REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 169 OF 2008

COMPUTER SOFTWARE LTD. ……..….. 1ST PLAINTIFF

DR. CROWTHER NGOYA PEPELA ……..…… 2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD. …….. DEFENDANT

J U D G E M E N T

1. In April 1994, the Defendant bank availed to the first Plaintiff a loan facility of Shs. 3 million at an interest rate of 16% per annum. The facility was secured by personal guarantees of the directors of the first Plaintiff, one of whom was the second Plaintiff. The facility was further secured by a Charge over L. R. No. 2/154, Kilimani, Nairobi (hereinafter "the suit property"). The Plaint detailed that by 1996 interest rates had spiralled and had reached the rate of 32% per annum and the first Plaintiff was unable to offset the loan leading to heavy indebtedness to the Defendant. Such eventually lead to an Agreement dated 7th October 2000 (hereinafter "the agreement") covering the restructuring of the loan capped at Shs. 10 million in exchange for which the first Plaintiff agreed to discontinue suit **HCCC No. 206 of 1999** which it had filed against the Defendant. The Plaint then went into some detail concerning the agreed sale of the suit property and further monies paid by the first Plaintiff to the Defendant as regards its loan. The Plaintiffs maintained that the Defendant refused to honour the agreement and sought to coerce the first Plaintiff into paying a further Shs. 10 million towards repayment of the loan. As a result, the Plaint sought a refund of Shs. 4,485,500/-, interest compounded annually from the date of payment, payment of any statutory tax liability accruing on the refund amount and compounded interest, costs of the suit and interest thereon at Court rates.

2. The Defence and Counterclaim was filed herein on 30th April 2008. The Defendant admitted the initial loan amount that it agreed to be advanced to the first Defendant as well as the Charge to be taken over the suit property. Thereafter the Defence detailed a general denial of the majority of the contents of the subsequent paragraphs of the Plaint. The Defendant then put forward a Counterclaim in the amount of Shs. 12,751,747.05 which it maintained was due and owing by the first Plaintiff and its directors jointly, severally and individually. In their Defence to Counterclaim, the Plaintiffs denied that they owed any monies whatsoever to the Defendant maintaining that the same was pleaded as a red herring. Any such claim had been superseded by the terms of the agreement entered into between the parties.

3. The hearing of this suit commenced on 11th November 2013. There was no appearance on the part of

the Defendant despite the Defendant's advocates firm on record having been served with a Hearing Notice along with the Defendant bank itself. As a result, the hearing proceeded *ex parte*. PW 1 was Mr. Muhia Gichuhi who adopted his witness statement dated 22nd June 2012 as his evidence before Court. He detailed that he had known the second Plaintiff since 1993. They were situated in neighbouring premises and in the same business. In the year 2000, the second Plaintiff had offered PW1 for him to purchase half an acre being a portion of L. R. No. 2/154, Kilimani, Nairobi. The purchase price was Shs. 5 million which PW 1 was to pay to the Defendant directly. He had attended, together with the second Plaintiff, at the Moi Avenue branch of the Defendant bank and had been introduced to a Mr. Konchellah who confirmed that the suit property was charged to the Defendant, who required Shs. 5 million as the purchase price for the portion of the property that was on sale. The matter had gone so far as PW 1's advocates preparing a draft sale agreement in January 2003 but the same was never executed. PW 1 had attended a final meeting with the second Plaintiff at the Harambee Avenue branch of the Defendant bank at which he had been introduced to a Mr. Ruto and a Mr. Njoroge of the Defendant bank, as regards the sale of the portion of the suit property to him. Unfortunately that was the last meeting that he ever had as regards purchasing the said portion of the suit property and the transaction was never completed.

