



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NUMBER 602 OF 2001**

**SULEIMAN KASUTI MURUGA.....PLAINTIFF**

**-VERSUS-**

**SOUTHERN CREDIT BANKING CORPORATION LIMITED**

**(FORMERLY BULLION BANK LIMITED) ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit vide a plaint dated 25<sup>th</sup> April, 2001, seeking for judgment against the Defendant for: -

- a) A declaration that the charge registered as entry number 5 in the encumbrance section of the title of the property known as Nairobi/Block 91/23, is incurably defective and/or null and void and/or unenforceable;*
- b) In the alternative, for a declaration that the plaintiff is discharged from all liability to the defendant under the charge registered as entry number 5 in the encumbrance section of the title property known as Nairobi/Block 91/23;*
- c) A permanent injunction restraining the defendant by itself, its agents or servants from transferring, selling by public auction or otherwise or dealing in any way with the property known as Nairobi/Block 91/23;*
- d) An order compelling the defendant to return to the plaintiff forthwith all documents of title relating to the property known as Nairobi/Block 91/23, which are in the defendant's possession;*
- e) Damages for wrongfully failing to return the documents of title to the property to the plaintiff;*
- f) Costs of this suit;*
- g) Interest on (e) and (f) above;*
- h) Any other or further reliefs which this Honourable court may deem fit and just to grant.*

2. The Plaintiff avers that, he is the registered owner of all that property known as Nairobi/Block 91/23, situate in Nairobi (herein "the suit property"). That on or about the 25<sup>th</sup> August 1992, he executed a legal charge (herein "the Charge") over the suit property, in favour of the Defendant to secure a sum of; Kshs 7,500,000, advanced by the Defendant to; Vacational Developers Limited (herein "the borrower").

3. However, he avers that, the charge is null and void, in that, the charge document was taken to him by one of the directors of the borrower and requested to sign. He signed the same and it was returned to the Defendant by the said director. Therefore, he did not appear before any advocate to sign the charge documents or have the charge explained to him or his signature attested. In the circumstances he did not execute the charge freely and/or voluntarily.

4. He further avers that, the charge is null and void for want of consideration as no monies were advanced to the borrower by the Defendant pursuant to the charge. It is also invariably defective, null and void for non-compliance with the mandatory provisions of; section 65(1) and 110 of the Registered Land Act (chapter 300) Laws of Kenya.

5. The Plaintiff avers that, even then, in the year 1994, the borrower applied for and the Defendant advanced it a new loan exceeding Kshs 40,000,000, secured by a mortgage over the borrower's property known as; L.R. No 209/870/1, Nairobi (herein the borrower's suit

property"). That, the loan was advanced without his knowledge or consent and effectively and substantially increased the borrower's indebtedness.

6. Further, in or about the month of February 1995, the Defendant without his knowledge or consent, rescheduled and restructured all the borrower's loans which by then stood at; Kshs 68,276,663.55, and granted the borrower indulgence and extensions of time or arrangements for payment of the amount allegedly then owing. The Defendant also combined all the borrowers loan accounts, so that the advances allegedly secured under the charge were merged with the new loan granted.

7. Similarly, in or about the month of May 1995, the Defendant sold the borrower's suit property without his knowledge and failed to apply the proceeds of sale of; Kshs 52,500,000 to the borrower's loan account, which should have repaid the principal sum and interest and released him from all liabilities.

8. He avers that, the above facts were unknown to him until the year 1998, when the Defendant demanded Kshs 30,000,000 from him. Subsequently upon receipt of the demand and without legal advice, he was coerced, pressurised and duped by the Defendant, into agreeing to pay the sum demanded in monthly instalments or the property be sold.

9. In the year 2000 to 2001, the Defendant made further threats to sell the suit property and forced him to make further proposals for the payment of various amounts allegedly owing by the borrower, even though, the Defendant was in fact well aware that, he was not liable to pay any such amounts. That, the Defendant is estopped from enforcing any sums owing, having failed to make demand for payment and/or to enforce the charge for eight (8) years. Finally, he avers that, the purported exercise of statutory power of sale has not arisen, as no valid demand for payment of the monies secured has been made to or received by him.

10. However, the Defendant filed statement of defence dated 25<sup>th</sup> October 2004 and amended on 15<sup>th</sup> December 2003, to include a counter claim. The Defendant averred that, the Plaintiff, in addition to executing the charge instrument, executed a guarantee and indemnity instrument dated; 14<sup>th</sup> May 1992, in which he guaranteed to pay the Defendant on demand, the sum advanced to the borrower. That the Plaintiff was also aware that the charge was to secure advances already made to the borrower. Further, the Plaintiff prevailed upon the Defendant to accept his advocates to; prepare, complete and register the charge and his advocate did the same on the understating of the parties that, the charge as registered is valid, enforceable and binding upon the parties.

