REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO. 328 OF 1999

SAMMY MWANGI KIRIETHE.....1ST PLAINTIFF

EVEREADY ENTERPRISES LTD.....2ND PLAINTIFF

HELEN NYOKABI KIRIETHE.....3RD PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

JUDGMENT

In a plaint dated 24th of November, 1999 and amended on 27th April, 2001, the plaintiffs sued the defendant for:

> ***"(a) A declaration that the defendant did not grant any overdraft facilities/advances/financial accommodation to the second plaintiff and that the three charge instruments are null and void and of no effect whatsoever and should be discharged and for a permanent injunction to restrain the defendant its servants and/or aged from selling by public auction or by private treaty the first plaintiff's plot no. NYERI MUNICIPALITY/BLOCK 11/6 and land parcel No. MWEIGA BLOCK 2(IKUMARI)/3 and 3rd plaintiff's land parcel No. Thegenge/Kihora/589.***
>
> ***(b) Compensation for loss of profit by the 2nd plaintiff of Shs. 5,000,000/= per year with effect from 21st September, 1996 until the final determination of this suit.***
>
> ***(c) Costs of the suit with interest thereon at court rates.***
>
> ***(d) Any other or better relief that this honourable court may deem fit to grant.***

The 1st plaintiff's contentions are that by a charge instrument registered in the Nyeri District Land Registry on 21st September, 1995, he charged his property known as plot No. NYERI MUNICIPALITY/BLOCK 11/6 in favour of the defendant in order to secure payment of overdraft facilities to be granted by the defendant to the 2nd plaintiff to an aggregate amount not exceeding Kshs. 260,000/=.

He further contended that by a charge instrument registered in the Nyeri district land registry on 21st September, 1995, he charged his land parcel known as No. Mweiga/Block 2(Ikumari) 3 in favour of the defendant in order to secure payment of advances to be granted by the defendant to the 2nd plaintiff to an aggregate amount not exceeding Kshs. 400,000/=; the instrument was described as supplemental to

another charge to secure payment of yet another aggregate amount not exceeding Kshs. 1,200,000/=. The entire aggregate amount secured was thus the sum not exceeding Kshs. 1,600,000/=.

On her part, the 3rd plaintiff charged her land parcels known as **No. Thegenge/Kihora/588** and **589** in favour of the defendant to secure overdraft facilities to be granted by the defendant to the 2nd plaintiff to an aggregate amount not exceeding Kshs. 95,000/=. The charge instrument was described as supplemental to an existing charge to secure payment of an aggregate amount not exceeding Kshs. 200,000/= and thus bringing the aggregate amount not exceeding Kshs.295, 000/=.

The plaintiffs contended that despite the properties having been charged in favour of the defendant, the latter did not grant any of the agreed facilities or advances or financial accommodation to the 2nd plaintiff. It is for this reason that the plaintiffs contended that the three charge instruments were null and void and of no legal effect whatsoever.

Further, it was contended that if the defendant had granted the 2nd plaintiff the overdraft facilities or advances or financial accommodation of Kshs. 755,000/= it would have made an average annual profit of Kshs. 5,000,000/=. The 2nd plaintiff was therefore claiming this sum per year with effect from 21st September, 1996 to the date of determination of this suit.

The 1st and 3rd plaintiffs also contended that on 15th November, 1999 the defendant placed an advertisement in the Daily Nation notifying the public of its intention to auction the 1st and the 3rd plaintiff's properties on 29th November, 1999 in purported exercise of its statutory power of sale.

In its defence, the defendant admitted that the 1st plaintiff charged Plot. No. Nyeri Municipality/Block II/6 in its favour to secure payment of overdraft facilities not exceeding Kshs.260, 000/=. It also admitted that the plaintiff charged land parcel No. Mweiga/Block 2 (Ikumari) 3 also in its favour to secure payment of an advance not exceeding Kshs. 400,000/= that was to be made by the defendant and that the charge instrument was supplemental to another charge that had been made to secure payment of an aggregate amount not exceeding Kshs 1,200,000/=. The total aggregate secured amount was Kshs. 1,600,000/=.