4. PW 2 was Charles Maina Home who detailed that he was an accountant by profession and had worked with the firm of Khaminwa & Khaminwa, Advocates since October 1992. He had known the second Plaintiff since the year 2000. His employer had maintained a client account with the Commercial Bank of Africa and in September 2003, having received money for the account of the second Plaintiff, he was instructed and made payment to the Defendant bank of Shs. 2,500,000/- and Shs. 500,000/- on 12th September 2003 and a further amount of Shs. 95,000/-on 16th September 2003 making a total of Shs. 3,095,500/-. Then again in July 2004, he had received instructions from his employer to make a further payment of Shs. 1 million to the Defendant bank which was paid on 26th July 2004. All the payment cheques totalling Shs. 4,095,000/- were honoured by the firm's bankers. The latter Shs. 1 million had been acknowledged by the Defendant bank by letter dated 29th of July 2004. Thereafter, PW 2 produced a letter from Harith Sheth, Advocates dated 26th October 2004 addressed to his firm being a Completion Statement for the sale of L. R. No. 2/154, Nairobi which showed that the full purchase price of the property was Shs. 22 million of which Shs. 4,400,000/-had been paid to Messrs. Khaminwa & Khaminwa as a deposit and a sum of Shs. 9 million had been paid to the Defendant bank on behalf of the Plaintiff vendors.

5. The second Plaintiff, Dr. Crowther Ngoya Pepela, was then called as PW 3. He adopted his witness statement dated 9th December 2011 filed herein on 10th January 2012. The second Plaintiff explained that he had initially approached the Defendant bank in 1993 as a director of the first Plaintiff seeking loan facilities of Shs. 3 million for the purposes of funding the first Plaintiff's business. As security for the loan, he had put up the suit property as he was the registered owner thereof at the time. The initial interest rate had been agreed at 16% but as time went on, the interest rate when higher and higher so that it became virtually impossible to carry out any profitable business and still service the loan. Despite the efforts of the Plaintiffs, the Defendant attempted to sell the suit property in a bid to clear the debt owed to it. The second Plaintiff noted that there had been applications made to Court to suspend the proposed sale of the suit premises by the Defendant.

6. In the year 2000, the second Plaintiff explained that, through his advocates Messrs. Khaminwa & Khaminwa, he had approached the Defendant bank and reached a mutually acceptable agreement which was dated 7th October 2000. The agreement had stated that the Defendant bank would accept the sum of Shs. 10 million as full and final settlement of the debt owed to it by the first Plaintiff. It was further agreed that the second Plaintiff was going to sell off a portion of the suit property to PW 1 for Shs. 5 million as agreed by the Defendant bank. The balance would be paid for out of the business of the first Plaintiff. As per the evidence of PW 2, payment was made by the said advocates to the Defendant bank in the total amount of Shs. 4,095,000/-. The second Plaintiff noted that the transaction to PW 1 never took place despite his intervention and the preparation of a sale document by PW 1's advocates. He then gave evidence that he had paid over and above Shs. 4,095,000/- a further sum of Shs. 1,485,500/-. His main grievance as against the Defendant bank was that once the monies were paid as above, the Defendant insisted on seeking for a further Shs. 10 million. He had offered half the suit property for Shs. 5 million and had paid Shs. 4,485,500/-by way of instalment. At that stage, the Defendant bank had stated that it

was no longer interested in the sale of half the suit property and the second Plaintiff maintained that he had been forced to sell the whole of the suit property. He detailed that he had overpaid the Defendant as a result and sought a refund of the amount of Shs. 4,485,500/-. He also sought interest on that amount from October 2004 to date at commercial rates. He also sought damages for the loss of the whole suit property rather than only half thereof. The second Plaintiff also asked for the costs of the suit.