11. That, pursuant to the registration of the charge, the Plaintiff and the Principal borrower have benefited from the consideration and have even made part payments though irregularly. Therefore, they are estopped from denying the validity of the charge and/or inquiring into its adequacy and competence.

12. However, on a without prejudice basis, the Defendant averred that, if the charge is invalid and unenforceable, though denied, then the charge deed amounts to; a valid agreement or undertaking in writing by the Plaintiff to pay the Defendant and/or to execute in favour of the Defendant a valid charge over the suit property to, secure the sums that may be advanced by the Defendant to the Principal debtor's company, provided the sum does not exceed by way of principal; Kshs 7.5 million together with such interest at the rate or rates provided and/or implied in the charge.

13. The Defendant denied making a further advance of; Kshs 40,000,000 to the borrower and averred that, its subsidiary company; Bullion Finance Limited; merely consented to the borrower creating a second charge over the borrower's suit property in favour of the Defendant, which arrangement was duly consented to by the Plaintiff, in his charge instrument executed in favour of the Defendant.

14. The Defendant further, on a without prejudice basis, averred that, the provisions of the charge gave the Defendant the right to reschedule the borrower's debt or combine or consolidate all or any of the borrower's debts. Therefore, Defendant did not depart from the terms of the agreement with the Principal borrower consequently discharging the Plaintiff from any liabilities under the guarantee, as alleged. That, if however, there were alterations which is denied, then the same were not substantial or material or did not in any way prejudice the Plaintiff.

15. Further, the property sold was pursuant to the Defendant's exercise of its statutory power of sale and with the consent of the Plaintiff. That the Plaintiff was at all times aware of his liability under the guarantee and was supplied with full particulars of the Defendant's claim as early as 1997. He did not raise objections to the same. In addition, the parties have exchanged various correspondence with the Plaintiff lawyers; Messrs Wekesa & Company Advocates, making various settlement proposals to redeem the suit property but did not honour the same.

16. Similarly, the Plaintiff has admitted under paragraph 19 of the plaint that, he is under an obligation to pay monies to the Defendant pursuant to the charge instrument. The Defendant reiterated the averments in the defence and prayed for judgment in the counter claim against the Plaintiff for:

*a) A declaration that the plaintiff is liable under his covenant to pay to the defendant a sum of; Kshs 64,643,112.50, together with further interest at the rate of; 21% per annum with effect from 1<sup>st</sup> September 2000 until payment in full;*

*b) A declaration that the plaintiff is liable to execute a valid charge over the aforesaid parcel known as; Title Number Nairobi/Block 91/23 in favour of the defendant to secure repayment of the principal sum of Kshs 7.5 million, together with interest and other charges specified in the instrument;*

*c) An order that the plaintiff do pay the defendant a sum of; Kshs 64,643,112.50, together with interest at the rate of 21% per annum from 1<sup>st</sup> September 2000 until payment in full;*

*d) An order that the plaintiff do specifically perform their agreement to execute a valid charge in terms of the declaration prayed in*

*(b) above*

*e) Costs of and incidentals to the counter-claim.*

17. The case proceeded to full hearing. The Plaintiff relied on his witness statement dated 14<sup>th</sup> February 2012 and a list of documents dated 11<sup>th</sup> November 2008, which he adopted and relied on fully. The statement reflects the averments in the plaint.

18. In cross examination, he confirmed that, he knew the borrowers' directors as they were his friends and that, he gave the suit property as security for advance of a sum of; Ksh 7.5 million to the borrower. He also admitted having signed the guarantee and indemnity and that Cyprian Wekesa Masafu Wanyonyi; was his lawyer. When he was shown the signature on the charge, he claimed, he was not sure about it, because the handwriting was not his.

19. That, he came to know about the default in repayment of the loan at a later stage as the Defendant did not notify him though the Defendant's Managing director informed him of the default. He admitted having received communication from the Defendant's lawyers and was aware of proposals to repay the debt, made on his behalf by the firm of; Wekesa & Co, Advocate.

