REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND ADMILARTY COURTS

CIVIL CASE NO. 966 OF 1999

KIKOMI (1993) LIMITED.....PLAINTIFF

VERSUS

TRUST BANK LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide a plaint dated 23rd July 1999, and amended on 2nd December 1999, praying for judgment against the Defendant as here below reproduced: -

(a) The Honourable court be pleased to grant an order of injunction restraining the Defendant whether by itself or its servants or agents or Advocates or Auctioneers or any of them or otherwise from doing the following acts or any of them, that is to say; from further advertising for sale, selling by public auction or private treaty or otherwise howsoever or completing by conveyance or transfer of any sale concluded by auction or otherwise howsoever that parcel of land known as; L. R. No. Kisumu Municipality/Block 4/159 situated in Kisumu and further from appointing a receiver or in any other manner howsoever interfering with the ownership management and/or control of the Plaintiff company;

(b) A declaration that the charge and debenture mentioned in paragraphs 12 and 13 and 15 and all or any sums purported to be secured thereby are illegal, irrevocable and incapable of being enforced;

b (A) A declaration that the appointment of the said Ndung'u Githinji and Peter Leo Onalo as the joint and several Receivers and Managers of the Plaintiff's assets and/or property is unlawful and invalid;

b (AA) An injunction restraining the Defendant or though their servants or agents or Receivers and Managers from trespassing upon the business premises of the Plaintiff or otherwise interfering with the Plaintiff's business operations being conducted on L. R. No. Kisumu/Municipality/Block 4/159 situated in Kisumu until the final determination of this suit or further orders of this Honourable Court;

b (AAA) An injunction restraining the aforesaid purported joint and several Receivers and Managers from acting as such and restraining them and each of them or their servants or agents from in any way whatsoever interfering with the Plaintiff's business operation;

(c) An order that the Defendant deliver up to the Plaintiff or to such persons as it appoints all documents in the Defendant's possession or power relating to the said charged property and at its cost and expense release and discharge the charged property from all encumbrances created thereon by the Defendant, or any person claiming;

(d) An injunction restraining the Defendant from clogging or fettering the Plaintiff's right to redeem its property known as L. R. No. Kisumu/Municipality/Block 4/159 and/or exercising the equity of redemption;

(e) A declaration that the Plaintiff is not under a duty to pay any unauthorised interest and/or illegal sundry charges and compound interest thereon;

(f) A declaration that the Defendant is not entitled to charge compound interest to the Plaintiff after its respective demands of payment of its respective principal sums, and that the sums claimed by the Defendant therefore is excessive and unlawful and is not due from the Plaintiff;

(g) Pursuant to the foregoing an account be taken between the Plaintiff and the Defendant and each of them;

(h) Damages as per paragraph 24;

(i) Damages as per paragraph 36;

(j) Interest on (i) and (ii) at prevailing bank rates;

(k) Costs of this suit together with interest thereon;

(l) Such other further or consequential relief as this Honourable court may deem fit.

2. The Plaintiff's case is that, at all material times to this suit, it is and has been the registered proprietor of all that parcel of land known as; L. R. No. Kisumu Municipality/Block 4/159, situated in Kisumu (herein "the suit property'). That sometimes in the year 1994, the Plaintiff approached the Defendant for an overdraft facility, and the Defendant duly accepted and offered the facility vide a letter of offer dated 28th November 1994. Thereafter on various dates prior to September 1998, the Plaintiff approached the Defendant and was granted further unsecured overdraft facilities.

3. Subsequently, following various discussions held between the parties, it was ultimately agreed that the Plaintiff's account with the Defendant would be consolidated with the account of; Caneland Limited, Surjit Singh, Malkit Singh, Country Motors Limited and Maruti Pharmaceutical, where various unsecured advances had been made. The parties further agreed the Plaintiff would issue cheques to clear the outstanding balances in respect of the aforesaid accounts to facilitate the consolidation.

4. Pursuant thereto, the Plaintiff issued cheques for the sum of; Kshs. 19,369,844.85, Kshs. 40,090,398.70, Kshs. 507,105.65 and Kshs. 57,002.60, in respect of the accounts of; Caneland Limited, Surjit Singh, Malkit Singh, Country Motors Limited and Maruti Pharmaceutical respectively. As a consequent thereof, the outstanding balances in the accounts of; Country Motors Limited and Maruti Pharmaceutical were duly cleared.