Similarly, the defendant admitted that the 3rd plaintiff had also charged her properties in its favour to secure overdraft facilities not exceeding Kshs. 95,000/= and the charge was also supplementary to an existing charge of an amount not exceeding Kshs.200, 000/=. The aggregate total secured was therefore Kshs. 295,000/=.

Further, the defendant admitted having advertised the securities for auction in exercise of its statutory power of sale. It, however, denied that the charge instruments were of no effect or that they were null and void as alleged by the plaintiff's. It is also denied that the 2nd plaintiff would have made an annual profit of Kshs.5, 000,000/=. Accordingly, so it urged, the plaintiff was not entitled to compensation claimed.

The record shows that the plaintiff had previously filed a similar suit against the defendant in Nairobi High Court Civil Case No.3136 of 1997 by way of originating summons. The suit was later consolidated with the current suit more particularly on 20th June, 2000 when this court ordered that the two suits be consolidated and be disposed of together.

According to the affidavit sworn in support of the originating summons, on 9th April, 1991 the 1st plaintiff was offered a loan of Kshs. 200,000/= by the defendant on terms and conditions, including the rates of interest payable, stipulated in the letter of offer.

On 16th day of November 1991, he was offered overdraft facilities of Kshs 700,000/= and an additional loan of Kshs. 300,000/= also on terms and conditions spelt out in yet another letter of offer.

On 14th day of July 1997, the loan and overdraft facilities were amalgamated so that the total loan due together with interest was Kshs 1,371,154.15. This sum was secured by a charge on the properties

referred to as Thegenge/Kihora/588, Thegenge/Kihora/589 and Mweiga/Block2/ Ikumari/ 3

According to the 1st plaintiff, by February 1996 he had already paid the sum of Kshs 1,693, 640.30 when he ought to have paid Kshs. 1,582,400/= only. Yet as of 29th February, 1996, the defendant was claiming the sum of Kshs 2,055,598/06 as the sum owing, which sum, so the plaintiff alleged, was exaggerated.

In September 1995, the plaintiff applied for an additional facility of the sum of Kshs 755,000/=. When the defendant asked for additional securities for this particular sum, the plaintiff provided Title No. Nyeri Municipality/Block 216 to secure the sum of Kshs. 260,000/=; a further charge on Title Number Mweiga Block2/Ikumari/3 as security for the sum of Kshs 400,000/= and a further charge on Title Number Thegenge/Kihora/588 and 589 to secure sum of Kshs 95,000/=.

The 1st plaintiff swore that, contrary to his agreement with the defendant, the latter did not disburse the funds as agreed. Instead, the defendant instructed auctioneers to auction his securities to recover the sum of Kshs 3,357,782.90 yet the amount owing was only Kshs 455,200/= as at 4th of August 1997.

It was the plaintiff's case that the sum demanded by the defendant was a clog on his equity of redemption. He therefore sought for account to be taken to determine what was due and owing to the defendant and for the discharge of his properties.

Mr G.M. Macharia, who was the defendant's manager at its Nyeri branch at the material time swore a replying affidavit to the originating summons on 4th February, 1998 and admitted that indeed the 1st plaintiff's loan had been consolidated into one loan account which he described as number 344 017 697 010. According to him, the loan balance stood at Kshs. 3,357,782.90 as at 19thNovember, 1997 and the statement by the plaintiff that he had repaid the entire debt was incorrect as there was no proof of such repayment.

Mr Macharia also swore that the 1st plaintiff had been in correspondence with the defendant and the state of his loan account and all his concerns had been addressed by the defendant. It is after his questions had been answered, that the1st plaintiff asked the defendant to indulge him and give him time to organise himself and repay the loan. It was Mr Macharia's case that the 1st plaintiff was aware and all along he acknowledged his indebtness to the defendant. In exercise of its statutory power of sale, the defendant instructed its auctioneers to realise the securities which it held since the 1st plaintiff had failed to settle the debt.