20. He admitted receipt of the notice of sale of the suit property, but argued that, the notice was for a period of 30 days instead of 90 days. He confirmed that, he did not repay any of the money advanced to the borrower. He conceded that, he had not filed a defence to the counter claim and that he has had an injunction order since the year 2004. In re-examination he confirmed that, the money paid by the time the sale took place was Ksh 18 Million, as informed by the statements from the Defendant. That the Defendant is claiming an amount it has written off.

21. The Defendant's case was supported by the evidence of; its witness Jeckoniah Agoro who relied on his witness statement dated; 2<sup>nd</sup> March 2012. His statement mirrored the averments in the statement of defence and the counter claim. However, he was not availed for cross examination after the court ordered he be recalled for the same.

22. At the conclusion of the hearing the parties filed their final submissions. I have considered the evidence adduced and the submissions together with the issues raised by the parties for determination and I find that, the following issues have arisen for consideration:

- a) Whether the amended defence and the counter claim is properly on record;*
- b) Whether the interlocutory judgment herein is valid;*
- c) Whether the Plaintiff executed a valid, binding and/or enforceable charge;*
- d) If the answer to (c), is in the affirmative, whether the Plaintiff is liable under the same;*
- e) Whether the Plaintiff executed a guarantee and indemnity in favour of the Defendant;*
- f) Whether the Plaintiff is entitled to the prayers sought in the plaint;*
- g) Whether the Defendant is entitled to the prayers in the counterclaim;*
- h) Who will bear the costs of the suits?*

23. As regards the first issue the Plaintiff argued that, the amended statement of defence and counter claim is void ab initio as the amendment was made two (2) years after close of pleadings. In response, the Defendant, argued that, the leave to file the amended defence and counter claim was granted by consent of the parties' Advocates. However, the court record reveals that, an application for leave to amend the defence and file a counter claim, was filed vide a chamber summons application dated 31<sup>st</sup> October 2003, and allowed by the court on 9<sup>th</sup> December 2003. But, the court record does not indicate whether the Plaintiff was served with the application or the hearing notice. Whatever, the case there is a court order allowing the amendment of the defence and filing of the counter claim, filed in court on 23<sup>rd</sup> December 2003 by the firm of; Cheptumo & Company advocate. Hence both the amended defence and counter claim are properly on record.

24. I shall now deal with the issue of the interlocutory judgment. I find that, on 2<sup>nd</sup> July, 2004, the Defendant requested for interlocutory Judgment under IXA R.3 (1), 5, and 9, of the Civil Procedure Rules (as it then was). The request was filed in court on 6<sup>th</sup> July, 2004 and on 9<sup>th</sup> July 2004, the Deputy Registrar, entered the interlocutory judgment, as requested for and ordered the costs the application await the determination of the other claim.

25. However, the Plaintiff submitted that, no interlocutory judgement can be entered on a counter claim in default of defence by a Plaintiff in the main suit; more so when the suit and the counter claim are so inter twined as to be inseparable. Further, the request for the judgment was made under; Order IXA Rule 3(1) (5) and 9 of the Civil Procedure Rules of 1998, which has nothing to do with a counter claim. The courts have held in several decided cases that, there is no jurisdiction to entertain and enter interlocutory judgment on a counter claim. Similarly, the Deputy Registrar had no jurisdiction to entertain the application for and enter interlocutory judgment. As such the Defendant was enjoined in law to prove the counter claim by way of evidence.

26. The Defendant in response submitted that, the interlocutory judgement entered on the counter claim should be made final, as it has produced evidence to prove that the Plaintiff provided the suit property as security and also executed a personal guarantee to secure the

borrower's debts. Therefore, it has proved its counter claim on a balance of probability. Further, the Plaintiff has not applied to set aside the interlocutory judgment.

27. I have considered arguments advanced on the subject issue and in my considered opinion, there is an interlocutory judgment on record, whether regularly entered or otherwise. The arguments advanced by the Plaintiff can only be a subject of an application to set aside that judgment. Therefore, unless and until the same is set aside it shall be considered as a valid judgment.

28. The next issue relates to the validity of the charge. In this regard, the Plaintiff submitted that, the charge is null, void and unenforceable, on the ground, inter alia that, he did not appear before an advocate to sign it and/or his signature thereon was not attested by an advocate. Further, the provisions of; section 65 (1) and 110 of Registered Land Act (cap 300) Laws of Kenya (repealed), were not complied with. He argues that, in fact, that is why the Defendant is praying under paragraph (b) and (d) of the counter claim that he executes a valid charge.