5. The Plaintiff avers that, notwithstanding receipt of the cheques in respect of the other accounts, the Defendant withheld the same from; August to September 1998 and returned them unpaid leaving the said accounts un-cleared. That, in an attempt to convert the unsecured advances into secured monies, the Defendant purported to create a Charge, dated 10th September 1998, registered on 5th November 1998, over the suit property and all the Plaintiff's assets vide a Debenture dated 10th September 1998, to cover advances to the extent of; Kshs. 185,000,000.

6. However, the Plaintiff avers that; the instruments are null and void ab initio and unenforceable for reasons inter alia that: -

a) No credit facility has been advanced after the purported charges.

b) The Plaintiff duly informed the Defendant vide a letter dated 17th August 1998, that it had executed the document subject to the deletion of paragraphs 2 (h) and 12 (a) of the Charge and Debenture respectively. Notwithstanding the aforesaid, the Defendant without the Plaintiff's knowledge and/or consent proceeded to present the Charge and Debenture for registration with the offending clauses.

c) The terms, contents and import of the instruments were not explained to any of the Plaintiff's directors or Mr. Pandhal and Mr. Surjit Singh Pandhal pursuant to the provisions of; Section 65 of the Registered Land Act (Cap. 300) laws of Kenya.

d) That Section 10 of the Banking Act (chapter 488) laws of Kenya, was not complied with by reason that, the Charge, the Debenture and all the sums allegedly drawn or payable under them including interest purportedly secured thereby, are illegal and the Defendant cannot realise the securities by auction or out of court.

e) The registration of the Charge and the Debenture were done after the Defendant Company was put under the Central Bank of Kenya (CBK) management on 17th September 1998. As such the directors had no capacity whatsoever to carry out any transactions and/or cause the registration of the documents of whatever nature to the exclusion of the Central Bank of Kenya (CBK) appointed Manager.

f) The alleged resolution to create the securities was never passed by the Plaintiff.

g) The securities are a fraudulent preference to the Defendant over other creditors.

7. That, in the alternative and without prejudice, the Charge and the Debenture are null and void and unenforceable for want of consideration and on account of fraud, trickery and deceit by the Defendant, in that, the Defendant presented the same for registration with full knowledge that they did not reflect the terms and conditions as agreed by the parties, and purporting that they were executed by the parties on the same date but in different towns. Further, the security transactions are ultra vires the Plaintiff's Articles of Association and beyond the powers of the directors under the Articles.

8. That, the Defendant pursuant to the null and void instruments, purported to appoint one Ndung'u Githinji and Peter Leo Onalo as the joint and several Receivers and Managers of the whole of the suit property and/or assets of the Plaintiff. The Plaintiff avers that, the purported appointment is null and void on the grounds that, it was not done under the hand and seal of the Defendant as required by the Debenture. Further, no notice of appointment has ever been issued and served upon the Plaintiff's directors as required by Section 351 of the Companies Act (cap 486) laws of Kenya nor the Registrar notified as required under section 103 of the Companies Act.

9. As such the continued acting of the purported joint and several Receivers and Managers is bound to highly prejudice the operations of the Plaintiff's textile production plant, which requires highly skilled and specialised management and which the purported Receivers and Managers lack. This will result in the Plaintiff suffering unwarranted and undue loss which may neither be irreparable nor irremediable. In the alternative, if the above Charge and Debenture are valid in law, it was an implied term of the legal Charge created as herein above that, the Defendant would not put a clog or fetter the Plaintiff's right to redeem the suit property.

10. That, the Plaintiff is only liable to pay such amounts as are properly secured by the legal Charge above, and interest charged in accordance with the Defendant's fiduciary duties under the Charge documents, the law and commercial principles.

11. Finally, no statutory notice as envisaged under Section 74 Registered Land Act, nor formal demand by the Defendant has been issued to the Plaintiff prior to the purported appointment.

12. That as a result of the aforesaid, the Plaintiff is not liable to honour the demand made by the Defendant to pay any monies and is entitled to return of the title, cancellation of the Charge and Debenture and/or discharge thereof duly executed by the Defendant, payment of costs of drawing up and perfecting the discharges including stamp duty and registration fees.