As far as the question of interest is concerned, Mr Macharia swore that it was clear from the correspondence exchanged between the 1st plaintiff and the defendant that the same was calculated daily and debited monthly. Again, it was also agreed between the parties that the interest charged was subject to change from time to time and that the defendant bank had no obligation to advise the plaintiff of such changes. In any event, failure to advise the 1st plaintiff wouldn't prejudice the defendant's right to recover the interest charged.

The 1st plaintiff, so Mr Macharia swore, was indebted to the defendant to the tune of Kshs. 3,673,969.10 as at 2nd January, 1998 and which sum continues to interests at the prevailing rates of interest.

The parties and their respective witnesses adopted the line of their affidavit evidence when they testified orally in court.

Although the 1st plaintiff testified that he begun dealing with the defendant as early as 1980 the documentary proof of his dealings with the defendant can be traced back to a letter of offer dated 9th April, 1991 by the defendant addressed the 1st plaintiff offering him a loan of Kshs.200,000/=.

In its pertinent parts this letter stated as follows:

We refer to your recent application for facilities which was subsequently discussed with us on 20/3/1991 and are pleased to advise that we have sanctioned a loan of Kshs.200,000/=.

Security for the loan would be a guarantee G.2 for Shs. 200,000-by Helen Kiriethe supported by a similar legal charge over her properties known as Thegenge/Kihora/588 and 589 in her name m/v Shs. 344,000- both.

The loan has been granted to enable you to carry out a development of an agricultural nature on the land at Mweiga. The loan will be repaid in monthly instalments of Kshs 7120-plus interest over a period of three years.

Our approval is subject to:-

1. Confirmation from the valuer that the valuation reports held are for mortgage purposes.

2. Security been finalised in all respects prior to drawdown.

3. We hereby reiterate our earlier stand that we shall consider matching your present facility with the Standard Chartered bank Ltd if you should want to join us.

The defendant proceeded to elaborate on the rates of interests applicable; when and how they will be calculated and the penal rates that will apply in the event of default. This was captured in the following terms:

Interest will be charged at 17% p.a. on the authorised facilities. A penal rate at 20% p.a. will be charged for amounts in excess of authorised limits for the time outstanding and will be calculated on daily balances and debited monthly by way of compound interest. The bank reserves the right to charge such rate or rates as it may in its sole discretion from time to time decide. Within the validity and limit of the facility this rate of interest will not be allowed to exceed the maximum rate which banks may charge on advance facilities as laid down by the Central Bank of Kenya from time to time. The banks shall not be required to advise any change in the rate of interest and any failure to do so will not prejudice the bank's right to recover interest charged. However in all respects, a penalty rate will be levied at 3% p.a. above the maximum rate laid down by the Central Bank of Kenya for all lending to the public in excess of agreed sanctioned limits.

As for the term of the contract between the 1st plaintiff and the defendant the latter stated in its letter as follows:

The continuance of the facilities to the date sanctioned is of course, dependent upon the accounts being conducted to our entire satisfaction at all times and on the understanding that the loan facility is repayable in full on demand should the bank deem it advisable to make such demand.

The bank reserves the right to set off or combine all or any account of the borrower in their own right, whatever their nature. The right to consolidate all securities held on any account, as security for all liabilities is also held.

The letter was also clear as to when the 1st plaintiff would access the loan facility because it stated:

No drawdown of the loan will be permitted until all security documentation has been finalised and registered and the duplicate copy of this letter signed and returned to the bank. In the event of full or partial drawdown of the facilities being permitted prior to completion of securities, a penal rate of interest at 20% p.a. will be charged for the time being.

The letter concluded by asking the 1st plaintiff to return to the defendant the duplicate copy duly signed

by himself acknowledging that he had understood and accepted the terms and conditions upon which this facility was being granted. The 1st plaintiff signed and returned the duplicate copy as directed.

