REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 148 OF 2011

CLESOI HOLDINGS LIMITED.....PLAINTIFF

VERSUS

PRIME BANK LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a Plaint dated 19th May 2011 but later amended to read the date of filing 13th May, 2011. The Plaintiff is seeking for Judgment against the Defendant for;

b. An order of permanent injunction restraining the defendant whether by themselves, their servants and agents or advocates or auctioneers or any of them either; individually or jointly or otherwise from doing the following acts or any of them, that is to say from interfering with rights or possession, advertising for sale, disposing off, selling by public auction or otherwise howsoever at any time or by completing by; conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting otherwise howsoever; interfering with ownership of title to and or interest in all that pieces of Land known as L.R No. 209/10830/5 and this order be served and do bind the Land Registrar and be noted on the respective Land Registry;

c. An order under Section 52 of the Indian Transfer of property Act (Amendment Act 1959) that, all further registration or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or any kind if right titles or interest in all those parcels of land known as LR No. 209/10830/5, with any registry, Government Department, and all other registering authorities be and is hereby prohibited and this order be noted on the respective Land Registry;

d. A declaration that the defendant cannot have any recourse against the plaintiff prior to it enforcing its rights against the principal borrower or at all, that any intended sale of the plaintiff's property is premature;

e. A declaration that the charges and the further charges enumerated in paragraph 8 of the plaint herein are null and void and incapable of conferring any statutory power of sale against the plaintiff, and that the plaintiff is released and discharged from the said charge from any liability there under and an order for immediate discharge by the Registrar of Lands;

f. An order directing the defendant's directors to deliver up to the Plaintiff the said documents of title duly released and discharged from the charge and an order that the defendant forthwith concurs in doing all acts and things and execute all the necessary deeds and documents in order to effectuate the orders aforesaid;

g. General, compensatory and punitive damages for loss of bargain;

h. Costs of this suit with interest thereon.

2. The Plaintiff avers that, at all material times it was and is still the registered owner of property LR No. 209/10839/5 (herein *"the suit property")*. That in the year 1994, a third party by the name of ***Jay Agencies Ltd*** (herein *the first borrower*) requested the Defendant to grant it a banking facility in the sum of Kshs.1,500,000/= The facility was granted and a charge dated 5th May 1994, created and registered over the suit property to secure the borrowing. By a further charge dated 23rd May 2000, the first borrower was granted a further loan facility in the sum of Kshs.8,500,000/=.

3. That, by a letter of offer dated 26th March 2003, the Defendant granted the first borrower a further sum of Kshs.29,500,000, contrary to the express agreement that, the Plaintiff would only guarantee a sum of Kshs.10,000,000/=. This further borrowing was not sanctioned by a

resolution passed by the Plaintiff's Board of Directors, as such it is unenforceable.

4. Similarly, the Defendant advanced ***North Camp*** (herein *the second borrower*) a sum of Kshs.18,000,000/= and the Plaintiff created a charge dated 28th December 2006, over the suit property in favour of the Defendant. By a further charge dated 16th December 2008, the second borrower was advanced a further sum of Kshs.12,000,000 secured by the same suit property.

5. The Plaintiff avers that, notwithstanding the valiant efforts by the borrowers to repay the loan, the Defendant has continuously manipulated the account to reflect the perpetual state of indebtedness. On 13th January 2004 the Defendant in the exercise of its statutory power of sale, served the Plaintiff with the statutory notice to realise the suit property.

6. However, the Plaintiff is disputing liability on the ground that the purported charges created over the suit properties are invalid and/or null and void on the ground *inter alia* that:

a. The charges do not comply with the provisions of section 46 of Registration of Titles Act, as they do not specify base rates or any other rate of interest; no specific repayment plan or any redemption date; and or amortization scheme.

b. Non-compliance with the mandatory provisions of India Transfer of Property Act of 1882 (herein "the ITPA") in that there is no valid advocate certificate and/or the name of the advocate who purportedly explained the effect of; Section 69 of the ITPA and Sulekha Khan, who purportedly drew the charges does not appear on the list of advocates with practicing certificate for the year 2000.

c. The charges were obtained through undue influence and duress to the wife of a director of the principal borrower, who was one of the signatories to the charges. Further, the identities of the persons executing the charges herein and the minutes leading to the company's resolution (if any) have not been provided or ascertained;

d. The charges were not registered with the Registrar of Companies within 45 days of creation pursuant to the provision of section 98 and 99 of the Companies Act Cap 486 Laws of Kenya (Repealed)

e. Section 44 of the Banking Act was contravened in that; the defendant levied unlawful charges and penalties without the permission of the Minister of Finance thus contravening the provisions of Central Bank of Kenya (Amendment) Act No.4 of 2001

7. The Plaintiff does aver that, the Defendant is acting in bad faith by threatening to exercise the purported statutory power of sale and preventing the Plaintiff from exercising its right to redeem the suit property. That, the Plaintiff carries on business on the suit property, which is peculiar in character and location; having been built it purposely as a go down. Therefore, if it is sold, the Plaintiff it will not get a similar alternative and stands to lose its asset and/or suffer irreparable loss and damage unless the defendant is restrained.

