable, without indulgence, presentation, demand for payment, protest or notice of any kind expressly waived by the borrower.

60. However, these provisions must be read together with the provisions of condition, 1 and 2 of Annexure I, referred to herein. The conditions did not make provisions beyond five (5) upon the overdraft limit bursting the 60% margin. It is evident that, the Principal debtor did not maintain the limit of its overdraft within the margin of the 60% of the current market value of the total pledged shares

61. This is evidenced by the correspondence of the parties produced herein. In that regard, Ellie Mwamburi, send an email dated 9th September 2008, to Sunil, clearly indicating that, the Bank had undertaken a current valuation of shares pledged to it and it revealed that, the bank was grossly under secured, the market value of the shares standing at; Kshs 248,344,620 and the 60% value being Kshs 149, 006,772, while the outstanding balance on the current account was Kshs 212,938,784.

62. The Bank then requested the Principal debtor to confirm the accuracy of those figures and advice it on what additional shares they were pledging to cover the short fall or the shares the Principal debtor would like sold so that, the outstanding amount would reduce appropriately. The Bank attached to the email a schedule showing; the various shares pledged, their respective market value and the 60% value thereof. Obviously from this mail the Principal debtor was in in the observance of the 60% margin. The question is; did the bank enforce the security? I shall revert to that issue later.

63. However, the Principal debtor did respond to that Bank's letter and on the 7th October 2008, Ellie Mwamburi wrote another email to Sunil and Keval informing them that, in view of the downward trend in the value of shares and the position taken by the Bank not to dispose of customer's shares, for those who will cooperate, the Principal debtor should consider providing additional security to be held temporarily and/or consider placing title deeds or properties on simple deposit with the Bank until the situation improves the following year.

64. Pursuant to that letter, on 13th January 2009, H. V. Shah pledged 1,400,000 Safaricom shares to the Bank to reduce the securities shortfall. In addition, the Principal debtor wrote to the bank a letter dated 30th January 2009, making reference to a meeting held by the parties on 29th January 2009. The letter refers, to the short fall in the share securities and states that, the Principal debtor's outstanding balance on the overdraft was higher compared to the required security arrangement with the Bank in view of the drop in shares prices over the last six (6) months.

65. The Principal debtor then informed the Bank that, they were in the process of concluding arrangements to deposit funds into the current account to reduce the outstanding amount and made a proposal to deposit funds in four instalments as follows:

a) on 28th February 2009----- Kshs 10,000,000;

b) 31st March 2009----- Kshs 15,000,000;

c) 30th April 2009----- Kshs 15,000,000; and

d) 31st May 2009----- Kshs 20,000,000

Total amount-----Kshs 60,000,000

66. By a letter dated 12th February 2009, the Bank accepted the principal debtor's proposal to deposit the funds in view of the continued drop in the value of shares and informed the Principal debtor that, the interest charges for the month of January 2009 remained un-serviced and required the Principal debtor to make arrangement to settle the same not later than 23rd February 2009. Further, the Bank indicated that, it was at liberty to sell the shares in the event, the first cash injection of; Kshs 10,000,000 was not received by 28th February 2009.

67. However, on 25th February 2009, the Principal debtor wrote to the Bank referring to the meeting held by the parties on the 29th January 2009, its letter dated 30 January 2009 and the Bank's response dated 12 February 2009, and informed the Bank that, it was not able to get any assistance whatsoever despite, trying their level best, to get funds from various sources due to, its own commitments and liquidity crunch problems, as a result of global financial and economic crisis.

68. The Principal debtor requested the Bank to "Reconsider" (with emphasis in capital) its stand on selling off the shares as the prices at the Nairobi Stock Exchange had plummeted in the last eight (8) months to its lowest and selling the shares forcefully at the lowest level would erode its wealth and would not benefit either of the parties. The Principal debtor requested the bank to wait for the share prices to improve to the level they were eight months earlier and then sell the shares. As a result of the failure by the Principal to honour its promise to make good the shortfall, the Bank commenced the sale of the shares on 26th February, 2009.

69. The question that arises at this stage is: what is the import of these correspondences on the rights of the parties under the contract and in particular the enforcement of the 60% margin clause. It is clear, therefrom that the Bank did not enforce its security as and when the margin clause was breached and/or when the trigger point occurred.

70. The next issue that arises is: when exactly did the trigger point occur? Indeed, the entire case rests on this issue. According to the evidence of; Sunil Chandulal Shah and Mr Onono, the trigger point occurred when the 60% level was breached on or about 7 October 2008. To the contrary, according to; Ellie Mwamburi Mwamburi, the overdraft sum exceeded the 60% of the value of the pledged shares in late 2008. To address this issue one has to consider the evidence of this witnesses in total.