7. On 4th December 2013, the Defendant suddenly woke up to realise that it had not been represented before Court so far as this suit was concerned. A Notice of Change of Advocates was filed replacing Yano & Co. Advocates with Messrs. Sisule Munyi Kilonzo & Associates as representing the Defendant. That firm filed on 11th February 2014, the Defendant's list of documents as well as the witness statement of the Recovery Manager of the Defendant, one **Paul Chelanga**. However, at the resumed hearing of the suit before Court on 12th February 2014, the Plaintiff called 2 further witnesses. PW 4 was **George Muturi Muigua** who detailed that he was a registered Certified Accountant and he had previously worked as the Chief Accountant for Pan African Paper Mills Ltd. He had been given the bank statements for the first Plaintiff for the period October 1992 to the end of January 1993 and had been asked to check the interest calculations. He worked out from the bank statements that the Defendant bank was calculating interest on a daily basis. In October/November 1992, the Defendant bank had applied a daily interest rate of 22% per annum. That rate had gone down to 21 percent per annum for December 1992 but rose to 22.5% per annum in January 1993. The accumulated interest was debited to the first Plaintiff's account on a compounded basis on the last day of each month. In cross-examination, he admitted that there was nothing wrong with that method of interest calculation adopted by the Defendant.

8. PW 5 was **Isaac Wirunda** who stated that he was a valuer by profession and had practised for over 10 years. He had been instructed by the second Plaintiff herein in November 2013 to carry out a valuation for a 1 acre and a half acre plot in relation to the suit property. His valuation was made with a view to establishing a current market value of the plots within the Kilimani area of Nairobi. Having visited various other plots within the area, PW 5 came to the conclusion that a half acre parcel of land as at 10th December 2013 was valued at Shs. 130 million while a full acre parcel of land would be Shs. 250 million. In PW 5's view, his valuations were a true reflection of the current market trend for redevelopment sites in that area. Under cross examination, he maintained that he had visited 5 other sites apart from the suit property. His firm maintained a data base of what plots were sold for in the Kilimani area. He admitted that he did not have any documentary evidence with regard to the three plots in the area that he knew had been recently sold. On re-examination, PW 5 confirmed that the prices were extracted from his firm's data base. The opinion that he had given was formed on actual data that was available although he could have also confirmed those values with fellow registered estate agents in the area.

9. The Defendant only called one witness the said **Paul Chelanga**. In his examination-in-chief, he detailed that he had knowledge of the matters before Court and that he was conversant with the Agreement. He stated that such was a letter of offer addressed to the first Plaintiff for a settlement amount of Shs. 10 million. He confirmed that the same had been accepted but on conditions. Firstly, the first Plaintiff would pay Shs. 500,000/-upon signing the letter of offer. It would then pay Shs. 5 million within a month of signing and the balance of Shs. 5 million in quarterly instalments of Shs. 500,000/-starting immediately. The debt by simple calculation should have been cleared by the end of August 2001. As was clear from the correspondence, DW 1 noted that the Agreement had not been honoured. The witness was shown a deposit slip for Shs. 1 million dated 26th July 2004 and confirmed that such payment was related to the redemption of the property not the debt repayment. He also commented upon the deposit slip for Shs. 9 million paid on 22nd of October 2004, again detailing that it related to the redemption of the property. With regard to correspondence in 2013, DW 1 noted that by letter dated 29th September 2003, the Plaintiffs proposed to pay Shs. 6.5 million in full and final settlement. This was a new request in view of the fact that the 1st Plaintiff had agreed to pay Shs. 10 million in the year 2000. Later there was a further suggestion from the Plaintiffs' advocates by letter dated the 13th October 2003 in which they agreed to pay Shs. 2.5 million in full and final settlement. This was even lower than the previous offer of Shs. 6.5 million. Finally there was a third letter dated 17th March 2004 from the Plaintiffs' advocates offering to pay the amount of Shs. 4.5 million in full and final settlement. These proposals were unacceptable to the Defendant bank and by letter dated 2nd June 2004, the Defendant bank confirmed to the second Plaintiff that the earlier settlement offer had lapsed. If the Shs. 10 million had been paid by

then and at that stage, the rest of the debt would have been renegotiated but this was not to happen. DW 1 noted that through their advocates, the Plaintiffs paid Shs. 1 million on 26th July 2004 and Shs. 9 million on 22nd October 2004 (as above). Those amounts had been credited to the first Plaintiff's account and went towards the reduction of the amount owing to the Defendant bank by the first Plaintiff. The Shs. 10 million was for the redemption of the suit property and the Defendant was entitled to pursue the balance of the debt. That balance, which was on the first Plaintiff's account, came to Shs. 12,455,549/05 to which was to be added the recovery costs incurred of Shs. 302,108/-. The total came to Shs. 12,757,747/05 which was the amount detailed in the Defendant's Counterclaim.