8. However, the Defendant filed a statement of defence dated 8th November 2011, denying the Plaintiff's claim. It was averred that, the Plaintiff on diverse dates voluntarily charged the suit property in favour of the Defendant to secure the borrowing by the first and second borrowers.

9. The Defendant denied the allegations that, the charges were purportedly created at the instance of the borrowers. It was averred that, they were created at the express request of the Plaintiffs to secure facilities granted to the borrowers. Further, the first and further charges were created by the Plaintiff to secure both the principal amounts, interest, bank charges and expenses.

10. The Defendant responded to the allegations that, the charges and/or further charges were null and void, by stating that:

a. The charges conform with all the legal requirements including but not limited to the provisions of the Registrations of Titles Act (cap 280) Laws of Kenya (herein "the RTA"), the ITPA and the law of contract;

b. The provisions of RTA as they relate to the application and use of statutory forms J1 and J2 are merely directive and not mandatory and the charges herein accord with those provisions to the extent that, they all contain specific clauses relating to; the principal amount secured, the date of repayment and interest charged. Further the charge documents were duly registered with the Registrar of companies and a certificate of registration issued accordingly;

c. The sums demanded by the defendant do not fall within the maximum limit under section 44 of the Banking Act therefore, the interpretation thereof; is misconceived and superfluous. That, after interest rate regime was liberalised on 23rd July 1991, the interest rate chargeable was left to be determined through negotiation between lenders and their customers on the basis of market forces. In any event, the defendant served the borrowers with reasonable notice of variation of interest rate;

d. The charge dated 5th May 1994, has a valid certificate by a duly qualified advocate; M/s Sulekha Madan Advocate who held a valid practicing certificate in the year 2000 and 2001;

e. There was no undue influence exerted over the wife of one of the directors as alleged;

f. All minutes of the meetings and board resolutions passed by the directors of the borrowers and plaintiff were furnished to the defendants leading to the execution of the charges and further charges; and

g. The plaintiff paid legal and registration fees for the registration of the charges as such it is estopped from challenging the validity

thereof.

11. Further, the Plaintiff lacks *locus standi* to challenge the mortgage and the borrowing contracts in view of the fact that, the principal borrowers have not challenged them. The Plaintiff has substantially admitted its indebtedness by virtue of the pleadings under paragraph 26 of the amended plaint, by stating that *"if it is liable under the charges, the sum being claimed by the Defendant is not legitimate amount accrued in the light of its own re calculation and findings"*.

12. The Defendant denied varying the original agreement with the principal borrowers as alleged or at all and averred that, it granted, extended or restructured the facilities of the principal borrowers' at the principal borrowers and Plaintiff's request. That, it pursued the principal borrowers and thereafter elected to enforce its statutory power of sale that, had accrued and is excisable.

13. Finally, the Defendant's averred that, the suit property is commercial in nature and was charged for commercial purposes therefore the issue of it being of sentimental value does not arise.

14. The case proceeded to a full hearing. The Plaintiff called two witness ***Nipti Rajesh Shah*** and ***Rajesh Kimji Shah***. The Defendant called one witness ***Alka Shahi. Nipti Shah*** relied on her witness statement dated 19th April 2011. The contents of that statement basically reflect the averments in the plaint.

15. However, in a nutshell, she testified that, she is a director and shareholder in the Plaintiff's company. That, at the beginning of the month of May 1994, her husband Rajesh Shah took to her at their home, certain documents and requested her to sign them. He explained that, the execution thereof was a formality needed in the ordinary course of business of their company. She did not read the documents and neither would she have understood them even if she read.

16. That, she trusted her husband on the explanation given requiring her signature and signed the documents. She did not know that the documents were conferring power on the Defendant to sell the suit property. Subsequently she signed three other similar documents at her home. She denied ever appearing before any of the four advocates who purportedly explained to her the effect of executing the charges. That, she does not even know where they practice from. She therefore denied receiving any independent legal advice before signing the subject documents.