13. Further, the Plaintiff seeks for a declaration inter alia, that the sums claimed are excessive in respect of interest charged against the purported Charge debt and pray that an account be taken and settled between the parties.

14. However, the Defendant filed a statement of defence dated 19th April 2000, and averred that pursuant to its engagement with the Plaintiff in a banker customer relationship, it was placed under statutory management from 17th September 1998 to 5th August 1999.

15. That, on various dates prior to 1998, it advanced the Plaintiff various financial facilities, in the form of overdraft as per the terms and conditions stated in the letter dated 28th November 1994 and signed by the Plaintiff. The Plaintiff later entered into credit agreements with the Defendant vide their letters dated 28th August 1996, 13th September 1994 and 12th August 1998, confirming their indebtedness to the Defendant and requesting that the Defendant continue to advance monies to the Plaintiff.

16. That, the Plaintiff executed a Charge registered on 5th November 1998 over suit property, as collateral security to the Debenture executed by the Plaintiff. That, although no further sums were advanced, there was consideration by the Defendant's forbearance to demand immediate repayment of the monies already lent and it did not demand payment until 18th October 1999.

17. The Defendant denied ever agreeing to and or in fact consolidating the accounts as alleged, but admitted that, the Plaintiff issued cheques as alleged but averred that, the cheques were returned unpaid as no arrangement had been made for them. Thus it denied that, the outstanding amounts were cleared as alleged or at all, nor that, the Plaintiff's account has been debited with any sum in respect of the accounts set out in paragraph 10 of the amended Plaint.

18. The Defendant further averred that, the parties have always been in consensus ad idem and have never attempted to enforce the impugned clauses. Further, the Charge is valid as it contains the verification required by; Section 65 of the Registered Land Act. Similarly, by registration of the Charge, the Defendant is vested with the leasehold interest under; Section 27 of the Registered Land Act. The allegations of the Charge and the Debenture being illegal were denied. The Defendant denied the particulars of fraud at paragraph 24 of the amended plaint and argued that, they cannot invalidate the Charge documents.

19. It was further averred that, the Plaintiff's company was given powers to borrow and to create securities for the borrowing under object 3(n) of the memorandum of association, and by Articles 92 and 93, the Plaintiff's board may exercise all those powers on behalf of the Plaintiff.

20. That, since the Plaintiff is not in liquidation it cannot challenge securities as fraudulent preference, as it is only the Liquidator who has power to do so and it is only exercisable after more than one year has lapsed from the date of execution.

21. The Defendant rebutted the allegations in relation to the appointment of Receivers and Managers and stated that formal demand was made on 8th March 2000, prior to the appointment of the Receiver and Managers and the notice of appointment was sent to the Plaintiff and filed with the Registrar on 24th March 2000.

22. It was averred that, the Defendant did not owe the Plaintiff any duty to deal with it at arm's length in a contractual transaction and further denied threatening to sell the property. The Defendant further denied clogging or fettering the Plaintiff's right to redeem the suit property.

23. The Defendant reiterated the averments in the defence in support of the counter claim and further averred that, by a letter dated 18th October 1999, the Defendant called upon the Plaintiff to pay the aforesaid sum within the time stipulated in the letter and payment was not made. That, the Plaintiff is now indebted to the Defendant in respect of advance and accrued interest and other charges in the sum of Kshs 227,231,495.25.

24. That, it was an express term of the Debenture that the Defendant would be entitled to appoint a Receiver in the event of non- payment, hence the appointment of the Receivers on 24th March 2000, and who have not been granted access to the property. Consequently, the assets are wasting as the Plaintiff has refused to open up and give vacant possession.

25. As a result, thereof; the Defendant seeks for judgment against the Plaintiff for:

a) The plaintiff's claim to be dismissed with costs;

b) Judgment against the plaintiff for; Kshs 227,231,495.25 together with interest thereon at 25% per annum from 1st October 2000 until payment in full;

c) An order for receiver and manger to be granted access to the assets as set out in the debenture to perform their duties; and

d) Costs.