10. Under cross-examination, Mr. Chelanga was taken through agreement which had arisen as a result of a combination of the letters dated 7th and 14th of September 2000. DW 1 emphasised that the agreement confirmed the payment of Shs. 10 million in full and final settlement of the Plaintiffs' liabilities to the Defendant bank. He confirmed that the conditions were that Shs. 500,000/- was to be paid immediately. There were other payments to be made as detailed above. The plot referred to in the agreement was the one that would be subdivided out of the whole of the suit property and it was to be sold to PW 1 who had been introduced to the Defendant bank by the second Plaintiff. It was not the Defendant's responsibility to sell the half acre plot (to be sub-divided). DW 1 did not dispute that the subdivided plot was to be sold to PW 1 but drew the Court's attention to the third condition of the agreement which was the payment of Shs. 5 million by 10 equal quarterly instalments. DW 1 confirmed that the Defendant bank expected the Shs. 5 million from the sale of the subdivided plot within 30 days of the date of the agreement as well as the Shs. 500,000/- to be paid immediately. That amount was not paid neither were the quarterly instalments, the first of which was to be paid in January 2001 with the last instalment due in December 2002. DW 1 also confirmed that that the Defendant held on to the title deeds of the suit property as nowhere in the Agreement did it say that the Defendant had to release those deeds for the sale to proceed.

11. On being pressed, DW 1 confirmed that the initial deposit of Shs. 500,000/- was to be made in order to stop the auction sale of the suit property which was about to take place. DW 1, upon being further examined as regards the said agreement, confirmed that it was his understanding that the Defendant had agreed to accept the sum of Shs. 10 million to settle the first Plaintiff's debt. However, if the Plaintiffs defaulted on the agreement, the Defendant bank would be entitled to revert back and claim the whole amount as owed by the first Plaintiff at the time. DW 1 was never shaken under cross examination in this regard. He detailed that the said agreement had been revoked because the Plaintiffs reneged on payment and that is why the Defendant went ahead to sell the suit property. Upon the default of the Plaintiffs, the agreement collapsed and the Defendant bank gave notice to the first Plaintiff of the outstanding amount. Although there had been a second payment of Shs. 500,000/- on 12th April 2001, the conditions of the agreement had not been fulfilled and the Defendant had a right to lay claim to the total outstanding amount.

12. Thereafter, DW 1 was referred to various letters in 2003 and 2004 and he agreed that by the Defendant bank's letter dated 15th April 2004, it had indicated that it would accept the sum of Shs. 10 million in full and final settlement. In DW 1's opinion that offer of Shs. 10 million was very generous and was over and above any other amount paid under the agreement. The Defendant bank was now demanding the total amount of Shs. 12,751,747/05 as against both the Plaintiffs and against the second Plaintiff as guarantor. With regard to interest, DW 1 detailed that the interest rate applied to the 1st Plaintiff's account was at 32% per annum as per the Charge document. However, the Defendant bank had stopped charging interest in the year 2000 even before the agreement had been entered into. After the agreement had failed, DW 1 confirmed that the Defendant had given instructions to valuers to sell the suit property.