17. That she was not actively involved in running the operation of the company, until on or about January 2011, when her husband suffered from a minor stroke and kidney gall stones and out of necessity she started acquainting herself with the family business.

18. However, later she came to know that, the documents she signed were charges to guarantee loan facilities to the principal borrowers herein. She maintained that no resolution was passed by the Plaintiff's board of directors before a further sum of Kshs. 29,500,000/- was granted to the first borrower.

19. That subsequently, the Defendant issued two statutory notices in regard to the borrowings. The notice in relation to the first borrower was claiming a sum of Kshs. 10,726,046.30 and in relation to the second borrower, a sum of Kshs. 88,726,422.30. The Defendant intimated that, it will proceed with the auction of the suit property if the payment was not made. Pursuant to the notices, the Defendant, on 12th April 2011, instructed ***Mwaka Musau Valuers,*** to value the suit property in preparation of realization.

20. In cross examination, she confirmed that. she is a director in the Plaintiff's company and at the same time, in the borrowers' companies', save that she was active in the principal borrowers' companies' but not in the Plaintiff's s company. She conceded that she signed the documents on behalf of all the three companies, both as a principal borrowers and as a guarantor respectively. She also confirmed signing the letters of offer, the guarantee and indemnity documents and all the board resolution authorizing the borrowing, but insisted it was under duress and/or in a hurry as the principal borrowers' needed the money urgently.

21. She stated that, Jay Agencies was engaged in the business of *"relief services"* in Rwanda, Sudan, Burundi and other countries. That it suffered set back caused by slowness in business and could not keep up with the payments of the loan. Similarly, Camp North Limited, could not pay the loan due to increased and varied interest charged. That the interest rate charged ranked between 12.5% to 23.75% per annum. She stated that, from the bank statements, the overdraft of the first principal borrowers, reflected a debit balance of Kshs.10,900,000 at the time of demand. However, the sum was not paid and instead, the Principal borrowers filed the suit.

22. She conceded that, there was outstanding sum due from the two borrowers' mainly in terms of the interest but argued that, the Defendant held fixed deposits under lien for different entities that was used to pay off the sums on the first borrowers account. That only one fixed deposit was in favour of the second borrower. She stated that the deposits were uplifted upon the Plaintiff's instruction but under duress. They were paid to the lien holders.

23. She further conceded that, by the time the statutory notices were issued the Principal borrowers accounts were in debit. However, she denied that, the Plaintiff was served with any statutory notices. In re-examination, she maintained that the Defendant, had not accounted for the interest on the fixed deposits and how the deposits were utilized.

24. The Plaintiffs second witness Rajesh Kimji Shah, relied on his statement dated 19th April 2011, in which he reiterates the averments in the plaint. His evidence was similar in almost to the evidence of his wife Nipti Shah. However, he conceded that, he signed the charges securing the facility of; Kshs.1,500,000 and later on Kshs.8,500,000 granted to the first borrower. The wife Nipti Shah also signed the charges, unaware of the documents she was executing.

25. He argued that the Defendants failed to keep separate accounts of the sums advanced (if any) and lumped up the accounts together. In cross examination he insisted that, all the facilities given had been repaid but conceded that, when the loan was restructured in 2008, there

were outstanding amounts in the respective loan accounts. He maintained that, he did not understand how the fixed deposits were utilized.

26. In re-examination he stated that, at no time did the Plaintiff maintain account in Kisumu and did not understand how the fixed deposit in the sum of Kshs.7,377,277.50 and/or of Kshs.6,899,559.05 was uplifted at the Kisumu branch, as he did not give instructions to uplift the subject amount or signed for it. Neither did he have knowledge of who received the cash in the sum of Kshs.13,258,634.05, allegedly paid to Shamji, although he known to him. Further the fixed deposit for Kshs.7,103,295,.55 was allegedly uplifted from Kenindia branch, but he did not give instructions for the same.

27. The Defendant's case was supported by the evidence of Alka Shahi who adopted her witness statement dated 8th November 2011, a bundle of documents dated 8th November 2011, a supplementary thereof dated 29th October 2015 and 17th November 2016 and a case summary 8th February 2018. She also relied on two affidavits sworn on 3rd May 2011 and 23rd May 2011, in opposition to the Plaintiffs application for injunction. The content of her statement is in all aspects similar to the averments of the statement of defence.