26. However, the Plaintiff filed a reply to the defence and a defence to the counter claim, dated 8th June 2001 and reiterated the averments in the amended plaint. It stated that, it would object and take preliminary objection to the hearing of the suit, on the grounds that, the amended defence and counterclaim as filed, is defective for failure to comply with; Order VII Rule 1 (e) of the Civil Procedure Rules which came in force on 5th May 2000, as well as Order. VI r. 7 (2) and Order VII rule 2 of the Rules, due to lack of a verifying affidavit. Finally, it was averred that, the amended defence and counter claim does not disclose a cause of action.

27. The case proceeded to full hearing whereby the Plaintiff's case was supported by the evidence of; Mr. Balvinder Singh Pandhal (Rumi) who relied on and adopted his witness statement dated 8th May 2013 and filed in court on 9th May 2013 and a list of documents dated 28th November 2006 and copies thereof dated 27th March 2012. The Plaintiff's evidence in chief reiterates the averments in the amended plaint and therefore are already taken into account in the summarised plaintiff's case.

28. In cross examination he stated that, the credit agreement is dated 12th August 1998 was signed by two directors. He signed as the 3rd Director. One of the directors Surjit Singh did not sign. The amount is Kshs 185,000,000. He wrote a letter dated 17th August 1998 where he asked for the deletion of condition for sole banking. The clause he wanted deleted in the Debenture was not deleted. He signed the Debenture. If one clause is invalid it does not take away the right in the other clauses. Clause (h) in the Charge at page 122 was not deleted and it has a similar clause as to clause 33 in the Debenture. He admitted having signed the Charge. He also admitted having attended the board meeting and there is a board resolution of the meeting of 12th August 1998 with a number of resolutions and one of the resolutions was to borrow. The resolution was signed by all the shareholders. He confirmed that the Charge was registered and there was a certificate of registration of the mortgage. He also confirmed that the Defendant made a demand for Kshs 130,995,430.00 vide a letter dated 23rd September 1998, and he responded vide a letter dated 26th January 1999, but his letter did not admit the amount claimed and did not deny the debt but he suggested the means of payment. The bank also made another demand for Kshs 175,756,901.40 by letter dated 8th October 1999, and he did not respond to it but responded to it in a meeting. He stated that he did not receive the notice issued to the guarantors. A demand letter was written to the guarantors on 27th December 2000 for Kshs 180,141,061.90. He did not respond to this letter. A demand letter was written to the directors on 8th March 2000 demanding for Kshs 192,936,248. A final demand letter was issued on 26th October 2000 for Kshs 227,231,495 and they did not respond to that letter as the matter was already in court. The Deposit Protection Fund Board wrote to their lawyers on 24th October 2002 as the bank had gone into receivership and their advocate made a proposal vide a letter dated 30th October which letter referred to the letter dated 30th October 2002. Their lawyer reinstated the offer of Kshs 82 million and they accepted the debt. This offer was accepted by the Deposit Protection Fund Board vide their letter of 8th November 2002. The DPF board stated in their letter of 29th April 2013 that if the offer is not paid, it shall lapse. He paid Kshs 5 million vide his letter of 6th May 2003 leaving a balance of Kshs 79 million.

29. In re-examination he maintained that in his letter dated 17th August 1998, he raised contention on the clauses that were to be deleted but they were not. He signed the Debenture which was subject to the changes but the company seal was not affixed. He signed the Debenture and the Charge but this was not done before an advocate. They signed the credit agreements but the bank did not sign them. He signed the documents on 10th September 1998 and the Defendant was placed under statutory management on 17th September 1998. The first demand was made on 23rd September 1998. He reiterated that no funds were disbursed to him and he does not owe any monies demanded. The demand for Kshs 180,000,000 came after the case had been filed. The final notice of Kshs 227,000,000 was also after the suit had been filed. He wanted to settle the matter but could not move after the Debenture was held.

30. The Defendant's case was supported by the evidence of; Ms. Purity Obago who relied on her witness statement dated 8th April 2019 and filed in Court on 9th April 2019, and Defendant's documents filed in the matter. Her evidence was also similar to the averments in the defence and counter claim.