29. However, the Defendant submitted that, the charge was prepared and registered by the Plaintiff's advocates; Wekesa & Co. Advocates, and that the Plaintiff has admitted he appeared before that firm. Therefore, he signed the charge documents before that advocate, who confirmed that the relevant provisions of the law were complied with (executed guarantee submissions page 21) He also made commitments to repay the debt.

30. I have considered the rival arguments and the subject charge and I find that, the Plaintiff pleads and thus admits that he executed the charge in favour of the Defendant. Although he alleges the director of the borrower took it to him to sign, he does not even name that director, yet in cross examination, he stated that he guaranteed advances to his "friends". The charge itself clearly indicates that, the chargor executed it before; Wekesa & Co. Advocates, who apparently were acting for the Plaintiff. That evidence supports the Defendants arguments that the Plaintiff's advocate witnessed execution thereof. The Plaintiff has not rebutted that evidence. I therefore find and hold that, he signed the charge document freely and/or voluntarily.

31. The next issue to consider is whether any money was advanced and if it has been repaid. The Plaintiff alleged that no money was advanced but did not adduce any evidence in support thereof. The money was advanced to the Principal borrower who has not refuted the fact that the credit facility was granted. In addition, the Defendant has produced the borrower's bank statement of the current account in proof of disbursements. The Plaintiff too has produced similar statement. Therefore, I dismiss the argument that the charge created by the Plaintiff herein is null and void for want of consideration.

32. However, the key question is whether the credit facility advanced has been fully repaid. There is no evidence that the facility was fully repaid. In fact, based on the correspondence between the parties, there were several statutory and/or other demands by the Defendant with the Plaintiff making various proposals to repay the facility.

33. The question that arises therefore is whether; the Plaintiff is liable to honour the demand. I have considered the documents produced by the parties and I find as aforesaid that, there is no dispute the Plaintiff executed a legal charge, in addition, to a Guarantee and Indemnity dated on 14<sup>th</sup> May 1992 in favour of the Defendant for an advance of a sum of; Kshs 7.5 Million in respect of monies advanced to the Principal borrower herein. However, it is noteworthy that he does not disclose in his pleadings that, he signed a guarantee and indemnity. Be that as it were, it is clear from the charge document that, the Plaintiff's liability under the charge was limited to the "maximum principal debt" of; Kshs 7.5 Million plus interest.

34. The Plaintiff however, avers that the Defendant released him from liability by inter alia granting the borrower further advances of; Kshs 40 Million without his consent and or knowledge. The Defendant denies having made the advance, and avers that it merely consented to the Principal borrower creating a second charge over the subject suit property; L.R. No 209/870/1, in favour of a Third party.

35. I have considered the evidence herein and I find that, on 2<sup>nd</sup> June 1994, the Principal borrower executed a "second mortgage" in favour of; Bullion Finance Limited, which is said to be the Defendant's subsidiary company. Therefore, it is a completely different entity from the Defendant; Bullion Bank Ltd (as it then was). I note that; from charge clauses (c) thereof reads that; "the lender has at the request of the mortgagor agreed to make advances to the mortgagor by way of a loan on the terms and conditions and for the period agreed by the lender of an amount not exceeding Kenya Shillings Forty million (Kshs 40,000,000/=), upon the said loan being secured in the manner hereinafter appearing".

36. Similarly, clause (d) states that, the mortgagor has agreed and covenanted with the lender, that it will execute a second mortgage in favour of the lender to, secure the sum of Kenya shillings Forty Million (Kshs 40,000,000/=), together with interest to rank pari passu with the first mortgage and to the intent that the security thereby created can be enforced against the mortgagor." Therefore, the lender is not the Defendant and as such the loan of; Kshs 40 Million was not advanced by the Defendant. The mortgagee thereof was entitled to the proceeds thereof before the Defendant. The Plaintiff seem to be under a mistaken belief that, the advance was made by the Defendant and therefore the proceeds of sale should have been utilised by the Defendant before the lender.

37. The other issue raised by the Plaintiff is on restructuring of the Principal borrower's loans and/or combination of the accounts without his knowledge or consent. On that issue, I note that the Plaintiff has produced evidence that, the Principal borrower requested for rescheduling of the loan and by an agreement dated 7<sup>th</sup> July 1995, the Defendant conceded to the request of rescheduling of the loan on the terms therein. It is not clear whether the Plaintiff was notified of the same but the Defendant argues that, the charge allowed it to reschedule the Principal borrower's debt. I have considered the charge and the Guarantee and Indemnity documents signed by the Plaintiff and I find that, it allowed the Defendant to consolidate the Principal borrower's accounts. In that regard, the charge document states at clause 2a that the security shall be a continuing security to secure both present and contingent liabilities, subject to aggregate maximum principal sum. Similarly, at clause 9 (d) the Defendant reserved the right to consolidate all mortgages and charges held in respect of the borrower's indebtedness and at sub clause (h) the right to vary any credit to the borrower and at (h) (i), the right to combine or consolidate all or any of the borrower's accounts. Therefore, the Plaintiff who voluntarily signed the Charge is bound by it.