28. However, in a nutshell, she reiterated that, the Defendant advanced the first borrower a sum of Kshs.1,500,000, and subsequently, enhanced by a further sum of Kshs.8,500,000. The second borrower was advanced an overdraft facility of Ksh.18,000,000 and a loan facility of Kshs.57,000,000. In the year 2008, the overdraft facility was converted into a loan facility and enhanced to a sum of Kshs.30,000,000, vide a letter of offer dated 1st August 2008. That all the facilities were secured by a charge (s) and a further charge(s) over the suit property as pleaded. All the charges were supported by board resolutions, passed inter alia on 30th November 1999, by both the principal borrower and the Plaintiff as a guarantor.

29. Subsequently there was default in the repayment of the facilities. The Defendant made demand for payment of a sum outstanding, which was not honoured instead the Plaintiff filed the present suit.

30. In cross examination, the witness maintained that, the first borrower was granted overdraft facility of Khs.10,000,000, secured by a charge over the suit property. She insisted that, at the time the demand was made, there were no outstanding fixed deposits, as all had been utilised. That, the Defendant carried out a reconciliation of the various fixed deposits receipts and filed a report to that effect in court. That out of a sum of; Kshs.46,500,000, fixed deposit held, a sum of Kshs.38,760,095.05, has been appropriate. The balance of Kshs.7,704,000 was returned to the fixed deposit holders.

31. At the close of the hearing of the case, the parties filed their respective submissions which l have considered alongside the evidence adduced and l find the following issues have arisen for determination: -

a. Whether the defendant advanced the principal borrowers' any monies;

b. If so, what was any security granted in consideration thereof; and/or; Were the monies advanced (if any), repaid and/or was there default;

c. Is the plaintiffs are entitled to the prayers sought; and

d. Who will bear the cost of the suit?

32. I have considered the first issue and l find that, there is no dispute that, the Defendant, vide a letter dated 7th April 1994, advanced the first borrower an overdraft facility of Kshs.1,500,000 and by a letter dated 5th July 2006, the facility was enhanced to Kshs.10,000,000. Similarly, by a letter of offer dated 3rd July 2006, the Defendant offered the second borrower, an overdraft facility of Ksh.18,000,000 and a loan facility of Kshs.57,000,000, and by a letter of offer dated 1st August 2008, the Defendant converted the borrowers existing overdraft facility to the extent of Kshs.27,000,000 into a loan facility.

33. The directors of the Plaintiffs herein, who are also directors of the principal borrowers' signified acceptance of these facilities by endorsing on the subject letters. They have also confirmed the advances, in their pleading and their evidence in court.

34. The next issue to consider is, how these facilities were secured and in particular whether; they were secured by the suit property herein. In that, regard there is evidence that, several charges were created over the suit property to secure the advances. For clarity it is not disputed that, a charge was registered over the suit property on 9th June 1994, at the Land Registry and at the Registry of the Registrar of Companies on 5th May 1994, to secure the Kshs.1,500,000/= plus interest and other charges. However, due to a mistake in the description of the borrower, a Deed of Rectification of charge was registered on 17th August 1994. A further charge was registered dated 23rd May 2005, was registered over the suit property to secure the sum of Kshs.8,500,000/=.

35. Similarly, a charge dated 28th December 2006, and a further charge dated 16th December 2008, were registered over the suit property to secure the facility advanced to the second borrower, vide a letter of offer dated 1st August 2008. Indeed, the Plaintiff admits and avers at paragraph 8 of the amended plaint that, it *"created four purported charges"* in favour of the Defendant at the request of the borrowers. Therefore, there is no dispute that the suit property was used to secure the advances herein.

36. However, the Plaintiff has denied passing the requisite resolution to charge the suit property. But it suffices to note that, the Defendant has produced copies of resolutions here below, passed by the Plaintiff to support the charges:-

a. Resolution dated 29th April 1994, to secure the advance of Kshs.1,500,000;

b. Resolution dated 30th November 1999, to secure an overdraft facility of Kshs.10,000,000;

c. Resolution dated 20th December 2006, to secure an overdraft facility of Kshs.18,000,000; and

d. Resolution dated 29th October 2008, to secure the sum of Kshs.12,000,000/=.

37. Therefore, it is evident that, the requisite resolutions were passed by the Plaintiff before the suit property was charged. It is also noteworthy that, the 1st Plaintiff's witness, Nipti Shah, was in attendance in most of the meetings, where these resolutions were passed and she described in the minutes thereof, as the chairman of the meeting. She was therefore aware of the resolution. In that case, the Plaintiff is not candid when it pleads that no resolutions were passed to support the charges and/or tendered.