31. In cross examination she stated that, the amount owed in 1997 was about Kshs 185,000,000. She was not aware that the Plaintiff had in 1998 raised issues in relation to the Debenture and the Charge. The bank agreed to effect the changes but these were not done. However, this does not make the Charge and the Debenture null and void. She also testified that she was aware that the documents were not attested to or explained to the Directors as to the consequences of signing the documents. She confirmed the dates of registering the Charge and the Debenture as 5th November 1998 and 17th September 1998 respectively and the bank was placed under statutory receivership on 17th September 1998. On 23rd September 1998, there was a demand made before the Debenture and the Charge were registered. They did not give a statutory notice under section 74 of the RLA (cap 300) laws of Kenya. She also stated that they had different interest rates. One of the key securities under the Charge was the suit property which was valued at Kshs 13 billion in 1999. She confirmed the bank had a counter claim.

32. In re-examination she maintained that; she was not there when the Debenture and the Charge were signed and she would not tell where they were signed or the manner thereof. The lender was to fix the interest rate. The value of the suit property has not depreciated and the bank's claim has nothing to do with the sole banking issue.

33. At the conclusion of the case; the parties filed their final submissions. The Plaintiff invited the court to consider the following issues: -

(a)Whether it is usual or reasonable for a bank to remain silent for 20 years without any explanations whatsoever and fail to pursue a debtor for such a huge sum of money allegedly owed;

(b) Why is it difficult for the Bank to disclose the status of the account by availing accurate accounts? And if the Bank provided statements of accounts, when and to whom were the same provided?

(c) Whether it is equitable for the Bank to maintain the legal charge upon the mortgaged property herein for 20 years thus inhibiting the plaintiff's opportunities to use the property as security for a loan in the circumstances of this case;

(d) Whether the Charge and the Debenture documents are defective for want of compliance with the Statutory requirement;

(e) Whether the plaintiff is entitled to the prayers in the amended plaint?

(f) Whether the defendant is entitled to the prayers in the amended defence and counterclaim?

(g) Who is entitled to the costs of the suit?

34. The Defendant on its part invited the court to consider inter alia whether: -

a) The Charge and Debenture are valid and enforceable;

b) The plaintiff is indebted to the defendant;

c) The plaintiff has proved its case and/or is entitled to the orders sought,

d) The defendant has proved its case and/or is entitled to orders sought; and

e) Who will bear the costs of the suit?

35. Having considered the issues identified for determination, I condense them into the following issues:

a) Whether the defendant advanced the plaintiff any credit facility and if so,

b) Was it secured; and if so, what was the security(s);

c) Is the Charge and Debenture instruments herein valid?

d) Has either party proved its respective claim on the required standard of proof and/or;

e) Is either party entitled to the orders sought and who will pay the costs.

36. I have considered the evidence in total and I find that, there is no dispute that; the parties herein had the usual and normal contractual relationship of a bank and a customer. As is the case therein, the Plaintiff as a customer was granted overdraft facilities by the Defendant from time to time; as evidenced by the documents produced by the Defendant at pages 1 to 74, which includes; bank guarantees and indemnities executed by the Plaintiff's directors on various dates in the year 1994, 1996, and 1997. Also executed were credit agreements dated 28th August 1996 and 12th August, 1998, the letters of offer and grant of credit facilities dated inter alia; 25th September 1995, 29th May 1996, 25th January, 3rd June, and 12th July, 1997.

37. It is apparent that, by a credit agreement dated 12th August 1998, it was agreed that, the Defendant would make or continue to make advances up to a sum not exceeding; Kshs. 185,000,000. That agreement is signed by the Plaintiff's directors; Bhalvinder Singh and Michael O. Monari on behalf of the Defendant. In addition, the Plaintiff's directors held a meeting, as per the minutes produced, in which they discussed the grant of the overdraft facility and the securities thereof.

38. It was resolved that pursuant to the execution of the agreement, the Plaintiff will provide securities being; personal guarantees of the directors, a first Debenture by way of fixed and floating Charges on the assets of the Plaintiff, and a first legal Charge over the suit property. A resolution has been produced in support of the application for the overdraft and the securities offered. Therefore, any allegation that there was no resolution is not well founded.

39. In furtherance of the credit agreement, the Plaintiff by a letter date 17th August 1998, requested for the increase in the legal Charges on the suit property to accommodate the Plaintiff's requirements and enable the Plaintiff consolidate its banking with the Defendant instead of going to different banks. The Plaintiff stated in the same letter that, they had signed the Charge and Debenture documents, in line with the discussions between the parties and requested that the changes they proposed be incorporated as requested.

