REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 392 OF 2010

COMMERCIAL BANK OF AFRICA LIMITED …… PLAINTIFF

VERSUS

SUNNY AUTOPARTS KENYA LIMITED ……. 1ST DEFENDANT

P. L. SHAH ……..…….. 2ND DEFENDANT

R. P. SHAH ……..…….. 3RD DEFENDANT

A. M. SHAH ……..……. 4TH DEFENDANT

J U D G E M E N T

1. At the outset, this Court would like to apologise to the parties involved in this case for the delay in the delivery of this Judgement owing to pressure of work and the fact that 4 out of 5 Judges of the Commercial Division of this Court had been engaged from March to October 2013 in hearing and determining Election Petitions as well as Criminal Appeals. In its Plaint dated 11th May 2010, filed herein on 8th June 2010, the Plaintiff bank sought Judgement against the Defendants jointly and severally in the amount of Shs. 34,987,224/10. The Plaint recited that the Plaintiff had taken over the entire shareholding and business of First American Bank of Kenya Ltd in 2005 with the necessary approvals from the then Minister for Finance. The entire assets of the First American Bank and all guarantees in its favour became and vested in the Plaintiff and, as a result, became recoverable and enforceable by the Plaintiff by virtue of section 9 of the Banking Act. The Plaint went on to detail that by Guarantees and Indemnities in writing all dated 2nd January 2001, the second, third and fourth Defendants guaranteed the credit or other banking facilities given to the first Defendant by way of overdraft or advances in respect of all sums which may be owing to the said First American Bank of Kenya Ltd. By 26th August 2009, the first Defendant was indebted to the Plaintiff in the said sum of Shs. 34,987,224.10.
2. The second, third and fourth Defendants jointly and severally denied that they had signed any such Guarantees and Indemnities in consideration of the said First American Bank of Kenya Ltd giving credit or other banking facilities to the first Defendant. Similarly, the first Defendant denied that as at 26th August 2009 that it was indebted to the Plaintiff in the said sum as alleged or any other sum. In the alternative, if the First American Bank of Kenya Ltd had any claim against the Defendants, then the same was as a result of the said Bank charging uncontractual and punitive interest and/or penalties to the first Defendant's bank account. The first Defendant denied any demand for payment made against it as did the second, third and fourth Defendants. Further, the Defendants pleaded that if there were, as a matter of fact, Guarantees and Indemnity given to the

First American Bank of Kenya Ltd, then the same were fatally defective, bad in law and/or unenforceable. More importantly perhaps, the first Defendant averred that if any debt had been due to the First American Bank of Kenya Ltd then the same was duly paid and settled upon payment of Shs. 43,000,000/= to the Plaintiff pursuant to the sale of L. R. No. 11964/4 Nakuru. Finally the Defendants maintained that if there were Guarantees and Indemnities proved as established by the Plaintiff, the same were limited to the amount of Shs. 10 million.

3. Along with their Defence, the Defendants filed witness statements made by the second, third and fourth Defendants as well as its Statement of Issues which detailed as follows:

> **"1. Did the Second, Third and Fourth Defendants respectively sign the alleged Guarantee(s) and Indemnities dated 2nd January 2001 as alleged in paragraphs 6, 7 and 8 of the Plaint?**
>
> **2. was there consideration for each of the alleged Guarantee(s) and Indemnities dated 2nd January, 2001?**
>
> **3. What were the terms of each of the alleged guarantee(s) and Indemnities dated 2nd January, 2011?**
>
> **4. If the answers to Issue Nos. 1 and 2 are in the affirmative, were the alleged Guarantee(s) and Indemnities dated 2nd January, 2001 and/or any of them, fatally defective, bad in law or unenforceable?**
>
> **5. Did the First American Bank Limited grant overdraft facilities to the First Defendant?**
>
> **6. was the business of First American Bank of Kenya Limited acquired by the Plaintiff and are all assets and liabilities of First American Bank of Kenya limited and the guarantees in favour of First American Bank of Kenya Limited transferred and vested in the Plaintiff? If so, was the said acquisition and/or transfer and/or vesting legal and/or carried out in accordance with all applicable provisions of law?**
>
> **7. was the First Defendant indebted to the Plaintiff in the sum of Kshs. 34,987,224.10 as at 26th August, 2009 as alleged in the Plaint? If the First Defendant was indebted to the Plaintiff, was the said debt as a result of the Plaintiff charging uncontractual and punitive interest and/or penalties?**
>
> **8. Did the Plaintiff make demand on the First, Second, Third and Fourth Defendants respectively, for the sum of Kshs. 34,987,224.10/= on 26th August, 2009 as alleged in the Plaint? If so, did the First, Second, Third and/or Fourth Defendants respectively receive the said alleged demands?**
>
> **9. If there was any debt owed to First American Bank of Kenya Limited by the First Defendant, was the same duly paid and settled upon payment of Kshs. 43,000,000/= pursuant to the Sale at Land Reference Number 11964/4 Nakuru with the requisite Discharge of Charge over the same having been issued? Has the First American Bank of Kenya Limited and/or the Plaintiff refused, neglected and/or failed to account for the said payments?**
>
> **10. If the answers to Issues No. 1 and 2 herein are in the affirmative, did the said payment referred to in Issue No. 9 herein, constitute substantial and/or material variation of the terms of the said alleged Guarantee(s) and Indemnities? Have the Second, third and Fourth Defendants respectively been thereby released from the said alleged Guarantee(s) and Indemnities? Are the said alleged Guarantee(s) and Indemnities limited to Kshs. 10,000,000/=?**