13. Upon re-examination, Mr. Chelanga confirmed that the Defendant had received a cheque for Shs. 500,000/- on 18th April and a second cheque of Shs. 100,000/- on 14th August 2001. These were the first payments made to the Defendant under the quarterly instalment arrangement. The Defendant bank had not even received the initial Shs. 500,000/- supposed to have been paid upon the signing of the agreement. DW 1 pointed to the 1st Plaintiff's letter to the Defendant's Mrs. Mogaka dated 15th January 2003 which in the 6th paragraph admitted that by that date the Plaintiffs had paid to the Defendant bank Shs. 1.4 million only. The Plaintiffs should have paid Shs. 1 million by 1st January 2001 and by the end

of April 2001, Shs. 1.5 million should have been paid. As regards the statement of PW 4 as to Shs. 2.5 million paid to the Defendant on 12th September 2003 plus a further Shs. 500,000/- and an amount of Shs. 95,000/- paid 16th September 2003, DW 1 noted that these payments were received well after the last instalment of Shs. 500,000/- should have been paid. To sum up, DW 1 stated that the first condition in the agreement had not been complied with, nor had the instalments been paid as per condition No. 3. Under condition No. 2 the subdivided plot was to be sold for Shs. 5 million. The responsibility for that lay with the Plaintiffs. DW 1 was not aware of any undertaking given by the Plaintiffs' advocates to facilitate the release of the title deeds from the Defendant, who would not have released the same without such undertaking. The Defendant would have been left without any security if things had not gone right. Finally, DW1 noted that, as per the Defendant's letter to the 1st Plaintiff dated 2nd November 1999, the overdrawn accounts of the first Plaintiff stood at Shs. 11,893,184/95 and for the associated company – Compunews Publishers Ltd, the account stood at Shs. 17,416,610/55 in debit making a total of Shs. 29,309,795/50. This was the amount that the Defendant had accumulated as owing before the agreement.

14. The Plaintiffs' submissions were filed herein on 14th March 2014. After summarising the evidence, the Plaintiffs relied upon the agreement noting that the same had never been amended. The Defence witness had sought to justify that the same had lapsed upon the default of the 1st Plaintiff to pay the instalments thereunder in a timely manner. It was the Plaintiffs' submission that default on payment modalities by them could not possibly lead to the lapse of the agreement. The Plaintiffs referred to the Law of Contract Act (CAP 23, Laws of Kenya) maintaining that it was impossible for one party to a legally binding agreement to unilaterally review the terms of such or to consider that such terms have lapsed. As a result, the Plaintiffs claimed the difference in value of a half-acre property in the Kilimani area of Nairobi as testified to by PW 4. They also claimed consequential loss as well as the sum of Shs. 4,495,000/- which DW 1 had admitted that the Defendant had received by September 2003. The Defendant had received the sum of Shs. 10 million from the sale of the second Plaintiff's parcel of land which was the amount under the said Agreement that the Defendant was supposed to receive and not more. The Plaintiffs also expected the Defendant to cover any payment of statutory tax liability since such arose from the Defendant's breach of contract. Finally, the Plaintiffs sought the costs of the suit.

15. The Defendant summed up the facts of its case and identified what it considered that the issues for determination namely:

> **"A. Whether or not the Plaintiffs performed their obligations under the Agreement dated 7th October 2000 between the Plaintiffs and the Defendant.**
>
> **B. Whether or not the Plaintiffs are entitled to the remedies sought.**
>
> **C. Whether or not the Defendant is entitled to the reliefs sought in the Counterclaim."**

The Defendant outlined what the terms of the agreement provided as regards the first Plaintiff's loan being restructured with a fresh repayment plan. With regard to condition No. 3 of the said Agreement, the Defendant submitted that the Plaintiffs should have their obligations to the bank as follows:

> **"(a) The Plaintiffs should have paid the 1st quarterly installment on or before 7th January 2001.**
>
> **(b) Taking into account repayment condition No. 1 of Kshs. 500,000/= which was payable immediately, the Plaintiffs should have paid Kshs. 1,000,000/= by 7th January 2001.**
>
> **(c) The Plaintiffs should have paid Kshs. 2,500,000/= by the end of the year 2001, specifically on or before 7th October 2001.**

(d) By the end of 2002, specifically on or before 7th October 2002, the Defendant should have received Kshs. 4,000,000/= under the quarterly installments agreement, and Kshs. 4,500,000/= under repayment condition No. 1 and 3 combined.

(e) The last installment under repayment Condition No. 3 should have been received by the Defendant on or before 7th April 2003".