38. The Plaintiff also impugns the charges dated 5th May 1994 and 23rd May 2000, in relation to the attestation thereof; for reasons already stated herein. I have looked at the first legal charge dated 5th May 1994 and it is evident that, the signatories and/or the chargors' were explained to the purport of section 69(1) and section 100 A (1) of the ITPA 1882, by one J. J Patel Advocate. The chargors subsequently signed the charges acknowledging that, they had been explained to and had understood the legal effect of those sections of the law.

39. The further charge dated 23rd May 2000, is impugned particularly, on the ground that, the Advocate who attested it one, M/s Sulekha Khan, was incompetent for want of certificate to practice issued by the Law Society of Kenya. In that regard, the Plaintiff produced a list from the Law Society of Kenya showing, the Advocates who held practicing certificates for the year 2001. However, I note that, the charge was executed in the year 2000 and not in the year 2001. Additionally, the Plaintiff refers to an Advocate as ***Sulekha Khan,*** while the charge documents refers to the Advocate as ***Sulekha Madan***. It is therefore not clear whether it is one and the same person.

40. Be that as it were, the Defendant has produced a letter dated 26th April 2011, from the Law Society of Kenya, which states that, Sulekha Madan held a practicing certificate for the year 2000. Similarly, copies of the Advocate's practising certificates for the year 2000 and 2001 are produced. In that regard I find that, the allegation by the Plaintiff that the Advocate did not have a practicing certificate do not lie.

41. The next issue relates to allegations that, Nipti Shah signed the charge documents under undue influence, duress and misrepresentation. The Plaintiff relied on the case of ***Anjanben Anil Shah vs. Akiba Bank Limited [2005] eKLR*** to argue that, the creditor will not enforce a security and/or a charge, where there has been undue influence on the surety and/or guarantor by the Principal borrower with the knowledge of the creditor or if the creditor did not take steps to ensure that the surety or guarantor executed the charge freely. However, to rebut the allegations the Defendant argued inter alia that Nipti Shah was involved in the day to day activities of the principal borrowers and that, the charge documents were explained to her, she understood and signed the same voluntarily.

42. I have considered the rival arguments advanced on the subject issue and note that, the general principles of law requires that; for a guarantor to escape liability under a guarantee, on the basis of; undue influence, the following conditions must be met:

a. The guarantee must be manifestly disadvantageous; as held in the case of **National West Minister Bank Plc vs Morgan (1985);**

b. The bank must have actual or constructive notice of the undue influence as held in the case of **Midland Bank vs Perry (1987);** and

c. he undue influence must be executed by an agent of the bank as held in the case of **Kings North Trust vs Bell (1985);**

43. In the instant case, it is evident that, the Plaintiff's directors are also the directors' of the principal borrower's. Therefore, they directly benefitted from the facilities advanced. In that case, the guarantee was not manifestly disadvantageous to them. Similarly, there is no evidence that, the Defendant gave Mr Shah, (as its agent), the charge documents to take home to his wife, Nipti Shah to sign. To the contrary, there is evidence that, she signed the charge documents in the presence of a lawyer, who attested to her signature. Therefore, there is no evidence that the Defendant, had actual or constructive knowledge of the alleged undue influence.

44. I also find, there is evidence that, Nipti Shah did not just sign one charge but signed a total of four charge documents. Therefore, she cannot have signed all of them as a formality, without inquiring as what these series of documents she was signing were all about. She has not disputed her signatures on the charge documents. But even more so, as aforesaid, she chaired all the meetings that deliberated and passed resolutions to charge the suit property to secure the borrowing by the principal debtors. I therefore find that, Nipti Shah was not unduly influenced and/or misled to sign the charge documents in issue, as alleged.

45. The Plaintiff also raised further that, the charges do not comply with the provisions of; section 46 of the Registration of Titles Act (Repealed). I have considered the arguments by the parties in relation to the subject issue find that, the subject provisions states that: -

"46. (1) Whenever any land is intended to be charged or made security in favour of any person other than by way of deposit of documents of title as provided for by section 66, the proprietor or lessee or, if the proprietor or lessee is of unsound mind, the guardian or other person appointed by the court to act on his behalf in the matter shall execute a charge in form J (1) or J (2) in the First Schedule, which must be registered as hereinbefore provided.

(2) The charge when registered shall (subject to any provisions to the contrary therein contained) render the property comprised therein subject to the same security, and to the same powers and remedies on the part of the chargee, as are the case under a legal mortgage of land which is not registered under this Act".

46. Having considered these provisions, I concur with the Plaintiffs submissions that, these provisions are couched in mandatory terms by use of the word “shall” in relation to the use of the relevant forms. However, I have reproduced the sample of Form J (1) here below, for ease of understanding and particularly to appreciate the content thereof.