11. Did any of the Defendants make payments?

12. Is the Plaintiff entitled to judgment as prayed in the Plaint".

4. The Plaintiff's case commenced before Court on the 13th June 2012. PW 1 was **Jane Wambui Nyagah** who testified that she was the Account Relationship Manager SME Department of the Plaintiff bank. She referred to her witness statement signed on 10th November 2011 and filed herein on the next day. The witness detailed the takeover by the Plaintiff by way of the purchase of the shareholding and the business of First American Bank of Kenya Ltd. She recounted the approval of the Minister for Finance given on the 5th May 2005 under the Restrictive Trade Practices, Monopolies and Price Control Act as shown in Gazette Notice No. 3499 of the 5th May 2005. She also referred the Court to the said Minister's approval to the transaction under section 9 of the Banking Act as shown in Gazette Notice No. 3503 of 11th May 2005. PW 1 detailed that she had been employed by the First American Bank of Kenya Ltd prior to its acquisition by the Plaintiff and she had been involved from time to time in the administration of the account of the first Defendant. PW 1 noted that the first Defendant requested First American Bank of Kenya Ltd in the year 2000, to reorganise the various bank accounts for the first Defendant's group companies and the indebtedness was consolidated into the accounts of the first Defendant. PW 1 set out the documentation put forward by the first Defendant for the purpose of the reorganisation of its accounts.
5. Mrs. Nyagah then informed the Court that as a result, as at 1st January 2001, the first Defendant was indebted to the bank under account No. 21042 005 in the sum of Shs. 148,600,523.70. The witness stated that she had compared the entries in the statement of account produced before Court with the original entries and had confirmed that they were correct. Thereafter on 2nd January 2001, she testified that the second, third and fourth Defendants had executed guarantees in favour of the bank in respect of the indebtedness of the first Defendant. Each such Guarantee and Indemnity was given in consideration of the bank "giving or continuing to give… credit or other banking facilities". All three Guarantees were witnessed by one Vina Shah and on each one the signature of the second, third and fourth Defendants had been verified. The witness noted that each Guarantee was limited to a maximum amount recoverable of Shs. 145 million. In March and April 2004, the bank had written to the first Defendant marked for the attention of the third Defendant regarding a reduction in the amount outstanding and the sale of the property known as L. R. No. 11964/4 Nakuru. This was followed by further letters in September and October 2004. Finally, agreement was reached on the sale of the Nakuru property for Shs. 43 million. Such was paid in 2 instalments totalling Shs. 39 million on 21st August 2007 with the balance of Shs. 4 million only being received by the Plaintiff on the 27th April 2009. The witness then gave details of proposals made by the first Defendant to pay off its indebtedness which, by 19th February 2009, had reached Shs. 38,987,224.10. This was before the final instalment for the sale of the Nakuru property had been received. On 26th August 2009, the advocates on record for the Plaintiff sent a letter of demand to the first Defendant requiring payment of the sum of Shs. 34,987,224.10. No response was received to that letter as a consequence of which the said advocates issued further letters of demand dated 17th November 2009 to the second, third and fourth Defendants as guarantors.
6. Under cross examination by Mr. Kibanya, Mrs. Nyagah's evidence was brief, touching upon her experience with the First American Bank and the later with the Plaintiff. She was involved with the first Defendant's accounts with regard to the matter before this Court from time to time but admitted that she was not the only person handling such accounts. She maintained that the basis of the debt were the records held by the Plaintiff bank.
7. The Defendants called the Managing Director of the first Defendant Mr. Rajen Premchand Shah who commenced his evidence by adopting his witness statement dated 19th January 2012. He continued with his evidence by stating that he had never seen any communication as regards the acquisition of the First American Bank of Kenya Ltd by the Plaintiff bank. He noted that, as regards the bank statements provided by the Plaintiff, the statements in Volume 1 did not have any title as to whom the account belonged to. He noted that they started it with an interest charge figure of Shs. 2,481,663.85 followed by a debit balance of Shs. 148,600,523.70. He did not know how these figures had been arrived at. He then went on to say that he had calculated the total of

the interest charged by the Plaintiff at Shs. 42 million whereas the claim against the Defendants was for Shs. 35 million. If the former figure was subtracted from the latter figure, there would be a credit due to the Defendants of Shs. 8 million. DW 1 went on to say that he was unaware of the guarantees that he and the other two guarantors had signed. On being referred to page 17 of the Plaintiff's original bundle of documents, he observed a Guarantee by one R. B. Shah. This was not his name and he did not remember having signed the Guarantee. He had never received any demand in respect of the Guarantee. From his witness statement, Mr. Shah reiterated what he had detailed to Court in his examination-in-chief and that statement concluded that to the best of the witness' knowledge neither the first Defendant nor he owed to the Plaintiff any monies either as claimed or at all.