16. The Defendant continued with its submissions by commenting upon the Plaintiffs' performance under conditions Nos. 1 and 3 of the agreement. It noted that the Plaintiffs had admitted that, at the time, they should have completed their payments under those conditions in the amount of Shs. 5,500,000/-, yet they had only managed to pay Shs. 3,095,000/-. The agreement had stipulated specific timelines and the Defendant submitted that time was of the essence. More specifically, the Defendant maintained that, in consideration of its indulgence to the Plaintiff's to waive its right to collect the full amount outstanding on the loan facility as at 7th October 2000, it had, instead, agreed to accept the sum of Shs. 10 million in full and final settlement of the outstanding loan subject to the conditions of the agreement. The Defendant denied that it had in any way frustrated the sale of the (supposedly subdivided) half acre plot belonging to the second Plaintiff in Kilimani, Nairobi. There would have been no issue arising as regards the release of the Title Deeds of the said property had the Plaintiffs obtained an appropriate undertaking from advocates in that regard.

17. The Defendant, continuing with its submissions, noted that the evidence showed that the Plaintiffs had breached the agreement and, as a result, the Defendant had terminated the same. The Defendant pointed to the case of **Kisumu Paper Mills Ltd v National Bank of Kenya & 2 Ors (2006) eKLR** in maintaining that it was trite law that a breach of a fundamental term of the contract entitles the innocent party to accept the breach as a repudiation of the contract and to bring the contract to an end. The Defendant noted that it had demanded and was entitled to the outstanding debt on the restructured facility as stipulated in the agreement. It understood that the "restructured facility" meant the amount outstanding on the loan to the first Plaintiff prior to the restructuring. It was not the amount outstanding after the restructuring of the loan facility being Shs. 10 million as erroneously interpreted and understood by the Plaintiffs. The Defendant maintained that the Plaintiffs were not entitled to the remedies sought in the suit. The Defendant had not sold the second Plaintiff's Kilimani property. The sale was a redemption pursuant to the Defendant's letter dated 22nd June 2004. The consequential loss amount claimed by the Plaintiffs being what the second Plaintiff maintained that he had incurred by way of loss of rent was not proved before Court and it was trite law that special damages should not only be pleaded but proved.

18. The Defendant noted that the sum of Shs. 4,495,000/-as claimed by the Plaintiffs had been paid to it well after they had breached the terms of the agreement. The first Plaintiffs owed monies to the Defendant under the loan facility and thus it would be absurd for the Defendant to refund any monies so paid. Similarly, the Defendant was under no obligation to bear any tax liability on behalf of the Plaintiffs. In its turn, the Defendant claimed as against the Plaintiffs the amount of Shs. 12,757,747/05 being the amount still owed under the loan facility. The second Plaintiff had guaranteed Shs. 3 million of the above amount plus such other sums including interest, banking charges, costs and expenses recoverable under his guarantee. Finally, the Defendant submitted that it was paramount to note that the Shs. 10 million paid by the Plaintiff's to the Defendant on or about 26th July 2004 and 21st October 2004 was not the sum agreed upon under the agreement. Such was for the redemption of the second Plaintiff's said property in Kilimani, Nairobi.

19. The Defendant in citing the **Kisumu Paper Mills** case (supra) drew attention to the finding in the English House of Lord's case of **Hain Steamship Company Ltd v Tate & Lyle Ltd (1936) 2 All ER 597**. That was a case involving a marine charterparty. **Lord Atkin** noting that the departure from the voyage contracted to be made was a breach by the shipowner of his contract detailed:

"…… But a breach of such a serious character that however slight deviation the other party to the contract is entitled to treat it as going to the root of the contract, and to declare itself as no longer bound by any of its terms."