The envisaged charge over Title No. Thegenge/Kihora/588 and 589 was duly executed between Helen Nyokabi Kiriethe as the chargor and the defendant on 2nd April 1991; it was also registered on the same date which, incidentally, was a week before the date of the letter of offer.

It would appear that the 1st plaintiff negotiated for additional financial facilities from the defendant later in the year but this time in the name of M/S Eveready Enterprises. A letter by the defendant dated 16th November, 1991, addressed to this firm read in part:

> ***We refer to your application for facilities detailed in your letter dated 16.9.1991 and are pleased to advise that we have sanctioned the following facilities:***
>
> ***1. An overdraft of Kshs 700,000/- to be reviewed on 31.10.1992.***
>
> ***2. An additional loan of Kshs.300, 000/- to make in all Shs. 473,000/- to be repaid at Kshs. 18,000/- over a period of three years.***
>
> ***Security for the loan and overdraft will be:***
>
> ***Held: 1. Legal charge for Kshs 100,000/- over Thegenge/Kihora/588 m/v 177,000/= as at 25· 1. 91.***
>
> ***2. Legal charge for Kshs 100,000/= over Thegenge Kihora/589 m/v 167,000/- as at 3.9.91***
>
> ***3. Legal charge for Kshs. 990,000/- over Mweiga Ikumari Block2/3 to be taken M/v shs. 1,535,000-as at 3.9.91.***
>
> ***4. Fresh guarantee G.2 for Kshs. 1,200,000/- to be signed by Sammy Mwangi Kiriethe and Mrs Helen Nyokabi Kiriethe to sign a guarantee G2 for Shs.200, 000/-***
>
> ***Our approval is subject to you closing your account with Standard Bank and the last statement being submitted to us.***
>
> ***Interest will be charged at 18.5% p.a. on the authorised facilities. A penal rate at 21.5% p.a. will be charged for amounts in excess of authorised limits for the time outstanding and will be calculated on daily balances and debited monthly by way of compound interest. The bank reserves the right to charge such rate or rates as it may in its sole discretion from time to time decide…"***

This time round 1st plaintiff signed the letter on behalf of M/s Eveready Enterprises acknowledging that he was bound by the terms and conditions of the offer.

Subsequently, a charge dated 4th December, 1991 in respect of Title No. Mweiga/Block2/Ikumari/3 executed between the 1st plaintiff and the defendant was registered on 5th December, 1991.

In the third letter dated 14th July, 1992, the defendant wrote to 1st plaintiff whom it now addressed as "Sammy Mwangi Kiriethe trading as Eveready Enterprises". In this letter, the defendant wrote as follows:

> ***We refer to the application for facilities detailed in your letter dated 9.5.92 and advise that we have agreed to convert your overdraft facility of Kshs 700,000= together with the excess of Kshs 245,526.90 and amalgamated the same with the current loan balance of Kshs.425,625 to make***

in all Kshs 1,371,154-15.

Security for the loan will be:-

1. legal charge for Kshs.100,000/= over Thegenge/Kihora/588 i.n.o. Helen Nyokabi Kiriethe M/V Kshs.177,000 as at 25/1/91

2. Legal charge for Kshs. 100,000/= over Thegenge/Kihora/589 i.n.o Helen Nyokabi Kiriethe M/V Kshs.167,000= as at 25/1/91

3. Fresh Guarantee G2 for Kshs. 200,000= signed by Helen Nyokabi Kiriethe.

4.Legal charge for Kshs.1, 200,000= over property No. Mweiga/Block 2/Ikumari/3 i.n.o Sammy Mwangi Kiriethe M/V Kshs. 1,535,000= as at 3/9/91.

5. Fresh guarantee G2 for Kshs. 1,200,000= signed by Sammy Mwangi Kiriethe.

The loan has been granted to provide working capital. The loan will be repaid in monthly instalments of Kshs. 36,800= inclusive of interest over a period of five years.