> “Form J (1) Charge (section 46)
>
> I, ……. being registered as the proprietor [lessee], subject to such charges as are notified by memorandum written hereon, and to the annual rent of Sh……..…..cts ……., of that piece of land containing [state area] or thereabouts, and situated in ……..[if the land to be dealt with contains all that is included in an existing grant or certificate of title or lease, refer thereto for description or diagram; otherwise set forth the boundaries in feet, and refer to plan thereof on margin of or annexed to the charge, or deposited in the ……...……] in consideration of the sum of Sh……. …..cts …….. lent to me by ……. of [insert description], the receipt of which sum I hereby acknowledge, do hereby agree: First that I will pay to him the said …… the above sum of Sh …… on the ……. day of ……..: Secondly that I will pay interest on the said sum at the rate of Sh. ……. per centum per annum by equal payments of Sh. …… cts. ……., on the ……. day of every [insert month or quarter or half-year or year], the first of such payments to be made on the ……. day of ……. next: Thirdly [set forth special stipulations if any]. And, for the better securing to the said ……. the repayment in manner aforesaid of the principal sum and interest, I hereby charge the land above described with such principal sum and interest. In witness whereof I have hereunto signed my name this ……. day of ……, 19….
>
> Signed by the said …… in the presence of}
>
> [Signature]
>
> [Endorse memorandum of charges]”

47. The contents of; Form J (2) are generally similar to those in Form J (1). Be that as it were, the salient information required in these forms include; particulars of; the proprietor of the land charged, the surface area, the location or situation of the land, the consideration, the particulars of the lender, the commitment by the chargor to pay the principal sum plus interest, the events when the liability to pay ceases and the signature of the chargor.

48. I have considered the charges executed and produced herein and note that, they clearly give details relating to the particulars aforesaid, irrespective of the format employed in drawing the same. The charges provide details of the description of the parties to thereto, the particulars of the charged property and the amount secured, the mortgagor’s obligations and/or covenants to repay the principal and interest, the memorandum is provided under the schedule to the mortgage. The charges are executed by the parties, and the mortgagors have signed the same and their signature attested. A certificate to that effect is signed as required under section 69 of the ITPA. Further particulars are contained in the letters of offer executed by the borrowers and the lenders.

49. In the given circumstances I find that, the charges conform with the requirements of section 46 of the Registration of Tiles Act, cap 281 of the laws of Kenya (Repealed), in so far as the content is concerned. In addition, the charges were registered as required by sub section 46 (2), thus conferring rights upon the chargee. Finally, taking into account the provisions of; Article 159(2)(d) of the constitution, which requires that the courts should uphold substantive justice and surpasses the statutory provisions of; section 46, the charges herein cannot be declared null and void for want of form.

50. Having dealt with all the issues raised concerning the validity of the charges, I find and hold that, all the four charges herein are valid and enforceable. The next issue raised relates to interest rates. The plaintiff’s evidence, as already stated herein is that, the interest and penalty charged or levied by the Defendant are; usurious and unconscionable and not according to the regulations by the Central Bank of Kenya. It was submitted that, the Defendant did not get the requisite approval of the Minister of Finance, to increase the interest rate, thus contravening section 44 of the Banking Act (cap) 488 Laws of Kenya and the Gazette Notices number 4939 of 1989, 1458 of 1990, 1617 of 1990 and 3348 of 1991; issued pursuant thereto.

51. To the contrary the Defendant submitted that; the 1st Plaintiff’s witness Nipti Shah, admitted in cross examination that, the interest rate charged were according to the contractual agreement between the parties. The Defendant produced a summary of interest rates charged and argued that the same has not been rebutted by other evidence. That more importantly, the Plaintiff has not sought for any accounts to be taken.

52. I have considered the rival arguments advanced by the parties and l find that interest rate chargeable is indicated in the letters of offer, and note in the minutes of the meeting of board of directors of the Plaintiff and also in the charge documents. These documents bind the parties. Even then, the interest was charged on the account of the principal borrowers. Therefore, competent parties to speak to it, should first and foremost be the borrowers. They have not as they are not a party to this suit.

53. Further if the Defendant has charged interest rate that contravene the statutory provisions as alleged, then the same can only be proved through provision of; detailed account holders bank statements. The Plaintiff in any case bears the primary responsibility and/or burden to prove the case. In fact, the Plaintiff herein wearing the hat of principal borrowers was in a position to provide the bank statements. To the contrary the documents provided is by the Defendant, support its position that the interest rate applied was contractual.