In my view that principle applies to all contracts not only shipping or maritime contracts. In this case, the agreement between the parties clearly dealt with the restructuring of the first Plaintiff's loan facility with the Defendant. Indeed, the Defendant had expressly accepted that it would receive the sum of Shs. 10 million in full and final settlement of the first Plaintiff's debt to it. However, as can be clearly seen on the face of the said Agreement, the same was subject to conditions. Those conditions involved the repayment of the said sum of Shs. 10 million as follows:

"1. Kshs 500,000=00 to be paid immediately

2. Kshs 5,000,000=00 to be paid directly to the Bank after sale of a portion of the plot within 30 days period

3. Kshs 5,000,000=00 to be paid in 10 equal quarterly instalments of Kshs 500,000=00 each starting immediately.

Please note that the Bank reserves the right to demand all the outstanding debt on the *restructured facility* at its discretion without further notice to you and the attendant costs will be debited to your account on expiry of the agreed date."

20. To my mind, nothing could be clearer and the evidence before this Court shows that the Plaintiffs failed to abide by all three conditions detailed to them by the Defendant bank under the agreement. The correspondence clearly shows that, upon the Plaintiffs involving the firm of Khaminwa & Khaminwa advocates in 2003 in the negotiations between the Plaintiffs and the Defendant, the latter gave the Plaintiffs further latitude as regards the repayment of the loan facility. It is also clear that those negotiations involved certain implications on the part of the Plaintiffs which the Defendant clearly put right in its letter dated 22nd June 2004 addressed to the second Plaintiff when it detailed as follows:

"We refer to your letter dated 31st May, 2004.

We would like to correct the impression created in your letter that the Bank is willing to accept Kshs. 4.5 million in full settlement of your debts with us. We do not recall giving such indication at any time.

After considering the many appeals you have made in this matter and following a further review of your accounts with us, we would like to state of the Bank's <u>final position</u> which is that you may redeem the security L. R No. 2/154 Kilimani at Kshs. 10million <u>after which the balance of the debt will be addressed</u>. This offer is made on condition that you pay Kshs. 1million on or before 15th July, 2004 and the balance of Kshs. 9million to be paid latest 31st August, 2004." (Underlining mine).

In my view, nothing could have been clearer as to the Defendant's resolve in regard to the first Plaintiff's borrowing. By June 2004, the agreement had long been overtaken by events due to the Plaintiffs continued default as regards the conditions detailed therein, as I have outlined above. Despite the pleas of the advocates for the Defendant to take into account the age of the second Plaintiff and other, to my mind, immaterial matters, the plain fact is that the Plaintiffs reneged on the agreement. As their case before Court was entirely based on the agreement, I hold no store in relation to the Plaintiffs' case before this Court. The same is dismissed with costs.

21. I would turn now to the Defendant's Counterclaim in the amount of Shs. 12,707,747.05. DW 1 gave evidence that after the Defendant had received the sum of Shs. 10 million arising from the redemption, the Defendant was entitled to pursue the balance of the debt owed by the first Plaintiff. He maintained that such balance was Shs. 12,455,549/05 to which would have to be added the recovery costs incurred by the Defendant of Shs. 302,198/-. If one added the two amounts together, this came to the said amount of Shs. 12,707,747.05. DW 1 stated that the Defendant was claiming the debt from the first Plaintiff together with the guarantor, the second Plaintiff. However, what amount was actually due and owing in October 2007 was a little unclear to this Court. I understood that the outstanding amounts claimed involved

monies owed not only by the first Plaintiff herein but also by an associate company known as Compunews Publishers Ltd also operated by the second Plaintiff. The Defendant bank has not sued the latter company. Similarly, it has not sued Mrs. Gloria June Pepela who the court presumes is the second Plaintiff's wife. In my view, in terms of the liability of the second Plaintiff to the Defendant bank, the latter can only rely upon the Guarantee dated 6th April 1994 as its security against the second Plaintiff. That Guarantee has been properly executed, stamped and witnessed. The proviso to clause 2 of the document reads as follows:

"Provided always that the total amount recoverable hereon shall not exceed the sum of Shillings THREE MILLION (KSHS. 3,000,000/=) addition to –

i. **Such further sum for interest on that amount or on such less sum as may be due or owing and other banking charges in respect thereof as shall accrue due to you from the date hereof until payment in full or the determination of this Guarantee pursuant to any notice of determination by the undersigned as hereinafter provided; and**

ii. **Costs and expenses recoverable from the Principal and costs and expenses (on a full indemnity basis) arising out of or in connection with the recovery by you of the moneys due to you under this Guarantee which the undersigned agree to pay.**

Such interest (in the absence of any agreement to the contrary) shall be calculated with the usual rests and at the ruling rate from time to time for bank advances in Kenya".