Interest will be charged at 20.5% p.a. on the authorised facilities. A penal rate at 21% p.a. will be charged for amounts in excess of authorised limits for the time outstanding and will be calculated on daily balances and debited monthly by way of compound interest. The bank reserves the right to charge such a rate or rates as it may in its sole discretion from time to time decide. Within the validity and limit of the facility these rate of interest will not be allowed to exceed the maximum rate which banks may charge on advance facilities as laid down by the central bank of Kenya from time to time. The bank shall not be required to advise any change in the rate of interest and any failure to do so with not prejudice the banks right to recover interest charged. However in all respects, a penalty rate will be levied at 3% above the maximum rate laid down by the Central Bank of Kenya for all lending to the public in excess of agreed sanctioned limits.

In view of the ever increasing costs of collecting deposits and a part of the continuing revision of charges, it has been decided to levy a "Deposit Mobilisation Fee" to all customers who benefit from the funds so collected.

"DMF" for loan facilities from Kshs. 100,001 to Kshs.2, 000,000= a levy of 2% p.a. is levied. Hence Kshs. 27,423-10 will be charged to your account.

Once again the 1st plaintiff committed himself to the terms and conditions by signing the duplicate copy of the letter and returning it to the defendant.

There is no evidence that legal charges or guarantees contemplated in this letter were immediately drawn and registered because the next time any instrument was drawn and registered on these properties was in September, 1995. In that month, and in particular on 11th September, 1995 the defendant wrote three separate letters to its advocates instructing them to draw a legal charge and two further legal charges. To be specific, the first letter instructed its advocates to draw a further legal charge in its favour for the amount of Kshs 400,000/= to make a total of Kshs.1, 600,000/= in respect of Title No. Mweiga Block2/ (Ikumari)/3 registered in the name of the 1st plaintiff as a guarantor to M/s Eveready Enterprises.

In the second letter, the defendant instructed its advocates to draw a legal charge in its favour for the sum of Kshs. 260,000/- over Title Number Nyeri Muicipality/ Block 11/6 in the name of Sammy Mwangi Kiriethe as a guarantor to M/s Eveready Enterprises.

Finally, in the third letter, the defendant asked its advocates to draw a further legal charge in its favour for the amount of Kshs. 95,000/= over Title No. Thegenge/Kihora/588 and 589 in the name of Helen

Nyokabi Kiriethe as a gurantor to Eveready Enterprises so that the total amount secured by this property would Kshs. 295,000/=.

Following these instructions a charge dated 21st September, 1995 on Title No. Mweiga Block 2(Ikumari) 68 to secure an amount not exceeding Kshs. 45,500 was registered on the same date. The chargor was indicated to be the 1st plaintiff while the borrower was the 2nd plaintiff who was described in the charge as a Limited liability company incorporated under the Companies Act (Cap.486) of the Laws of Kenya as NO. C 51640; indeed amongst the documents filed by the plaintiffs is a certificate of incorporation showing that the 2nd plaintiff was incorporated as a limited liability company on 27th day of November, 1992.

Again a charge, dated 21st September, 1995 on Title Number Nyeri Municipality Block 11/6 was drawn in favour of the defendant for an aggregate sum not exceeding Kshs. 260,000/= was also registered on the same date. Once again the chargor was the 1st plaintiff while Eveready Enterprises Ltd was described as the borrower.

The other instrument was a further charge also of 21st September, 1995 on **Title No. Thegenge/Kihora/588 and 589**. The chargor was the 3rd plaintiff. The charge was described as being supplemental to an earlier charge dated 2nd April, 1991 and it was to secure payment of Kshs 95,000/= which was a financial accommodation to the Eveready Enterprises Limited, the borrower, to overdraw up to this aggregate amount. In addition to the previous charge, the total amount secured by the title was thus Kshs 295,000/=.