54. The other issue raised and heavily contested relates to; fixed deposits held by the Defendant but allegedly not accounted for. At the hearing of the case, the Plaintiff dealt with this issue at length. It therefore, became evident to the court that, there was need for a summary of the various deposits held and how they were utilised. The court ordered each party to file the summary in the court.

55. The Defendant filed a detailed summary thereof dated 8th February 2018. The Plaintiff did not file any, instead tabulated the unaccounted for fixed deposits in their submissions. I further note that, though heavily contested, the Plaintiff did not raise this issue of fixed deposits substantially in its pleadings and/or witness statement. The submissions cannot be considered as a pleading and/or taken as evidence, in the circumstances. There is need to prove *inter alia* the fixed deposits held, in whose favour, for which liability, and how they were uplifted and the proceeds therefor applied.

56. As much as the Plaintiff were not custodians thereof, but they are the ones who fixed the deposits and must have been supplied with copies of the documentations relating to the same at the time of transacting. The production of these documents would rebut the Defendant's evidence. It is not sufficient for the Plaintiff to just tabulate the uncounted for deposits without supporting documents.

57. Be that as it were, I have indeed, analysed the summary documents produced by the Defendant and note that, some fixed deposits were in the name of the principal borrowers and others in the names of the individual directors. Therefore, not all the fixed deposits were in the Plaintiff's name. The Plaintiff cannot therefore lay claim on the deposits not made by them. The respective depositors have not addressed the same.

58. Further it is evident that, the fixed deposits were not given to secure liabilities owed by the 1st and the 2nd borrowers herein per se but by other companies associated with the Plaintiff. Therefore, only those relating to the principal borrowers herein could be applied to the outstanding debts. The other earmarked deposits were not available for appropriation.

59. In the same vein, though the Plaintiff denied knowledge of how payments were applied and made to other parties, the Defendant maintained that, some deposits were encashed by the Plaintiff's witnesses and /or paid to 3rd parties on their instructions. The Plaintiff's witnesses did not rebut the evidence of encashing these deposits and there is no evidence that, the purported signatures on the encashed fixed deposits, do not belong to the Plaintiffs witnesses. In fact, the Plaintiff interestingly submitted that the *"bank officer would have encashed themselves without informing us, without signatures or signed under duress"*.

60. If further evidence was required, the same could only have been ordered for, had the Plaintiff prayed for an order for accounts to be taken and/or the Defendant be ordered to produce true and proper accounts in relation to the accounts and in particular, the fixed deposits. There is no such prayer. In the given circumstances and in the absence of any contrary evidence, I find that, the Defendant have provided reasonable evidence on how the fixed deposits were applied.

61. However, as a general observation, the Plaintiff does not seem to be disputing the amount demanded but is concerned that, the Defendant has not furnished it with documentation as to how the figure claimed was arrived. Indeed, the Defendant is under a contractual duty to supply its customer with bank statements. However, due to the duty of confidentiality the accounts should be rendered to the account holder. I have no evidence that the statements were not given. In my opinion, the Principal debtor should have been a party to this case. It is not clear, why the Plaintiff did not make them parties when they bear the original liability to repay the debt.

62. The last issue relates to the Defendant's failure to pursue the principal borrowers before demanding payment from the Plaintiff as a guarantor and/or attempting to enforce the security and/or sale of the suit property. In this regard, I note that; generally, a guarantee is a written promise by one person to be responsible for the debt, default or miscarriage of another incurred by a third party. In other words, it is a written promise that, if the principal debtor does not pay, then the guarantor will.

63. However, the principal debtor retains primary liability for the obligations which have been guaranteed. The liability of the guarantor is thus a secondary obligation, which is contingent on the principal debtor failing to perform the obligation which has been guaranteed. The liability of a guarantor is therefore, dependent on the underlying obligation of the principal debtor to the guaranteed party.

64. This is known as the principle of co-extensiveness. The effect of this principle is that:

a. As a general rule, the liability of the guarantor can be no greater and no less than the liability of the principal debtor (although it is open to the parties to agree to limit the guarantors' liability);

b. The liability of the guarantor will, as a general rule, be extinguished (or reduced, as applicable) if the principal obligation to the guaranteed party is void or unenforceable, illegal, has been discharged, ceases to exist or is reduced to a defence or right of set-off.