71. The Principal debtor's main witness on this issue was Mr Onono. I have considered his evidence and I find that it wanting in several aspects. First and foremost, Mr Onono acknowledged that, IRAC deals mainly with interest over and/or undercharge by lenders and confirming the amount owed (if any). There is no dispute on the interest charged herein. However, with due out most respect to Mr Onono knowledge and skill, I find that, the fundamental issue with the report is omission or "exclusion" of the Guarantors shares pledged to the Bank.

72. Mr. Onono argued that, his instruction was in relation to the shares pledged by the Principal debtor per se. However, he admitted that, even then, he included the shares pledged by; H.V Shah on 31st July 2008, as they were a replacement of shares pledged to CMC erroneously. He then concludes by stating that; "in any event the inclusion of the shares would not affect the chart".

73. However, in my considered opinion, that conclusion cannot be correct because the total current market value of all the shares pledged is critical in determining whether the outstanding overdraft facility is beyond the 60% margin or not, at any given time. It is determining the same that, one is able to determine when the trigger point occurs. In that regard I find that the date of 7th October 2008 alluded to by Mr Onono as the trigger date is not sufficiently supported.

74. In the same vein, the bundle of document filed in court on the 17th January 2012; with a document entitled; V V & Sons Ltd – Share Holding Value analysis, reveals that as at 7th October 2008, the total holding value of the shares was; 210,827,665, 60% of total holding value was 126,496,599 and his bank overdraft balance was 213,935,286.95. Therefore, the gross safety margin as at 7th October 2008 was 3,107,621.95. However, the basis of the value of the shares on a daily is not supported by evidence on from the NSE. In that case the analysis is equally insufficient to determine the trigger date.

75. Be that as it were, in my considered opinion to address this issue regard must be held strictly first and foremost to the contractual terms of the contract as stipulated in the letter of offer and any other security documents; including the Guarantee and Indemnity forms signed by the Guarantors and then secondly the conduct of the parties as evidenced by the correspondences exchanged.

76. The terms of conditions 1 and 2 of Annexure I, of the letter of offer required the Bank to call upon the Principal debtor to provide additional shares within 5 days of date the 60% margin was breached and in default sell the shares immediately. In this regard, the Principal debtor submitted that, the general rule is that, the intention of the parties to an agreement should be ascertained from the document itself, and referred to the case of; *Savings and Loan Kenya Limited Vs. Mayfair Holdings Limited Civil Appeal 152 of 2006.* and an extract from Chitty on Contracts, 28th Edition, Volume 1, to argue that, "the task of ascertaining the intention of the parties must be approached objectively, the question is not what one or other of the parties meant or understood by the words used, but the meaning which the document would convey to reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

77. That Standard Bank security forms, in cases where facility is secured by share normally contain a "sell off" clause which allows a Lender to unilaterally sell the shares, if the value falls below ascertain margin and the customer does not provide increased security to shove up the short fall. Further the Bank owed the Principal debtor a duty of care to obtain the best market price in selling the shares, so as to; protect the interest of both parties, as held in the case of; *Standard Chartered Bank Vs. Walkers [1982] All ER 938, Kenya Commercial Bank Limited Vs. James Osebe [1982-88] 1 KAR 48, Housing Finance Company of Kenya Limited Vs. Palms Homes Limited & Others [2002] 2 KLR 93.*

78. That, the bank having failed to exercise the duty of care as aforesaid, it cannot profit from its own mistake. Reference was made to the cases of; *Cheall Vs. Association of Professional Executive Clerical and Computer Staff [1983] 2 AC. 181 and Alghussein Establishment Vs.*

Eton College (1988) 1 WLR 587. That as a consequent of the delay by the Bank, the Principal debtor can claim as a defence, to set off the difference between the value of the shares at the appropriate time and the 60% margin trigger.

79. However, the Bank argued that, if there was any delay in selling the shares, the delay does not impair its right to exercise any other right under the letter of offer including the right to sue for any shortfall or enforce the guarantees, as provided for under clause 19 of the letter of offer. That all clauses in the letter of offer including condition 1, have to be read harmoniously in order to accord proper meaning to the contract, as held in the case of; Alta Berkeley VI C.V. v. Omneon, Inc. 41 A.3d 381 Del.Supr., 2012.