38. As regards the restructuring, the evidence adduced is not clear. Although there is evidence of the aforesaid letter, it is not clear whether it is the facility secured by the Plaintiff that was rescheduled and/or any other loan facility, and/or even the terms upon which it was rescheduled.

39. However, to put this matter in perspective, it is important to examine the correspondence between the parties. By a letter dated 5<sup>th</sup> March 1997, the firm of; Harit Sheth & Co. Advocates served the Plaintiff with three (3) months' statutory demand for a sum of; Kshs 58,627,281.50, as at 28<sup>th</sup> February 1997. The Plaintiff responded vide a letter dated 10<sup>th</sup> March 1997 from; Wekesa & Co. Advocates requesting that the auction scheduled for 16<sup>th</sup> July 1997, be stopped and proposed to liquidate the sum of; Kshs 7.5 million in 36 monthly equal instalments with effect from 31<sup>st</sup> August 1997. As a sign of commitment the Plaintiff paid a sum of; Kshs 300,000. The Plaintiff further requested for the statement in order to make a proposal on interest.

40. By a letter of 6<sup>th</sup> August 1997, the Defendant accepted the proposal by the Plaintiff to pay Kshs 7.5 million, in thirty-six (36) instalments together with interest. By a letters of; 17<sup>th</sup> September 1997, and 11<sup>th</sup> February 1998, the Defendant indicated that, the principal amount of; Kshs 7.5 million and interest of Kshs 23,575,469, had not been paid and that the Plaintiff had defaulted on the proposal to pay the initial deposit by 23<sup>rd</sup> January 1998. The Defendant then made a demand for payment within 7 days from the date of the letter, the Defendant by a letter of 29<sup>th</sup> April 1998 instructed Plan Custody Limited Auctioneers, to realise the property.

41. The Plaintiff then wrote a letter dated; 25<sup>th</sup> August 1998 stating that he had a purchaser to buy the property and offered to pay Kshs 8.2 million on or before 30<sup>th</sup> September 1998. He also undertook to pay accrued interest, and enclosed therein post-dated cheques. However, the Defendants vide a letter dated 31<sup>st</sup> August 1998, notes that the cheques had not been enclosed. By a letter of 1<sup>st</sup> November 2000 the Defendant served the Plaintiff with a second statutory notice.

42. Be that as it may, the parties held a meeting at the request of the Plaintiff and agreed that the Plaintiff would pay; Kshs 23 million to discharge the debt. However, on 28<sup>th</sup> June 2000, the Defendant wrote to the Plaintiff regretting that, the Plaintiff had defaulted on payment of the sum allegedly due to hard economic conditions. Between 1997 and 2001 the Defendant did not take any action. On 22<sup>nd</sup> February 2001, the Plaintiff offered to settle the debt by paying a sum of; Kshs 8 million in four instalments.

43. On 7<sup>th</sup> March 2001, on a without prejudice basis, the Defendant accepted the Plaintiff's offer to pay, Kshs 8 million, in four instalments, with the first instalment on or before 10<sup>th</sup> March 2001, the 2<sup>nd</sup> and 3<sup>rd</sup> instalments on or before 31<sup>st</sup> March/30<sup>th</sup> April 2001 respectively and the last instalment on or before 30<sup>th</sup> May, 2001. In addition, the Plaintiff was to pay, a sum of; Kshs 900,000 as legal fees and auctioneers charges. The Plaintiff did not honour the payments proposals.

44. It is clear from the analysis of the correspondence between the parties that, the Plaintiff personally and/or through his lawyers sought for indulgence to pay the sums demanded. There is no evidence that, the Plaintiff was induced to accept the liability to pay. The tone in the letters is of persons who had a cordial relationship. There is no evidence that, the Plaintiff was incapable of understanding the consequences of his action. Even if he was, then his lawyers cannot have been induced, therefore I dismiss the allegation of duress, coercion and/or misrepresentation into writing the letters seeking for indulgence.