8. Under cross-examination by Mr. Fraser, Mr. Shah, on being shown the Gazette notices detailing the transfer of the assets of First American Bank of Kenya Ltd to the Plaintiff acknowledged the same but stated that he had no document showing whether the Defendants' facilities had been transferred to the Plaintiff. He admitted to signing the letter dated 18th August 2005 at page 46 of the Plaintiff's Bundle of documents in that he confirmed that the total amount owed by his Group of companies as at 31st July 2005 was Shs. 78,074,283.24. However he did not admit a debt owing to the Plaintiff, the Commercial Bank of Africa. The witness confirmed that there was an entry of Shs. 78,074,283.24 on 29th July 2005 and that the name of the account was Sunny Autoparts Ltd. DW 1 also confirmed that consolidation of the various bank accounts had been made. He had noted a credit of Shs. 130 million to the account but had not raised this matter with his advocate. He went on to say that there was no basis for the interest figure of Shs. 42 million and that, as far as he was concerned, the debt is Shs. 34 million. He maintained that the Defendants wanted to be left free but that did not mean that they were entitled to interest free money. Finally, on being shown the Guarantee at pages 17 of the Plaintiff's Bundle of documents, DW 1 did not confirm his signature and stated that he had no relationship with Vina Shah although she was involved in the running of the company. Upon re-examination, DW 1 confirmed that he had signed the letter dated 18th August 2005 as a director of the first Defendant, not in his personal capacity. He agreed that the letter captured ongoing negotiations with the Plaintiff. The first Defendant had requested further documentation from the Plaintiff which was not provided. He went on to say that at the time of the Gazette notice, he did not know how much the first Defendant was owing and he did not know what figures were used for consolidation purposes. He confirmed that his figure of Shs. 42 million was a computation of interest based on the figures provided by the Plaintiff bank for the period 31st December 2000 to 1st July 2002. He concluded his evidence by stating that the first Defendant did not owe any money and that he did not owe any money as guarantor.
9. DW 2 Ashit Mansuklal Lakhamshi Shah gave his evidence on 3 October 2012. He adopted his witness statement dated 19th January 2012, as his evidence-in-chief. Under cross examination, DW 2 stated that he was a director of the first Defendant but he was unaware as to whether the company had borrowed money from the First American Bank. He disputed the indebtedness of the Company. He left all matters in relation to the company in the hands of the third Defendant and he was only before Court because he had been summoned. DW 2 was then shown the nine page Guarantee and Indemnity document dated 2nd January 2001. He denied his signature at page 34 of the Plaintiff's Bundle of Documents. He further denied knowing Vina Shah. He did not know whether she was an employee of the first Defendant. On being shown the mandate card for the Plaintiff at page 75 of the Plaintiff's Supplementary Bundle of Documents, DW 2 admitted that that the signature alongside the name A. M. Shah was his signature. He confirmed that he was a signatory to the bank account at First American Bank. He did attend both directors' and Annual General Meetings of the first Defendant company. He had seen the audited accounts and maintained that they did not show the debt. They did not show any credit balances. He could not tell whether, over the years, the account had showed debit overdrafts. He maintained that the third Defendant had responsibility for the debt. Under re-examination, DW 2 informed the Court that the first Defendant's company's operations were conducted by the third Defendant and he was not involved therein. He confirmed that the signature on the Guarantee and Indemnity document at page 34 of the Plaintiff's Bundle of Documents was not his. It was not his address on the document either. The names thereon of A. M. Shah were not his and the initials could be anybody's. He resolutely confirmed that he did not sign any guarantee with the First American

Bank Kenya Ltd.

10. On 10th June 2013, DW 3 Premchand Lakamshi Karamshi Shah gave evidence before this Court. As his examination-in-chief, he adopted his witness statement signed on 19th January 2012. In that rather brief statement, DW 3 detailed that he could not recall ever being notified of the acquisition of the First American Bank Ltd by the Plaintiff, the Commercial Bank of Africa Ltd. He had never consented to the same and he disputed all the liabilities pleaded by the Plaintiff in this suit. He sincerely believed that he was not liable to the Plaintiff under the Guarantee dated 2nd January 2001. He did not owe the Plaintiff as detailed in the Plaint or at all. Under cross-examination by Mr. Fraser, DW 3 agreed that he was a director of the first Defendant company. The third Defendant was his son. He was not aware that the first Defendant company had borrowed any monies from the Plaintiff. On being shown page 16 of the Plaintiff's Bundle of Documents, being page 9 of the Guarantee and Indemnity dated 2nd January 2001, DW 3 denied that the signature thereon was his. He did not know Vina Shah. On being shown the Specimen Signature Card at page 72 of the Plaintiff's Supplementary List and Bundle of Documents, DW 3 admitted that he had signed the same in 2 places. He could not remember if he was the Chairman of the first Defendant at the time or just a director. He maintained that the signatures at page 72 and page 16 were not similar. However, DW 3 admitted that he had signed his witness statement that he was sick when he signed the same. As a result the signature was "short". He stated that he was a heavy diabetic and had not attended any directors' meetings or A. G. Ms of the first Defendant Company since January 1989. DW 3 maintained that he had never received the letter dated 17 November 2009 addressed to him at page 62 of the Plaintiff's Bundle of Documents. The box number was not his. He was not aware if the box number was that of the first Defendant Company. He resolutely confirmed that he had not signed any Guarantee for the first Defendant – not for any bank including the Plaintiff. Upon re-examination, DW 3 was shown the page 8 of the Plaintiff's Bundle of Documents – the Guarantee and Indemnity. He maintained that P. L. Shah was not his name, it could have been anybody. The postal address was wrong. His was P. O. Box 712 Nakuru. Finally, DW 3 confirmed that he had never signed a Guarantee in favour of the Plaintiff and that the day-to-day running of the affairs of the first Defendant company was in the hands of his son, the third Defendant.