40. However, the Plaintiff avers that, despite the Defendant's acknowledgement of the changes and commitment to incorporate the same before the registration of the instruments, that was not done, and therefore the instruments are null and void. Finally, the Plaintiff argued that by failing to incorporate the subject clauses, the execution of the Charge and Debenture was fraudulent as per the particulars at paragraph 25

of the amended plaint.

41. However, the Defendant on its part conceded that, it did not make the proposed changes but argued that, in any event, the Defendant has never attempted to enforce the "sole banker clauses" that the Plaintiff claims to be the basis for a declaration that the Charge and Debenture are fraudulent, and therefore void and unenforceable.

42. Further, the failure to incorporate the changes does not render the entire agreement void and unenforceable, as both the Charge and Debenture have "severability clauses" under; clause 5 (l) (i) of the charge and clause 33 (i) of the Debenture. The effect of a severability clause is that; should any one clause in a contract be found to be invalid, only that clause will be affected. The rest of the provisions of the contract would remain valid and enforceable.

43. I have considered the respective arguments advanced by the parties and I find that, the proposed changes that are a subject of discussion herein; required firstly that, all the other companies associated with the Plaintiff be deleted from the two (2) documents. However, I find that, if that was not done, then it simply means that those companies would not be held liable on the documents. Be that as it may, the two documents clearly show on the face value that the other companies are not party thereto.

44. The other changes required the Defendant to delete clause 2 (h) of the Charge and clause 12 (a) of the Debenture as to the condition for "sole banking". I have considered both clauses and

I find that, they do not prejudice the Plaintiff in any way.

The clauses are more "operational" in nature and do not affect the Plaintiff's liability, unless it can be shown that they were applied to the Plaintiff's detriment. I see no evidence to that effect.

45. Further, the clauses were meant to benefit the Defendant but were apparently not utilised. If anything, it is the Plaintiff who stated in the letter dated 17th August 1998, that the purpose of enhancing the legal Charge was to "concentrate the banking with the Defendant rather than going to different banks".

46. I therefore find and hold that, the failure to delete the subject clauses does not render the entire Charge and Debenture instruments null and void. It only means that, those clauses will be inapplicable for the purpose of enforcing the rights of the parties under them. In any case the doctrine of severability spoken to by the Defendant will apply.

47. Be that as it were, the Charge and Debenture documents have been impugned on several grounds already referred to herein. I have considered the submission tendered and I shall proceed right away and make my findings on the same. The first issue relates to lack of consideration. In that regard, I find that, it is not in dispute that, no further advances were made after the two documents were executed. However, clause (2) of the Debenture and 3 (a) of the Charge makes reference to the subject debt of; Kshs, 185, 000,000 and deals with the issue of consideration. It further states that, the securities are meant to cover existing and future advances. Be that as it were, consideration is stated to include inter alia; the Defendant's forbearance to demand the immediate repayment of the Kshs 185, 000,000. Therefore, the issue of lack of consideration does not arise.

48. The other issue relates to the attestation of the Charge and the Debenture where it is argued that, the terms, contents and import of the instruments was not explained to any of the Plaintiff's directors. However, the Defendant invited the court to note that, the Plaintiff's witness confirmed during the hearing of the case that, the signatures on the Charge and Debenture are of Plaintiff director's signatures as indicated thereon and they signed before an advocate, affixed his stamp thereon and counter signed. That the said directors who signed the documents have not disputed the same.

49. I have looked at both documents and I find that they are signed by both parties. The signatures are attested to by Advocates, Mr I.N Desai for the Plaintiff and Waweru G. Mathenge Advocate; for the Defendant. The certificate of verification is also signed. In any case as already stated herein, the Plaintiff's directors had been executing legal documents including personal Guarantees and Indemnity and had passed a resolution to grant the securities. Therefore, they cannot be heard to plead the doctrine of "non estum factum". They are estopped.