80. The Bank denied the delay in selling the shares as alleged since it is evident that the Principal debtors' directors provided additional securities between October 2008 and January 2009 and additional funds to reduce the overdraft. The effect of the Principal debtor's letters dated 30th January 2009 and 25 February 2009, created an estoppel. Thus, by representation made, the Principal debtor is estopped from insisting that the Bank should have continued with the sale. The Bank relied on the cases of; First Assurance Ltd – v- Seascapes Ltd, Benjamin Ayiro Shiraku V Fozia Mohammed[2012]eKLR and Serah Njeri Mwobi -vs- John Kimani Njoroge – Civil Appeal No. 314 of 2009

81. However, the Principal debtor in response submitted that, section 97 and 98 of the Evidence Act, (cap 80) laws of Kenya, excludes the use of oral testimony or extrinsic documents to prove the terms of a document that has been reduced in writing, as stated in the Halsbury's laws of England Volume 12.

82. Having considered the respective submissions of the parties on the issue as to, when the 60% margin limit was triggered, I note that, the general rule is that, parties are bound by the terms of their contract and the court cannot re write the contract for them (somakalit pipeplastic vs National bank). However, I concur with the submissions that, the terms of a contract must be considered as a whole and that oral evidence and/or conduct of the parties cannot override the express terms of the contract.

83. In the instant case, the Bank is relying on inter alia; the letters from the Principal debtor to justify the delay in selling the shares. However, first and foremost, those correspondences cannot supersede or override the express terms of the letter of offer and in particular condition (1) of Annexure I. Secondly, the letters of; 30th January 2009 and 25th February 2009, were written long after the bank had already written to the principal debtor on, 9th September 2008 and 7th October 2008, indicating that the Principal debtor had burst the 60% margin.

84. In the same vein, the Bank cannot argue that, by the Principal debtors providing additional shares and/or depositing funds to regularise the account, it is justified in the delay to sell the shares. This is because as, a matter of fact, the Bank commenced sell of the shares on; 26th February 2009, due to the Principal debtor's failure to make the first payment of the four proposed payments by instalment, thus the additional shares and/or funds did not maintain the 60% margin. In fact, in the emails send by Mr Ellie Mwamburi, referred herein, the Bank indicate that even interest was in arrears.

85. Therefore, in my considered opinion, the Bank's argument that it indulged the Principal debtor does not assist it; for it was strictly bound by the terms of the letter of offer. If the Bank therefore suffered any loss as a result of its delay in selling the shares on the due date, then it must bear and/or shoulder the loss.

86. However, the Principal debtor too cannot run away from the letters written to the Bank to delay the sale and that is where the doctrine of estoppel comes in. From the correspondence herein, it is clear that, the Principal debtor sought for indulgence because it was in default. It is therefore estopped from denying any liability that, may arise as a result of delayed sale. Further by virtue of giving additional shares and/or making deposits, after default, they led the bank to believe that, they would not challenge the Bank's action to delay the sale of the shares. The principles of equity states inter alia that; "He who goes to equity must go with clean hands"

87. Further the Principal debtor cannot have sought for indulgence if it was not in default and therefore it cannot deny liability, unless it can prove that, had the Bank sold the shares at the right time, the Bank would have realised adequate funds to cover its debt.

88. The next issue to consider is whether the guarantors are liable to the Bank. The Principal debtor submitted that, the Bank having breached the contract with the Principal debtor, the Guarantors are discharged and that to allow the claim against the Guarantors would be to allow the Bank benefit from its own wrong.

89. However, the Bank argued that, clause 2 of the guarantees provides that, the guarantee is continuing security until the sum advance to the Principal debtor are paid in full. That clause 8.2 thereof provides that, the liability of the Guarantors is unaffected by any arrangement the Bank may make with the Principal Debtor or with any person that might operate to diminish or discharge the liability of or otherwise provide a defence to a Guarantor.

90. Further, clause 8.3 provides that, the Bank may at any time and without reference to the Guarantor give time for payment or grant any other indulgence. Reference was made to the passage in paragraph 331 of the Halsbury's Laws of England 4th Edition, which states that; if a guarantee contains a provision allowing the Bank to vary the principal obligation without discharging the Guarantor, such provision preserves the Guarantor's liability.

91. The subject paragraph reads as follows: -

"The Guarantor is not discharged by any variation of the principal contract made with his consent. The Guarantee will often expressly authorize the creditor to vary the principal obligation without discharging the Guarantor. Such provisions, if appropriately worded, are effective to preserve the guarantor's liability."

92. Further reference was made to the cases of; Trust Bank Limited (In Liquidation) V Amalo Industries Limited & 2 Others [2012] eKLR

and *Gimalu Estates Ltd & 4 Others v. International finance Corporation & another [2006] eKLR* , to argue that the delay in selling the shares does not discharge the Guarantors herein.

93. I have considered the rival submissions on the issue of Guarantors' liability and I find that, the general rule is that, if the Bank materially varies its agreement with the Principal debtor, such as granting time to the Principal debtor, to pay the debt (see *polka vs Everett (1876)* then the Guarantor will be discharged. However, this can be dealt with by suitably drafted clause to the contrary.