The final instrument drawn and registered on 21st September, 1995 was a further charge on Title Number Mweiga Block 2(Ikumari)/3. It was registered in favour of the defendant to secure banking facilities made to the Eveready Enterprises by the defendant; these banking facilities were upto an aggregate amount not exceeding Kshs. 400,000/= and considering the previous facility secured by the same title, the total existing charge debt was Kshs. 1,600,000/=.

Although the parties' testimony in support of their respective cases centered on previous loans or other financial accommodation granted to the 1st plaintiff the crux of the matter between them appears to me to be these instruments that were registered on 21st September, 1995. As a matter of fact, the plaintiffs' cause of action seems to have been centered on these particular instruments in which the star character is, not the 1st plaintiff, but the 2nd plaintiff company. In order to appreciate my point, it is necessary that I reproduce here the pertinent parts of the plaintiffs' plaint which make the substance of the plaintiffs' claim. In them, it is averred as follows:

> ***5. The 1st plaintiff avers that by a charge instrument registered in the Nyeri district land registry on 21st September, 1995 the 1st plaintiff charged his plot No. NYERI MUNICIPALITY/BLOCK II/6 in favour of the defendant in order to secure payment of overdraft facilities to be granted by the defendant to the 2nd plaintiff to an aggregate amount not exceeding Kshs. 260,000/=.***
>
> ***6. The 1st plaintiff further avers that by a charge instrument registered in the Nyeri district land registry on 21st September, 1995 the first plaintiff charged his land parcel No. MWEIGA/BLOCK 2(IKIMARI)3 in favour of the defendant in order to secure payment of advances to be granted by the defendant to the second plaintiff to an aggregate amount not exceeding Shs. 400,000 which said instrument was described as supplemental to another charge to secure payment of aggregate amount not exceeding Shs 1,200,000 and thus to make an aggregate amount not exceeding Shs. 1,600,000/=.***
>
> ***7. The third plaintiff avers that by a charge instrument registered in the Nyeri district land registry on 21st September, 1995 the third plaintiff charged her land parcel No. THEGENGE/KIHORA/588 and 589 in favour of the defendant to secure overdraft facilities to***

be granted by the defendant to the second plaintiff to an aggregate amount not exceeding Shs. 95,000/= which said instrument was described as supplemental to another charge to secure payment of an aggregate amount not exceeding Shs. 200,000/= and thus to make an aggregate amount not exceeding 295,000/=.

8. The three plaintiffs aver that despite the three properties having been charged in favour of the defendant it did not at any time grant overdraft facilities/advances/financial accommodation the second plaintiff of the intended amounts of Shs. 260,000/=, Shs. 400,000/=, Shs.1, 200,000/=, 1,600,000/= and 95,000/= and Shs. 200,000/= or 295,000/= making the three charge instruments null and void and of no effect whatsoever.

The first four preceding paragraphs of the plaint are merely descriptive of the parties.

On his part, the defendant was never in doubt about the plaintiffs' claim; in a rather terse statement of defence, it pleaded as follows:

1. The defendant admits the descriptive parts of the amended plaint said that its address for service the purpose of this is clear of M/s Muthoga, Gaturu & Company Advocates, Barclays Bank Building, Off Kenyatta Road, Post Office Box Number 1294, Nyeri.

2. Paragraphs 5, 6, 7 and 9 of the Amended Plaint are admitted.

3. It is denied that the charge documents registered in favour of the defendant are null and void and the plaintiffs are put to strict proof thereof. The defendant states that the plaintiffs are not entitled to a declaration to that effect as prayed for in the amended plaint.

4. The defendant has no knowledge of the matters pleaded in paragraph 8A of the amended plaint, denies the same and puts the plaintiffs to strict proof thereof. The defendant denies that it is liable in any way to compensate any of the plaintiffs for loss of profit and the plaintiffs are put to strict proof thereof.

5. The jurisdiction of this honourable court is admitted.

6. Save that which is expressly admitted herein the defendant denies each and every allegation of fact set out in the amended plaint as if the same were set forth herein and traversed seriatim.