11. The Defendants' submissions were filed herein on 26 July 2013. They commenced by summarising the pleadings and/or documents filed by the parties including the Defendants' witness statements. As to the question of issues arising out of the evidence, the Defendants referred to the *locus standi* of the Plaintiff and maintained that this was a clear issue raised in the Defence. The Plaintiff had not shown whether all the assets and liabilities of the First American Bank had been acquired by the Plaintiff and whether the Guarantees in favour of the First American Bank were transferred and/or vested in the Plaintiff. It had failed to exhibit an Asset Transfer Agreement as between the two banks for whatever reason. The third Defendant, in his evidence, had stated that despite the Gazette Notices, he wanted a document showing that the first Defendant's facilities with the First American Bank were transferred to the Plaintiff. He had further confirmed that neither he nor the first Defendant had ever seen any Asset Transfer Agreement. The Defendants referred to section 112 of the Evidence Act which provided that in civil proceedings where any fact is within the knowledge of any party to the proceedings, the burden of proving or disproving that fact is upon him. The Asset Transfer Agreement had been dated 14th March 2005 and such was within the knowledge of the Plaintiff who then had the burden of proving that such assets were transferred, which it had failed to do. As a result, the Defendants submitted that the Plaintiff had no right of appearance before Court in so far as its alleged claim in the Plaint arose out of and/or was in connection with any alleged liabilities of the First American Bank. This was the more so given the fact that the alleged debt claimed in the Plaint emanated and/or had its origin in the First American Bank and that the Guarantees were in favour of that bank, not the Plaintiff. As regards the statements of account provided by the Plaintiff in volumes 2 and 3 of its Bundle of Documents, the Defendants noted that the third Defendant, in his evidence, had observed that the Plaintiff's Statements of Accounts contained in volume 2 and volume 3 did not indicate the account holder of the said bank account in question. There was no indication that the Statement of Accounts were in respect of the first Defendant's bank account with the First American Bank. As such the said Statements of Accounts could not be relied upon as evidence of the first Defendant's alleged indebtedness.

12. Continuing with their submissions, the Defendants maintained that the Statements of Accounts as produced and relied upon by the Plaintiff where an incomplete record and that it was not explained why those Accounts started with the application and/or charging of interest, thereafter to be followed by a substantial debit balance instead of a zero balance as should be the case. The Defendants also queried the consolidation of one bank account with another particularly with regard to Bearing House, Menengai Estate, Nakuru. The Plaintiff, in the Defendants' submission, should have produced the original of the accounts of the First American Bank prior to the alleged consolidation of the same. Further, as regards an entry dated 30th December 2003, the third Defendant, in his evidence, had stated that he did not know where the amount of Shs. 130 million had come from as transferred from Account No. 928270002. There had been no explanation by the Plaintiff as to where such money had come from but then why should there be when the third Defendant was giving evidence after the Plaintiff had closed its case. This point was never raised in the cross examination of PW 1. Indeed, throughout the submissions of the Defendants, questions were raised continually relating to matters that had arisen in respect of the Statements of Accounts which never were, but should have been, put to the Plaintiff's witness.
13. In this regard, the Defendants referred to the authority of **HCCC No. 1100 of 2000 – Fina Bank Ltd v Anil M. Chandarana & Anor (2004) eKLR** as per **Kasango J.** who had held that the provision of a few statements of accounts was insufficient to satisfy the burden upon the plaintiff (in that case) to prove the financial accommodation on a balance of probability. Thereafter at page 9 of the Defendants' submissions, they tabulated the interest that had been levied at as against the accounts from 1st January 2001 through to 1st July 2002 totalling Shs. 42,097,467.05. In this respect, the Defendants referred to the evidence of the third Defendant who had proposed that the interest should be deducted from the sum claimed in the Plaint leaving a balance in the first Defendant's favour. Such submission, in my opinion, had no rhyme or reason. The Defendants maintained and queried why the Plaintiff had not included a prayer for interest in the Plaint and had produced no documentation and/or evidence to demonstrate that it had been agreed between the parties as to the interest that was to be charged and levied as against the first Defendant's accounts. As a result, the rate of interest had not been established. Furthermore, the Plaintiff had not proffered any reason why interest had been levied or charged from 1st January 2000 to 1st July 2002 and not thereafter. Here again, I find cause to criticise the Defendants for not putting such questions to the Plaintiff's witness in cross-examination.
14. The Court was then referred to the case of **Christopher N. Mutuku & Anor. v CFC Stanbic Bank Ltd (2013) eKLR** in which it had been observed that the letters of offer executed by the parties were relevant in forming the foundation of the contract and the intentions of the parties. The Defendants concluded this part of their submissions by asking the Court to find that the interest charged and/or levied and/or applied in the Plaintiff's Statements of Accounts was unlawful and/or illegal as the same were not contractual. They requested that the said sum of Shs. 42,097,467.05 should be credited to the accounts to reflect a credit balance in the first Defendant's favour of Shs. 7,110,242.95. Regretfully I was unable to understand this submission bearing in mind that there is no Counterclaim in this matter put forward by the Defendants.
15. The Defendants then submitted on what they termed the purported admission of indebtedness. Such was as regards the first Defendant's letter dated 18th August 2005 addressed to the Plaintiff. The Defendants submitted that the said letter was not and indeed could not in law constitute an admission of indebtedness on the part of the first Defendant. The reasons for this was that the Plaintiff had not proved that as at 31st July 2005, the alleged sum of Shs. 78,074,283.24 was due and owing. In the absence of such proof, the Defendants maintained that the allegation that the first Defendant had admitted its indebtedness was of no consequence whatsoever. In any event, the Defendants maintained that what they termed the alleged letter of the 18th August 2005 clearly referred to an ongoing dialogue between the first Defendant and the Plaintiff as per the heading thereof. The said letter referred to the Plaintiff's previous letter dated 2nd August 2005. In that letter, the Plaintiff requested the first Defendant to open a second current account and for that purpose, had taken the aforesaid sum outstanding as at 31st July 2005 to be the cut-off point. The Defendants maintained that the said sum was only put up by the Plaintiff as the alleged amount owing by the first Defendant for the purposes of the ongoing dialogue between the parties. Further, the Defendants noted that the said letter of 18th August 2005 clearly indicated that the Plaintiff was to send to the first Defendant all necessary documentation which the third Defendant

stated in evidence had not been supplied including relevant bank statements of accounts. As a result, the admission was clearly equivocal and indeed from the correspondence that followed as between the parties, there were ongoing negotiations between the Plaintiff and the first Defendant.