It seems therefore that the second Plaintiff can only be liable to the Defendant in the amount of Shs. 3 million plus interest on this amount and the costs of recovery which the Defendant itself has stated to be Shs. 302,198/-.

22. Leaving that aside for the moment, the Court must necessarily examine what is owed to the Defendant bank by the first Plaintiff. In this regard, the only documentation that the Court may rely upon is contained in the Defendant's Supplementary List of Documents dated 11th February 2014. I have carefully perused this documentation. It appears that the first Plaintiff had 2 accounts with the Defendant bank the first being Account No. 01020-041335-00 and the second being Account No. 01020-041335-01. According to pages nos. 1 and 51, the balance on the former account as at 10th July 2007 stood at Shs. 12,455,549.05 and on the latter account, on even date, the balance was Shs. 302,198.00. These balances match up with the evidence as given before Court by DW 1. However, the evidence before Court clearly shows that Shs. 10 million paid to the Defendant bank upon "redemption" of the second Plaintiff's Kilimani property was so paid in 2 instalments. The first of Shs. 1 million was paid to the Defendant by Khaminwa & Khanimwa, Advocates on 26th July 2004 and the second in the amount of Shs. 9 million paid on 21st October 2004. Unfortunately for the Defendant, the statements which its witness produced before Court at pages 19 and 24 showed exactly the same balance as at 31st July 2004 and as at 31st October 2004 of Shs. 12,455,549.055. There was no evidence before Court as to whether the Shs. 10 million, which the Defendant acknowledged having received, was ever credited to the account No. 01020-041335-00 of the first Plaintiff. What however is revealed is the payment and credit to the first Plaintiff's account (at page 13 of the Defendant's Supplementary List and Bundle of Documents) of Shs. 3 million as per the two cheques tendered by Messrs. Khaminwa & Khaminwa dated 16th September 2003 for Shs. 2,500,000/- and Shs. 500,000/- respectively. Similarly, at page 62 of the said Bundle a credit of Shs. 95,000/- is noted on 17th September 2003 in the first Plaintiff's account no. 01020-041335-01. This would appear to be the cheque again tendered by Messrs. Khaminwa & Khahinwa on 17th September 2003.

23. It seems therefore that the amounts paid by the Plaintiffs, either directly or through their advocates, had been credited to the first Plaintiff's accounts with the exception of the Shs. 10 million referred to above. If that amount had been credited, it would mean that the amounts due and owing on the first Plaintiff's accounts would amount to Shs. 2,455,549.05 on Account No. 01020-041335-00 and Shs. 302,198.00 on Account No. 01020-041335-01 respectively. Added together these amounts come to Shs.2,757,747.05.

24. Bearing in mind that it was DW 1's evidence that the Defendant had stopped the levying of interest on the first Plaintiff's accounts in the year 2000, the above figure of Shs. 2,707,747.05 would seem to be the proper amount to which the Defendant is entitled under its Counterclaim. In any event, the Defendant would seem to have messed up its prayers with regard to its claim for interest in its Counterclaim. In my view, if the Defendant had stopped charging interest in 2000, I don't see how it can consider itself entitled to interest on the sum claimed. As a result, I enter judgement for the Defendant on its Counterclaim as against both Plaintiffs in the amount of Shs. 2,707,747.05 only. This amount is below the amount guaranteed by the second Plaintiff as above. The Defendant will be entitled to its costs of the Counterclaim.

DATED and delivered at Nairobi this 19th day of June, 2014.

J. B. HAVELOCK

JUDGE