45. The next issue is whether statutory notices were served. In that regard I note that, although the Plaintiff denies service thereof and/or alleges the notices were defective due to want of adequate period of compliance, as he was accorded 30 days instead of 90 days, I find that, the Plaintiff was served with several statutory notices dated inter alia; 5<sup>th</sup> March 1997, 10<sup>th</sup> July 1997 and 1<sup>st</sup> November 2000 and subsequently he sought for indulgence and the auction stayed. He cannot thereof deny the service of the notice and indeed he only faults the notice of; 1<sup>st</sup> November 2000, for giving him a shorter period. However, what is clear is that the only notice to the Principal borrower was dated 2<sup>nd</sup> November 2000. As to why the Defendant did not serve the borrower with the other notices, it is only well within its knowledge.

46. Having held that, there is no evidence that the sum secured was fully repaid, the next issue to consider is how much is payable. The proof of this amounts rests on the Defendant as it forms the basis of the counter claim. In that regard the Defendant is seeking for Kshs 64,643,112.50 plus interest @21% per annum with effect from 1<sup>st</sup> September 2000 till payment in full. However, the Plaintiff submitted that, the Defendant had not proved that sum. That, even if the sum of; Ksh 7.5 million attracted interest at 100% per annum for a period from 1992 to 2000, it would only amount to Kshs 60,000,000.

47. Further as at 1<sup>st</sup> April 2004, the amount outstanding was Kshs 8, 606,074. The borrower paid Kshs 100,000 between 1992-2004. Further there is unexplained debit of Kshs 2, 867,600 as at 30<sup>th</sup> July 1999. Similarly a transfer transaction of Kshs 61,736,429 is not explained, then an amount of Kshs 56,242,030 was written off on 3<sup>rd</sup> March 2002 and yet it is still a subject of the counter claim.

48. In addition, there is no evidence of disbursement of Kshs 7.5 million and how much interest was charged thereon or agreed on and whether the debt of Kshs 7.5 million was ever reduced. That there are other discrepancies of a loan of Kshs 15,000,000 with interest @42% and no explanation as to why the guarantee by directors of borrowers was not enforced.

49. In my considered opinion, the Plaintiff has raised very salient issues. Indeed, it is not possible to ascertain from the statements produced by both parties how the amount claimed by the Defendant was arrived at. In the given circumstances the natural consequences are that the Defendant's claim fails.

50. However, I have also held that, the Plaintiff has not discharged his liability herein and it will not be in the interest of justice to just release him from liability. Therefore, I order that before the Defendant attempts to exercise its statutory power of sale, it should furnish the Plaintiff with a proper statement of accounts showing:

- a) The amount advanced and in particular in relation to the sum of Kshs 7.5 million,
- b) Any other advances made in favour of the borrower thereafter,
- c) The amount repaid of the aforesaid sums that may have been advanced; and interest applied;
- d) The period over which the demand is made;
- d) Any other payments received from other parties liable to pay and in particular the borrowers,

51. In arriving at this figure, the parties must consider inter alia;

- a) The Plaintiff guaranteed a maximum principal sum of Kshs 7.5 million plus, interest;
- b) The Defendant was legally bound to exercise its statutory power of sale upon the expiry of the 1<sup>st</sup> statutory demand in march 1997, any delayed action leading to accrued interest, was based on indulgence, (by choice) of both parties and therefore interest that has accrued before the Plaintiff obtained the order of injunction must be borne by both.
- c) The evidence adduced from the correspondence herein indicates that the Defendant on a without prejudice basis was ready to accept a much lesser sum than claimed herein.
- d) The Defendant does seem to have abandoned following the principal debtor just like the way the Plaintiff decided not to sue them jointly with the Defendant.

52. The information should be supplied within 21 days of the date of this order and if not supplied, then prayer (c) of the plaint will be deemed allowed with costs to the Plaintiff. If the information is supplied, the Plaintiff shall examine the same and unless there is a dispute, he shall pay the sum certified within 21 days of receipt of the statement of accounts. Once paid judgment will be deemed to have been entered in the sum paid, in favour of the Defendant and each party will meet its costs. Therefore, none of the prayers in the respective claims is allowed as prayed.

53. However, each party is at liberty to apply, if need be, after the accounts.

54. Those then are the orders of the court.

**Dated, delivered and signed in an open court on this 17<sup>th</sup> day of August, 2020.**

**GRACE L NZIOKA**

**JUDGE**

In the presence of:

Ms Sagini for Mr Okeyo for the Plaintiff

Ms Nzuki for Mwangi for the Defendant

Robert Court Assistance.