16. The Defendants then attacked the alleged Guarantees and Indemnities which they said were purportedly signed by the second, third and fourth Defendants on 2nd January 2001. All three of those Defendants had given categorical evidence that they had not signed the same. They had also maintained that initials were utilised rather than full names of the alleged guarantors. In the Defendants' view the said initials and/or names could have referred to other persons having those initials and names. As a result, the Plaintiff had not proved that the second, third and fourth Defendants were the persons referred to in the Guarantees and Indemnities, on the balance of probability. The said instruments did not contain any details of the Defendants' Identity Cards or Passports and, as a result such were insufficient for the purposes of proper identification. Further, the postal addresses cited in the Guarantees and Indemnities did not belong to the second and fourth Defendants. The Defendants further criticised the evidence of the PW 1 in that she had not stated that she was familiar with and/or acquainted with the second, third and fourth Defendants' respective signatures or handwriting. No reason was given for the Plaintiff's failure to call the alleged witness to the signatures of the second, third and fourth Defendants – Mrs. Vina Shah.
17. The Defendants then submitted that it was surprising that the witnessing of these important documents which had the likelihood of being highly contentious in the future, were witnessed by an employee of a concerned party rather than an advocate as is the normal practice. The Defendants referred to the authority of **John Didi Omulo v Small Enterprises Finance Company Ltd & Anor (2005) eKLR** in which **Warsame J.** (as he then was) observed:

"If it was the first defendant's Advocate who prepared the charge and guarantee instrument, he had a duty to ensure all the legal process is complied with, in order to minimise the risk of default based on non-observance of the provisions of the law. The first defendant through its agents based in Nairobi and Kisumu abdicated in their responsibility, thereby turning the whole process into a design laid by the 2nd defendant effected by the employees of the first defendant. I cannot comprehend how an Advocate appointed by the first defendant to prepare and execute such instrument was not able to ensure that the documents were executed before him."

18. The Defendants then proceeded to punch holes in the evidence of PW 1 as to the taking of specimen signatures from the second, third and fourth Defendants maintaining that she was not telling the truth to court. PW 1 had not made any reference to any principle agreement and/or contract as between the parties for example a Letter of Offer which required the giving of the Guarantees and Indemnities as security as a condition of the grant of further and/or additional credit facilities to the first Defendant. The Defendants submitted that there was no foundation for the making of the Guarantees and Indemnities and that there was no proper consideration for the same. The Defendants referred the Court again to the persuasive authority of the **Mutuku** case and more particularly the **Fina Bank** case (supra) where **Kasango J.** had further held:

"Consideration is the basic, necessary element for the existence of a valid contract. The first facility the plaintiff allegedly afforded the principal debtor was the loan fluctuating facility in November 1995, thereafter the plaintiff granted the principal debtor a bill discounting facility in lieu of the fluctuating loan facility, this was December 1996. There is no evidence before this court that these facilities were granted it would therefore follow that the guarantee signed by both defendants are unenforceable since they were not supported by any consideration evidence before this court." (Emphasis mine).

19. The Defendants then pointed to clause 11 of the Guarantees and Indemnities as to the necessity for the Plaintiff to show that the demand notices issued thereunder to the second, third and fourth Defendants had in fact been sent by prepaid letter post. The Plaintiff had not proved that the demand letters had been properly stamped, addressed and put through the Post Office. The Plaintiff should have produced the relevant Certificate of Posting in that regard. As a result, the Plaintiff had failed to prove that the notices were properly served up upon the second, third and fourth Defendants. Without this, the Plaintiff could not sustain the suit herein in respect of the

Guarantees and Indemnities or at all. The Defendants referred to **Halsbury's Laws of England 4th Edition** in this regard but failed to annex to their submissions a copy of the extract thereof. They submitted however that if a demand is stipulated, no cause of action can arise until the demand is made.

20. In wrapping up their submissions the Defendants summarised the same as follows:

> **"1. The Plaintiff has not established and or demonstrated that is has <u>locus standi</u> to bring the suit herein in so far as the same relates and or refers to <u>FIRST AMERICAN BANK</u>.**
>
> **2. The Plaintiff has not proven on a balance of probabilities and or at all, the alleged debt in the Plaint and or any part thereof.**
>
> **3. The Plaintiff has not proven to the required standard of proof, the allegation that the 1st Defendant has admitted indebtedness.**
>
> **4. the Plaintiff has not proven any liability whatsoever arising out of the alleged guarantees, as against the Defendants jointly and or severally and or at all".**

21. The Plaintiff's submissions were filed herein on 19th August 2013. They opened by confirming that the Plaintiff had filed its statement of Issues on 25th July 2011. Its submissions went on to detail the substance of the Plaintiff's claim as against the 4 Defendants. In the Plaintiff's view the Defence only raised three active issues:

> **"i. In paragraph 10 of the Defence it is stated that the debt is as a result of uncontractual and punitive interest and or penalties.**
>
> **ii. In paragraphs 15 and 16 of the Defence it is alleged that the debt was paid and settled upon payment of Shs. 43,000,000.00 pursuant to the sale of LR 11964/4 Nakuru and the Discharge of Charge.**
>
> **iii. In paragraph 16 it is stated that the liability under the guarantee is limited to Shs. 10,000,000/-."**

The Plaintiff claimed that its case had been proved by the evidence of PW 1, Mrs. Nyagah. The submissions then went into and commented upon Mrs. Nyagah's evidence at length. The Plaintiff noted that the Defendants' advocates had not cross examined PW 1 as regards any of her evidence in relation to the transfer of the assets and liabilities of the First American Bank Ltd to the Plaintiff and/or the acquisition by the Plaintiff of all the books of accounts and securities relating to the account of the first Defendant. The Plaintiff maintained that the evidence given by Mrs. Nyagah should be accepted as the truth in respect of the acquisition and transfer of the first Defendant's debt and the Guarantees. The Plaintiff referred the Court to **Halsbury's Laws of England 5th Edition Volume 11, Sarkar's Law of Evidence 11th Edition** and noted that both volumes relied on the authority of **<u>Browne v Dunn</u> (1893) 6 R 67 HL**. The Plaintiff submitted that there was a duty on the Defendants to put the substance of their defence to the Plaintiff's witness so that there would be an opportunity for the Plaintiff to respond before the close of its case.