50. The last issue relates to the registration of the Debenture, whereby the Plaintiff argue that it was not properly registered. However, I note that the Defendant has produced a copy of the certificate of lease which shows a Charge registered in favour of the Defendant on 5th November, 1998. In the same vein, there is evidence by the certificate of the registration of a mortgage, which shows that a Debenture was created and registered on 17th September 1998, pursuant to the provisions of; section 96 of the Companies Act, (cap 486) laws of Kenya, (repealed). Therefore, the two instruments were properly registered.

51. Having held that the Charge and the Debenture are valid, the next issue to consider is whether the sum they secured was fully repaid. In that regard, I note that on 10th September 1998, the Defendant recalled the facility by calling in an outstanding sum of Kshs 130,625,253. 10 plus interest at 39% per annum. On 23rd September 1998, the Defendant made a demand for the sum of Kshs 130,995,430 with interest at 36% per annum being the sum outstanding as at 17th September 1998. On 8th October 1999, a further demand was made of a sum of Kshs 175,756,901.40 with interest at 21% per annum effective 8th October 1999. By a letter dated 20th December 1999, the guarantors were required to make good their guarantee in the sum of Kshs 100,000,000 plus interest at 28% per annum. A similar demand to the guarantors was made on 4th January 2000. On 8th March 2000, a demand was made to the Plaintiff to make good the outstanding amount of Kshs 192,936,248 with interest at 28% per annum with effect from 29th February 2000. By a further letter of 8th May 2000, a demand was made for Kshs 203,639,404.55 with interest at 28% per annum. And finally, by a letter dated 26th October 2000, a demand was made for Kshs 227,231,495.25 with interest at 25% per annum.

52. However, subsequently, the parties entered into negotiations, wherein the Plaintiff offered to pay a sum of Kshs 84,000,000 in full and

final settlement of the outstanding amount. By a letter dated 24th October 2002, the Defendant requested the Plaintiff to enhance the offer to Kshs 85 million to cover all accounts of Kicomi Ltd and Caneland Ltd. In response thereto, the Plaintiff wrote a letter dated 30th October 2002 stating that they will not be able to pay more than Kshs 84 million, which sum was accepted by the Defendant through a letter dated 8th November 2002, as full and final settlement of the debt subject to the Deposit Protection Fund Board conditions and procedures of negotiated settlement. Subsequently, the Plaintiff paid a sum of Kshs 5 million leaving a balance of Kshs 79 million which is a subject of a letter dated 6th May 2003, wherein the Defendant is reminding the Plaintiff that the sum of Kshs 84 million was payable within the given period of time.

53. However, the Plaintiff did not pay whereupon by a letter dated 26th May 2003, the Defendant withdrew the acceptance of the sum of Kshs 84 million and reverted back to the position before the negotiated settlement and made a demand for a sum of Kshs 537,800,000 as at 30th April 2003. By a letter dated 12th June 2003, the Plaintiff refused to accept the withdrawal and said they had already made part payment of the sum and thus having partly performed the contract, the court process would not be beneficial for both parties. They proceeded to file the suit.

54. From the above correspondence, it is clear that the parties had moved from their respective positions in relation to the outstanding sum, the interest thereon and the interest rate applicable. This is informed by the fact that, four years thereafter by a letter dated 10th January 2006, from the Defendant's lawyer to the Plaintiff's lawyer, the Defendant makes reference to their letter dated 8th November 2002 wherein they accepted the Plaintiff's offer of Kshs 84 million in full and final settlement of the outstanding debt.

55. The Defendant further makes reference to their letter dated 29th April 2003, informing the Plaintiff that they had not paid them the said sum and that they were to pay the same within fourteen (14) days of the letter or the proposal be cancelled. Reference is also made to the payment of Kshs 5 million made by the Plaintiff leaving a balance of Kshs 79 million which was payable within ninety (90) days from 17th April 2004 and which had not been made.

56. The Defendant makes a demand for a balance of Kshs 79 million to be paid within thirty (30) days from the date of the letter, failure to which the final settlement would come to an end, and the Defendant would proceed to file a suit for the recovery of the sum.

57. It is therefore clear that despite the Defendant having cancelled the negotiated settlement by a letter dated 26th May 2009, by the demand of the same amount in 2006, the Defendant had revived the settled amount and therefore the claim in the counter claim for any sum beyond that is not tenable. In that regard, all the issues raised by the Plaintiff in relation to various interest rates charged and/or the management of the accounts of the various companies and/or cheques that were not utilized have been overtaken by the consent and therefore I will not delve into them. In that particular regard, the issues raised in relation to the violation of the provisions of the Section 44 of the Banking Act as it relates to interest rate charged and/or chargeable will rest where they have fallen.