65. Thus, the liability of a guarantor is co extensive with the lability of the principal debtor. However, as stated in Halsbury's Law of England 4th Edition (Re issue) Volume 20 (1) "when the creditor has acquired a right to immediate payment of a debt from a guarantor, the guarantor is entitled to call upon the principal debtor to pay the amount of the debt guaranteed so as to relieve the guarantor from his obligation, even though the guarantor had paid nothing under the guarantee, and even though the creditor has not demanded payment from him or the principal debtor"

66. Similarly, in Chitty on Contracts 24th Edition Volume 2 at page 1031 paragraph 4831, it is stated that, *"prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor."*

67. In Halsbury's Laws of England 4th edition paragraph 159 at page 87, it is stated that, *"it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for."*

68. In the instant matter, it is evident from the bank statements produced by the Defendant that, the 1st and 2nd borrowers herein did not fully repay the loan facilities. The default is not denied. In that case, the liability of the Plaintiff crystallised upon the default. There is evidence that notices were send to the principal borrowers and guarantors, but the unique circumstances of this case, is that, the Plaintiff is the principal borrowers and the guarantors too. As such, the statutory notices served to both the Principal debtors and Guarantor were received

by the same persons. Obviously, they did not pay the outstanding amount.

69. Therefore, they cannot argue that, the Defendant should not have called upon them as guarantors before calling upon them as borrowers. If this court were to allow the Plaintiff escape liability as guarantors by raising the defence that they have not been pursued as principal debtors, when they have failed to pay the debt, would be mockery of the judicial process and a miscarriage of justice. It will amount to unjust enrichment of the Plaintiff's directors. The co-extensive principle referred to herein, is founded on the understanding that, once the guarantors pay off the debt owed by the principal debtor, the guarantor is entitled to indemnity from the principal debtor.

70. The Plaintiff further raised the issues that, it has been discharged from liability due to the variation of the contract between the principal borrower and the Defendant, in that the Defendant granted the principal borrower a sum of Kshs. 29,500,000/=, consolidated accounts and/or restructured the facilities without its knowledge and failed to take additional securities or released the same. However, it suffices to note that, the charge document provide under clause 7 (d) (ii) and (iii) at page 23 that, the mortgagee shall be at liberty without affecting its rights under at any time:

> a. To vary exchange or release any other securities held or to be held by the Mortgagee for or on account of the mortgage debt and interest hereby secured or any part thereof
>
> b. To renew bills and promissory notes in any manner and to compound with give time for payment to accept compositions and make any other arrangements with the Company or any other person or persons liable on bills notes or other securities held or to be held by the Mortgagee for or on behalf of the company.

71. Similarly, at clause (f) at page 24 of the charge, it is stipulated that, the mortgagee may at any time and without notice to the mortgagor combine or consolidate all or any of the company's account's with and liability to the mortgagee and set off or transfer any sums standing to the credit of any or more of such accounts in or towards satisfaction of any of the company's liabilities to the mortgagee or any other account or in any other respect whether such liabilities be actual or contingent primary or collateral joint or several and whether such accounts and liabilities be at or to one or more branches of the mortgagee

72. In the same vein clause K at page 25 provides that, no property of the mortgagor which is subject to the charge or mortgage at the time of execution of the mortgage or charge shall be redeemed except on payment not only of all the moneys thereby secured but also of all monies secured. The Plaintiff directors signed the charge documents and are bound by the terms thereof. The suit property herein cannot be released unless all the sums owing are fully repaid.

73. I shall finally consider whether the prayers in the amended plaint can be granted. In view of the findings above that, the principal debtors or borrowers have not fully repaid the credit facilities given, then prayer (a) seeking for an order of a permanent injunction to restrain the sale of the suit property and/or completing the transfer thereof cannot be granted. Neither can prayer (b) seeking for an order to issue under section 52 of ITPA to prohibit any further registration or change in ownership of the suit property.

74. In the same vein, prayer (c) and (d) cannot be granted having held that, the charges are valid and enforceable and that the Defendant can enforce the same without first pursuing the principle debtor and/or borrowers. Finally, the prayer seeking for an order to direct the Defendant to deliver the title documents back to the Plaintiff's directors, cannot be granted in view of the other orders herein. As regards the prayer of general, compensatory and punitive damages for loss of bargain, it fails, I find that, there was no evidence led in support of the same. Finally, it is trite law that, costs follow the event, the costs of this suit are awarded to the Defendant. All in all, the suit is dismissed with costs to the Defendant.

75. It is so ordered.

DATED, **DELIVERED** and **SIGNED** on this 30th day of ***July*** 2020, on line

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. King'ara: ---------for the Plaintiff

Mr. Mwangi: --------- for the Defendant

Robert: ----------Court Assistant