22. The Plaintiff then went on to summarise the provisions of the Banking Act as regards the transfer of the assets and liabilities of an institution and submitted that the third Defendant had admitted that the debt had been taken over and further, by his letter of 18th August 2005 that the third Defendant had admitted the debt sum. The Plaintiff went on to note that Mrs. Nyagah had not been cross examined as regards her evidence on the amalgamation of the first Defendant's Group accounts nor indeed the statements of account and the amount outstanding. As regards the heading to the statements, Mrs. Nyagah had given evidence that these statements were printed out after the transfer of the accounts from the First American Bank Kenya Ltd to the Plaintiff bank. In any event, the Plaintiff noted that the third Defendant had admitted in his evidence of a banking

relationship with the First American Bank Kenya Limited. Further, the Plaintiff noted that it had been admitted by all three Defence witnesses that it was the third Defendant who was the person responsible for the day-to-day management of the business of the first Defendant. The Plaintiff commented that the Defendants had not tendered even a single document in evidence to support their Defence. Their statements of evidence were confined to denying liability and such were evasive to the best of the witnesses' recollection. It was submitted that the Plaintiff had tendered evidence which proved its claim.

23. Continuing its submissions, the Plaintiff addressed the question of the Guarantees. It commented upon PW 1's evidence that the guarantees were executed by the second, third and fourth Defendants at pages 8, 17 and 26 of the Plaintiff's Bundle of Documents. The witness had compared the signatures on the guarantees with the specimen signatures that the Plaintiff held as regards the operation of the first Defendant's bank accounts and found them matching. The Plaintiff challenged the suggestion raised in the Defendant's submissions that PW 1 was not a competent person to make a comparison as between the specimen signatures and those on the Guarantees. In the Plaintiff's opinion the submission was unjustified and the witness' competence was never put to her in cross-examination. The Plaintiff invited the Court to compare the signatures for itself and pointed to the documents in which the same were contained. It commented that all the signatures were witnessed by Vina Shah who although seemingly unknown to the second and fourth Defendants was known to the third Defendant who admitted that she was involved in the operation of the first Defendant company. Further, the Plaintiff referred to pages 65 to 68 of its Bundle of Documents which showed that Mrs. Vina Shah was a trusted senior manager of the first Defendant and its associated companies in which the second, third and fourth Defendants were directors. In the Plaintiff's view, the witnessing of the signatures of the second, third and fourth Defendants by such a trusted senior manager only served to confirm that the execution of the Guarantees and Indemnities was genuine.

24. As regards the Defendants' reference to the Ruling of **Warsame J.** in the **John Didi Omulo** case (supra), the Plaintiff pointed out that the learned judge was commenting upon a Charge over the land which incorporated a guarantee. The Judge's comments about requiring witnessing by an advocate were in relation to the Charge. There is no requirement that a Guarantee should be witnessed by an advocate not even the advocate who drew the same. The Plaintiff noted that the witness statements of the second, third and fourth Defendants made no reference to the question of the validity of their signatures on the Guarantees and Indemnities. Having reviewed the evidence before Court of the second, third and fourth Defendants, the Plaintiff commented and submitted that the arguments that the names "P. L. Shah", "R. P. Shah" and "A. M. Shah" were not the names of the second, third and fourth Defendants were fallacious. Although agreeing that the full names did not appear on the Guarantee documents, the second, third and fourth Defendants had responded to these Court proceedings in which they were named in exactly the same way. They had all admitted to being directors of the first Defendant. As a result, the Plaintiff asked the question that who else with those initials would be executing Guarantees and Indemnities on behalf of the first Defendant?

25. The Plaintiff also submitted that the point about the addresses being wrong in the Guarantees and Indemnities was also of no substance. The address used was P. O. Box 7268 Nakuru which had been accepted in the Defendants' written submissions as the address of the first and third Defendants. In view of the fact that the second and fourth Defendants had admitted that the third Defendant was the person in charge of the day-to-day management of the first Defendant, it was clear that the addresses used in the Guarantees and Indemnities were addresses which clearly related to the second, third and fourth Defendants. As regards the suggestion that the guarantees lacked consideration, the Plaintiff pointed to clause 1 of each Guarantee and Indemnity which clearly detailed the giving or continuing to give credit or other banking facilities to the first Defendant. It also pointed to the fact that there was clear evidence of the continuance of those facilities as per the Statements of Account as well as the letters of admission dated 8th April 2005, 18th August 2005 and 15th November 2005.

26. Continuing with its submissions, the Plaintiff commented extensively upon the correspondence as contained in its Bundle of Documents from pages 35 to 59. There had been no cross-examination of PW 1 in connection with this correspondence and indeed no evidence was led as regards the second, third and fourth Defendants in this respect. The Plaintiff asked the Court to accept that the

correspondence spoke for itself. It further submitted that the suggestion that the admissions detailed in the correspondence could not be relied upon because the amounts admitted had not been proved, was without merit or substance. The Plaintiff maintained that the amounts due had been proved by the evidence of Mrs. Nyagah. Further and in relation to the overriding objective, it would be a total waste of time and costs to prove matters which are admitted. As regards whether the Plaintiff had sent out demands to the Defendants, there had been no cross-examination of PW 1 as to evidence that the demands were sent. Further, there had been no argument detailed in the witness statements of the second, third and fourth Defendants that they had not been served.