58. It also suffices to note that, by a letter dated 26th January 1999, the Plaintiff wrote to the Defendant stating that it was in the process of negotiating with other banks to arrange bridging finance to clear the entire outstanding debt with the Defendant and sought for indulgence. The Plaintiff did not raise any issues on the outstanding sum and/or interest rate that was applicable.

59. Having settled the issue of the sums outstanding and the interest thereon, the next issue to consider is whether the said sum has been paid. There is no evidence to support the same. Therefore, the sum is properly and legally outstanding and is overdue for payment. The Defendant holds a first legal Charge over the suit property and a Debenture over the assets of the company and is entitled to enforce any security to recover that sum. Apparently, other than the appointment of the Receivers, there is no evidence of enforcement of the legal Charge. Similarly, other than the service of the demand letter of the guarantors, the debt has not been enforced against them. The attempt by the Defendant to enjoin them in this matter, proved unsuccessful when its application to that effect was rejected by the court.

60. A secured creditor has several options in enforcement of its security. The first port of call will be a realisation of the security. The option to sue is usually the last in queue and for enforcement of any deficit after realisation of the security. In view of the fact that the Defendant has a counter claim herein, any judgment entered in their favour will call upon them examining their position as to whether they want to go through the due process of execution of the judgment or revert back to the securities.

61. In that regard, the appointment of the Receivers herein, has been faulted on various grounds already referred to herein. However, a perusal of the documents produced, I note that Cook, Sutton Githinji and Company served the Plaintiff's directors with the notice of appointment and the relevant notices given under Section 103 and 351 of the Companies Act (repealed). The instrument of the appointment of the managers having been given and produced herein and further following the ruling of the court requiring that the Defendant do fresh appointment, I am satisfied that the Receiver and Manager were properly and lawfully appointed. However, due to the effluxion of time, it may not be tenable to have the Receiver in place but that is an option left to the Defendant.

62. In conclusion, I find that, both the Charge and the Debenture instruments were properly executed and they are not null and void and therefore any prayer seeking for a declaration that they are illegal, irrevocable and incapable of being enforced is declined.

63. The prayers for an injunction to restrain the Defendant from dealing with the suit property, or from clogging or fettering the Plaintiff's right to redeem the property are not granted. Similarly, the prayer for injunction seeking to restrain the Defendant from appointing Receiver and Manager and/or a declaration that the appointment is unlawful and invalid and/or an order restraining them from trespassing upon the Plaintiff's premises or business operation, cannot be granted in the light of the findings herein that they were properly appointed.

64. In the same vein, the prayer seeking that all the documents in the Defendant's possession be released and/or discharged falls by the way. And so is the prayer in relation to interest rate charged demanded and/or payable. Finally, the damages sought for herein were based on the averments under paragraph 24 and 36 of the amended plaint, that relates to the alleged fraud and/or alleged threat to sell the suit property, The allegation have not been proved at all by any evidence and are therefore dismissed. There being no liquidated sum awarded, the prayer for interest in any sums awarded does not arise.

65. As regards the counter claim, having dismissed the Plaintiff's claim in its entirety, prayer (a) falls in place. Judgment in relation to prayer (b) is entered for a sum of; Kshs 79,000,000 and not the sum of Kshs 227,231,495.25. Taking into account that this is a negotiated sum, and the circumstances of this matter, together with the period within which this matter has been in court, I award interest at courts rate from the date of demand of the sum awarded being; the 10th of January 2006 until payment in full.

66. Finally, prayer (c) that seeks for the Receiver and Manager be granted access to the assets set out in the Debenture will be considered in the light of the sentiments of the court on enforcement of the Defendant's respective remedies. I award the Defendant the costs of the suit.

67. Those then are the orders of the court.

Dated, delivered and signed on this 18th day of September 2020 in an open court.

GRACE L. NZIOKA

JUDGE

In the Presence of

Billing for the Plaintiff

Tugee for the Defendant

Robert Court Assistant.