94. In the same vein, the continuing clause in a contract of guarantee secures present and future loans especially in cases of a current account debt where the Rule in the *Claytons* case may work to the disadvantage of the bank. However, a Guarantor can only be asked to pay what the Principal debtor owes, and if the Principal debtor has a good defence to the Bank's claim, the Guarantor may also raise this as a defence (*Bechervaise vs Lewis 1872*). It follows that, if the court finds that, the Principal debtor is liable, the Guarantors will be equally liable.

95. The next issue to consider is whether, the Principal debtor is entitled to the orders sought. In that regard, the Bank submitted that, Principal debtor has not made out a case for grant of the order of special damages in the sum of Kshs.84,331,066 or any of the other orders sought in the amended plaint. It has failed to demonstrate, the exact date when the 60% trigger was reached.

96. That the burden of proof in civil cases is beyond peradventure and needs not be restated and the onus is always on the party alleging to prove any fact that they allege. The Bank referred to; section 107 of Evidence Act (supra) that provides: -

"whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

97. Further reference was made to the case of; *D. T. Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati [2014] eKLR*. Therefore, it incumbent on the Principal debtor to prove when the 60% trigger was reached and the total value of the Plaintiff's shares exceeded the overdraft on 7th October 2008.

98. The Bank submitted that, the hypothesis by the Principal debtor that, if the Bank had sold its shares on 7th October 2008, it would have fully recovered the monies advanced and had a healthy balance in the sum of, Kshs.84,331,066, to hand over to the Principal debtor, is contrary to the Principal debtor's testimony that, the total value of the shares had exceeded the overdraft as at 7th October 2008. It is also not backed by any evidence as the Bank has demonstrated that the share valuation relied on by the Principal debtor is erroneous.

99. The Bank submitted that; it would also be unequitable to allow the Principal debtor to benefit from its own breach of the agreement, by failing to provide the additional funds as promised vide its letter dated 30th January 2009, having induced the Bank to postpone the sale, and then turn around and purport that it, is entitled to Kshs.84,331,066 because the Bank delayed in selling the shares.

100. I have dealt with the issue of when the 60% margin trigger was reached and/or triggered at length in this judgment, in a nutshell the evidence adduced by either party is not conclusive on this issue. For clarity, to recap the same, I found that;

- a) *The report of IRAC produced by Mr Onono was not conclusive as to the amount owing to the Principal debtor (if any), for reasons stated herein;*
- b) *The analysis of the shares of the company produced by the plaintiff too did not indicate the basis of the sums stated therein;*
- c) *The document relied on by the Bank at page 89 of its submissions is not consistent with the evidence adduced through correspondence referred to herein;*
- d) *None of the witness who testified settled on a particular debt as the date of the 60% trigger point.*

101. The submissions by both parties give credence to this finding as they blame each other for not having established the precise date when the 60% trigger point was reached. This finding too deals with the issue as to whether the Bank has proved its counter claim.

102. The court is live to the fact that, these suits herein are consolidated and are a test suit to other suits. Therefore, the findings herein are very important. The question that arises therefore is what orders should the court make in this matter that will meet the end of justice. Generally, when a claim is not proved it should be dismissed in favour of the opposite party. In the instant matter both parties' claims are not supported by adequate evidence and none of the parties will benefit from the dismissal.

103. The provisions of Article 159 of the constitution of Kenya, implores upon the court to promote substantive justice. In the same vein justice is done when it is seen to be done. In view of the facts and/or the circumstance of this case I order as follows:

- a) *Within 30 days of the date of this order, the parties shall engage an independent third party and supply the party with all the material information required to ascertain inter alia, when the 60% trigger point occurred base on the terms of letter of offer and the value of the total shares pledged, the price of each share at the time and the outstanding balance on the overdraft facility; at that time.*
- b) *If the parties do not agree on an independent party for the exercise, either party is at liberty to apply to the court for further orders or directions;*

c) If the parties agree and provide a final report, the report shall form the basis of the final orders herein;

d) The cost of the report shall be borne in equal proportion by the parties

104. If the parties do not comply with the above conditions, then the respective claims in the pleadings will stand dismissed with no orders as to costs at the expiry of the time set. In view of the aforesaid, the issue of interest and costs shall await the final orders.

105. It is so ordered

Dated, delivered and signed on this 26th day of June, 2020

G. L NZIOKA

JUDGE

In the presence of:

Ms. Migiro for the plaintiff

No appearance for the defendants

Ms. Mburu for the plaintiff in HCCC 419/2010

Robert -----Court Assistant