27. The Plaintiff then went on to refer to the indemnity set out in clause 15 of the Guarantee and Indemnity documents. Such was a complete indemnity which put the second, third and fourth Defendants in the position of principal debtors. This liability was without condition and did not require a demand to be made before the liability arose. Should the Court consider that the demands were not properly given to any of the Defendants so as to activate their liability as guarantors, then, as principal debtors under the indemnity, the Plaintiff maintained that the second, third and fourth Defendants remained liable to pay the amount claimed. The Plaintiff then attacked the active defences raised by the Defendants pointing to paragraphs 10, 15 and 16 of the Defence. As regards the allegation in paragraph 10 that the debt was as a result of uncontractual and punitive interest, the Plaintiff maintained that no evidence was brought before the Court of such, neither was PW 1 cross examined on the point. Turning to the suggestion that the debt was settled upon payment of Shs. 43 million pursuant to the sale of the LR No. 11964/4 Nakuru, the Plaintiff maintained that the Defendants had produced no evidence in support of this suggestion and submitted that it was without merit. The Defendants at paragraph 16 of the Defence had maintained that the liability under the Guarantees and Indemnities was limited to Shs. 10 million. Here again, the Plaintiff submitted that there was no evidence adduced by the Defendants to support this proposition. The proviso to clause 1 of the Guarantees and Indemnities showed that the guaranteed amount was Shs. 145 million.

28. Finally, the Plaintiff wrapped up its submissions at paragraph 8 thereof as follows:

> **"8. It is submitted that the evidence of Mrs. Nyagah which was substantially unchallenged in cross-examination or in the Witness Statements of the second, third and fourth defendants establishes:**

a. **The transfer to the plaintiff of the admitted indebtedness of the first defendant to First American Bank of Kenya Limited together with the guarantees of the second, third and fourth defendants.**

b. **The execution of the guarantees and indemnities by the second, third and fourth defendants.**

c. **The indebtedness of the first defendant to the plaintiff.**

d. **The demands on the second, third and fourth defendants as guarantors.**

e. **The amount of the indebtedness of the defendants to the plaintiff and the right of the plaintiff to judgment as prayed in the Plaint.**

29. Possibly the easiest way to determine this matter before this Court is by reference to the Defendant's Statement of Issues which I would respond to as follows. I have carefully perused the Guarantees and Indemnities dated 2nd January 2001 more particularly the signatures of the Guarantors. I have compared those signatures with the signature cards for the first Defendant at pages 71 to 75 of the Further Documents relied on by the Plaintiff. Further, I have compared the same with the signatures on the witness statements of the second, third and fourth Defendants. I have no doubt that the signatures at pages 8 -16 of the documents relied upon by the Plaintiff are the signatures of the second Defendant – Premchand Lakhamshi Karamshi Shah. Similarly, the signatures at pages 17-25 are, in my opinion, the signatures of the third Defendant Rajen Premchand Lakhamshi. Further, the signatures at pages 26-34 would appear to be those of the fourth Defendant Ashit Mansukbhai Karamshibai Shah. I hold no store by the Defendants'

submissions as regards the said Guarantees and Indemnities bearing only the initials of the second, third and fourth Defendants. To my mind, who else but the second, third and fourth Defendant would be guaranteeing the liabilities of the first Defendant seeing as they were all directors of that company at the time of the signing of the Guarantees and Indemnities.

30. If this was not enough, the signatures of the said 3 Defendants at pages 16, 25 and 34 of the Documents relied on by the Plaintiff had all been witnessed by Mrs. Vina Shah. The third Defendant gave evidence that Mrs. Vina Shah worked for the first Defendant and associated companies. More than that, from the Board Resolution of Mutsimoto Motor Company Ltd in relation to the meeting of its Board of Directors on 11th December 2000, the said Mrs. Vina Shah was appointed as an authorised signatory to the accounts of that company. For the second and fourth Defendants to say that they did not know Mrs. Vina Shah is a mystery to this Court as it is quite clear that she was intimately involved with the first Defendant's group of companies, a point clarified at page 68 of the Plaintiff's further documents relied upon, being a letter from the first Defendant to the Relationship Manager dated 14th January 2003 concerning a Cash Collateral Account No. 21042056. The second paragraph of that letter reads:

"We also request you to send us the closing statement of this account together with all other collateral accounts (including foreign currency) to the attention of Mrs. Vina Shah to enable her to reconcile the accounts."

In my opinion, Mrs. Vina Shah was quite obviously a trusted employee of the first Defendant most probably involved with its accounting procedures.

31. The Defendants made much in their submissions of the fact that there was no consideration for the said Guarantees and Indemnities. Such was a little surprising in that at clause 1 in each of the Guarantees and Indemnities, the consideration is detailed namely the:

"giving or continuing to give at any express request credit or other banking facilities for as long as the Bank may think fit to: SUNNY AUTOPARTS (K) LTD of P. O. Box 712, Nakuru."

From the correspondence put before court by the Plaintiff, emanating from the first Defendant, it is quite clear that its address is given as P. O. Box 712 Nakuru. The Defendants cited to this Court the **Fina Bank** case (supra), as quoted above, to support their contention that the Plaintiff had failed to lay before Court a Letter of Offer detailing the facilities and conditions therefore offered by First American Bank of Kenya Ltd to the first Defendant. Indeed that was the position, but I do not consider that such omission (if it was one, considering the takeover by the Plaintiff of the said First American Bank was in 2005, 9 years ago) is fatal to the Plaintiff's case. The Plaintiff has laid before this Court abundant evidence in the form of Statements of Account to demonstrate monies advanced to the first Defendant.