It is clear from both the plaint and the defence that the loans and other financial accommodation granted to the 1st plaintiff by the defendant were not in issue; neither were the rates of interests applied, the penalties or other charges to which the 1st plaintiff is alleged to have been subjected to. The question whether or not those financial facilities had been paid or whether the defendant could exercise its statutory over sale with respect to those financial advances made to the 1st plaintiff are also questions that do not arise in these pleadings.

The primary, and no doubt the only issue in contest, revolves around the charges or further charges that were registered on 21st September, 1995.

Going by the parties' pleadings, and in particular the defendant's statement of defence, it is not in dispute, and as a matter of fact it is admitted, that the execution and subsequent registration of the charges and further charges on the properties referred to as Title Nos. Nyeri Municiaplity/Block II/6; Mweiga/Block 2/ (Ikumari) 3 and Thegenge/Kihora/588 and 589 was meant to secure advances of various amounts to be made by the defendant to the 2nd plaintiff. This is clear from the averments made in paragraphs 5, 6 and 7 of the plaint and which the defendant has expressly admitted in its defence in no uncertain terms.

The legal instruments themselves tell the same story; the recital in each of them leaves no doubt as to the intention of the parties and more importantly the defendant's obligation towards the 2nd plaintiff. Take for

instance, the first charge registered on Title Number Mweiga Block 2 (Ikumari)/68 where it is expressed as follows:

> ***This charge is made the 21st day of September, 1995 Sammy Mwangi Kiriethe (hereinafter called 'the chargor')….on one part and Kenya Commercial Bank… (hereinafter called 'the Bank'):***
>
> > ***(a) Whereas the Chargor is registered as the absolute proprietor of the land comprised in the above mentioned title…***
> >
> > ***(b) The Bank has at the request of the chargor agreed to make advances or to grant banking facilities to Eveready Enterprises Limited a limited liability company incorporated under the Companies Act (cap 486) of the Laws of Kenya as No. 51640…(hereinafter called 'the borrower') by permitting the borrower to overdraw the borrower's current account with the bank or granting the borrower other financial accommodation from time to time to an aggregate amount not exceeding the sum of Kenya Shillings Fourty(sic) Five Thousand (Kshs. 45,000/=) such a limit as may for the time being and from time to time fixed by the bank upon having the same secured in the manner hereinafter appearing…"***

This recital is similar in the rest of the three other charge instruments in respect of Title Nos. Nyeri Municipality BlockII/6; Thegenge/Kihora/588 and 589 and Mweiga Block 2(Ikumari)/3 save for the amounts secured and the names of the chargors. The 2nd plaintiff was always described as "the borrower" to whom the bank had agreed to make grants of various amounts of money as "advances or other financial accommodation".

Inspite of these agreements, there is no evidence that the 2nd plaintiff held any sort of bank account with the defendant to which the defendant could make 'advances or other financial accommodation' and from which the 2nd plaintiff could draw as stated in the agreements.

The defendant's witness Benard Njuki Kimani did not make any pretence or suggest that the advances were made; he admitted that no payments were made to the 2nd plaintiff ostensibly because its application for the financial facilities was not successful. It was his evidence that the defendant asked the 1st plaintiff to enhance the existing securities to cover his exposure and it is on this understanding that further charges were executed in September, 1995. He was categorical that "*no money was being disbursed"* and "*the further charges were to cushion the bank against the escalating balances."*

This testimony is obviously contrary to the available evidence; at the very least, it is inconsistent with the charge instruments which the defendant executed and in which it acknowledged the 2nd plaintiff as the borrower to whom advances were going to be made upon their registration. It cannot be that on the one hand the 2nd plaintiff's application for financial accommodation of whatever sort was unsuccessful and on the other, it was embraced as a borrower to whom financial advances were going to be made. The explanation offered for the failure by the defendant to make the disbursements to the 2nd plaintiff as contemplated in the charges and further charges of 21st September, 1995 is simply not viable.