32. The third issue raised by the Defendants related to the terms of each of the Guarantees and Indemnities. To my mind, these documents were all similar and obviously in standard format. All of them have been properly stamped and I find that the limit of liability expressed in each of the 3 documents was Shs. 145 million to which would be added other sums in relation to interest, costs, commissions and other costs, charges and expenses.

33. As the answers to the Defendants' Issues Nos. 1 and 2 were in the affirmative, I do not find that the Guarantees and Indemnities dated 2nd January 2001 were fatally defective, bad in law or unenforceable. From the Statements of Accounts put before this Court by the Plaintiff, I am satisfied that overdraft facilities were granted and given to the first Defendant by the said First American Bank of Kenya Ltd. Taking into account the contents of Gazette Notices Nos. 3499 and 3503 of the 5th May 2005 and 11th May 2005 respectively, produced as documents nos. 1 and 2 of the Plaintiff's bundle of documents, as well as the evidence of PW 1, I am satisfied that the business of First American Bank of Kenya Ltd was acquired by the Plaintiff under the provisions of the Banking Act 11th May 2005.

34. From the account statement at page 691 of Volume 1 of the Plaintiff's files of statements of accounts, it seems quite clear that as at 31st July 2005, the balance due from the first Defendant to

the Plaintiff was Shs. 78,074,283.24. PW1 gave evidence that the Nakuru property L. R. No. 11964/4 was sold off to alleviate the debt, the first portion of Shs. 39 million being paid in August 2007 and the balance of Shs. 4 million, out of the total purchase price of Shs. 43 million, was paid on 27th April 2009. Thereafter, PW 1 gave evidence that the balance remained of Shs. 34,987,224.10 on the first Defendant's account. This was the amount demanded on 26th August 2009 by letter from the Plaintiff's advocates on record to the first Defendant demanding that sum. As a result, I am satisfied that, as at that date, the first Defendant was indeed indebted to the Plaintiff in the amount of Shs. 34,987,224.10. Before I leave this heading, I should comment that I was not impressed with the allegation by the third Defendant in his evidence that the Statements of Account provided by the Plaintiff did not contain the name of the first Defendant. The explanation for that was given by PW 1 to the effect that the Statements of Account had been printed out much later from computer records. What is clear is that the Account No. 21042 005 does appear upon each of the said statements. There is no denial from the Defendants that such account was for the first Defendant.

35. From the Plaintiff's Bundle of Documents pages 62-64, the Plaintiff's advocates on record wrote to the second, third and fourth Defendants on 17th November 2009 making demand as regards their guaranteeing all sums due from the first Defendant to the First American Bank of Kenya Ltd. Those letters were sent to P. O. Box 7268 Nakuru which is the address that appears on each of the Guarantees and Indemnities above referred to. The second, third and fourth Defendants denied that such was their address and further denied that they had received the said demand letters. In this connection, the Defendants had referred to clause 11 contained in each of the Guarantees and Indemnities which stated that:

"Any notice or demand hereunder shall be deemed to have been duly given or made if sent by prepaid post letter to me at the address herein written or at my last known address and shall be effectual notwithstanding any change of residence or death and such notice or demand shall be deemed to be received by me or by my personal representatives forty-eight hours after the posting thereof and in proving service it shall be sufficient to prove that the letter containing the notice or demand was properly stamped addressed and put into the Post Office."

It was the Defendants' submission that it was incumbent on the Plaintiff to prove that it sent the requisite letter of demand by prepaid post and to provide proof of such service by showing that the letter of demand was properly stamped, addressed and put into the Post Office. The Plaintiff's counsel's rejoinder was that firstly the evidence of PW 1 had gone unchallenged as to the sending out of the demand notices and further that the second, third and fourth Defendants had not disputed receiving the said demands in their witness statements or in their oral evidence before Court. Secondly and in any event, the indemnity set out in clause 15 of each of the Guarantees and Indemnities were complete indemnities putting the second, third and fourth Defendants in the position of principal debtors. Counsel submitted that this liability was without condition and did not require a demand before liability arose. This Court accepts this position and discounts the Defendants' submissions in that regard.

36. As regards the Defendants' issue No. 9, this Court is satisfied that the amount of Shs. 43 million received pursuant to the sale of the L.R. No. 11964/4 Nakuru went towards reducing the debt owed by the first Defendant to the Plaintiff. The debt was not fully paid as a result of this credit to the first Defendant's account. I find that the Guarantees and Indemnities were not limited to Shs. 10 million but, as above, to Shs. 145 million. Further, I do not consider that the crediting of the monies received as regards the sale of the Nakuru property, did not constitute a substantial and/or material variation of the said terms of the Guarantees and Indemnities. I do not find that any of the Defendants made any payments as towards the first Defendant's indebtedness to the Plaintiff bank.

37. In my opinion, the Plaintiff is entitled to its judgement as prayed for in the Plaint. I make nothing of the Defendants' submission that there was any significance in the Plaint not demanding interest on the sum claimed in the Plaint of Shs. 34,987,234.10. In my view, the Defendants can count themselves lucky that the Plaintiff either accidentally forgot to include a prayer for interest or deliberately did so for reasons best known to it.

38. As a result of the foregoing, I enter Judgement for the Plaintiff as against the Defendant jointly and severally in the amount of Shs. 34,987,224.10 together with costs.

DATED and delivered at Nairobi this 1st day of April, 2014.

J. B. HAVELOCK

JUDGE