In the absence of any financial advances made to the 2nd plaintiff by the defendant, it is a logical and a legal conclusion that the contracts of 21st September, 1995 are unenforceable for want of consideration.

Although they were registered as charge instruments, they were more of contracts of guarantee in which the 2nd plaintiff was presented as the principal debtor while the 1st and 3rd plaintiffs were sureties. In any case, in construing whether a document is a guarantee or not, it is the intention of the parties, and not the name of the document, that matters. According to **Halsbury's Laws of England Volume 48(2008) 5th Edition:**

> ***Dealing with a guarantee as a mercantile contract, the court does not apply to it merely technical rules, but construes it so as to reflect what may fairly be inferred to have been the***

parties' real intention and understanding as expressed by them in writing, and so give effect to it rather than not.(see paragraph 1083)

And in ***Pioneer Shipping Ltd v BTP Tioxide Ltd*** **[1982] AC 724** at 736 it was held that:

'The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they . . . chose to express them; or, perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed':

It is apparent from the registered legal instruments that the 1st and the 3rd plaintiffs played the role of the promisor and undertook to be answerable to the promisee, who in this case is the defendant, for the debt of the 2nd plaintiff. However, although the 2nd plaintiff's primary liability to the defendant was contemplated, it never came to pass.

According to **Halsbury's Laws of England** (supra):

The consideration for the surety's promise does not move from the principal debtor, but from the creditor. It need not directly benefit the surety, although it may do so, and it may consist wholly or some advantage given to or conferred on the principal debtor by the creditor at the surety's request. Thus, the surety's promise often stipulates for a supply of goods or an advance of money to the principal debtor… (see paragraph 1048)

The liability of the surety is secondary that is to say it does not arise until the principal debtor, whose liability is primary, has made default. The surety's liability arises when the principal debtor has made default but not until then **(Belfore Union Guardians versus Pattison (1856) II Exch 623.** In the present case, without any advances having been made to the 2nd plaintiff, what is deemed the primary liability never arose and therefore the question of whether the principal debtor had defaulted could not arise.

If for any reason I am mistaken as to the import of the instruments executed between the plaintiffs and the defendant, the point remains that whatever description is given to them, the agreements they represent are void ab initio and at any rate, unenforceable for lack of consideration which is an essential ingredient in any valid contract.

In these circumstances, I am satisfied that the plaintiff has proved on a balance of probabilities that the charges and further charges registered on 21st September, 1995 were of no legal effect. Prayer (a) of their suit will succeed to that extent. Accordingly, the defendant is restrained by way of a permanent injunction from enforcing the charge or further charge instruments registered on 21st September, 1995 in respect of title Numbers Title Nos. Nyeri Municipality BlockII/6; Thegenge/Kihora/588 and 589 and Mweiga Block 2(Ikumari)/3.

As far as the prayer for compensation is concerned, all I can say is that being a claim for special damages, it ought to have been specifically pleaded and particularised. This was not done. In any case, there was no sufficient evidence that the 2nd plaintiff ever generated the sort of income that the plaintiffs have claimed as yearly profits.

Mr Francis Ngure who described himself as an accountant and who testified on behalf of the plaintiffs tabled what in my view were nothing more than imaginary figures of what the 2nd plaintiff would probably have made as profit and not what it had actually made at any one time since it was incorporated in 1992. The witness did not have any evidence that the 2nd plaintiff had filed any returns with the Kenya Revenue Authority in which the profits claimed or any other profits had been posted. He admitted that his was only accounting figures. With this sort of evidence, I am not persuaded that the 2nd plaintiff is entitled to compensation as claimed in the plaint. It is at best, speculative. Accordingly, prayer (b) of his plaint fails.

The plaintiffs shall however have the costs of the suit. It is so ordered.

Dated, signed and delivered in open court this 16th March, 2018

Ngaah Jairus

JUDGE