REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 5872 OF 1990

JIMBA CREDIT CORPORATION LIMITED...PLAINTIFF

VERSUS

DEEP INVESTMENTS LIMITED..1ST DEFENDANT

RAMESH M KHARWA……………………………………………………..………2ND DEFENDANT

HARISH M KHARWA……………………………………………………...……3RD DEFENDANT

RAJNIKANT K SHAH…………………………………………………..……4TH DEFENDANT

JUDGMENT

1. According to the Amended Plaint dated 5th April 1991 and filed on 12th April 1991, the Plaintiff filed suit against the 2nd, 3rd and 4th Defendants as guarantors of the 1st Defendant who had been advanced facilities of the aggregate sum of Kshs 15,000,0000/= by a Mortgage, Further Mortgage and Second Further Mortgage dated 4th February 1983, 6th September 1983 and 4th May 1984 to secure payment over the 1st Defendant's property known as L.R. No 209/386/6 (hereinafter referred to as the "suit premises"). The Plaint was initially dated 21st September 1990 and filed on 28th November 1990.
2. The 2nd, 3rd and 4th Defendants undertook to indemnify the Plaintiff against all losses, damages, costs and expenses which the Plaintiff would suffer by reason of default on the part of the 1st Defendant.
3. Upon default by the 1st Defendant, the Plaintiff exercised its Statutory Power of Sale and sold the suit premises for a sum of Kshs 10,000,000/=.The suit premises were transferred on 29th August 1989. The Plaintiff was claiming a sum of Kshs 28,780,622/= together with interest thereon at 19% from 1st August 1990 until payment in full, being the shortfall of the outstanding balance. The Plaintiff's claim was therefore for judgment against the Defendants jointly and severally for:-
    a. **The said sum of Kshs 28,780,622/=.**
    b. **Interest on (a) above at the rate of 19% per annum from 1st August 1990 until payment in full.**
    c. **The costs of this suit together with interest thereon from the date of judgment until payment in full.**
    d. **Any other or further relief as this Honourable Court would deem fit to grant.**
4. In their Defence dated 3rd August 1991, the 2nd, 3rd and 4th Defendants denied any liability to pay and indemnify the Plaintiff, or that the 1st Defendant had been advanced financial accommodation

as had been alleged by the Plaintiff or that the 1st Defendant was indebted to the Plaintiff as alleged or at all. They stated that the aggregate, maximum liability for the 1st Defendant was Kshs 15,000,000/= inclusive of interest.

5. Having filed suit in 1990, Summons for Directions were taken and directions given on 20th December 1994, the Plaintiff filed its Statement of Issues which were as follows:-
    a. **Did the 1st Defendant charge its property known as L.R. No 209/386/6 to the Plaintiff by a Mortgage, Further Mortgage and Second Further Mortgage dated 4th February 1983, 6th September 1983 and 4th May 1984 respectively.**
    b. **What were the purposes of the said Mortgages and what sum did the said**

    Mortgages secure.

c. **Did the 2nd, 3rd and 4th Defendants guarantee and indemnify the Plaintiff for all the monies lent to the 1st Defendant and indemnify the Plaintiff against all the losses, damages, costs and expenses which the Plaintiff may suffer by reason of the default of the 1st Defendant.**
d. **Did the said Guarantee and Indemnity ceases to operate in respect of the**

    Plaintiff due to the Further Mortgage dated 4th May 1984.

e. **Did the 1st Defendant default in making payment to the Plaintiff and did the**

    Plaintiff lawfully exercise its Statutory Power of Sale and sell the charged property.

f. **Did the Defendants owe the Plaintiff the sum of Kshs 28,780,622.00 together with interest at 19% per annum from 1st August 1990 or did the Defendants owe the Plaintiff only Kshs 5,000,000/= inclusive of interest.**
g. **Was there a cause of action against the 2nd, 3rd and 4th Defendants.**
h. **Was the Plaintiff entitled to the costs and interest of this suit if successful or were the Defendants entitled to the same if they succeed.**

f. Following a Notice of Motion application dated 28th August 2007, the matter was referred to the Commercial & Admiralty Division for determination.
g. On 10th May 2010, M/S Kairu & McCourt Advocates and M/S Burton Isindu & Co Advocates for the Plaintiff and the Defendants respectively filed a consent in the following terms:-
    a. **THAT by consent of the parties, each party do file a bundle of documents as per the List of Documents filed by the Plaintiff on 17th March 2003 and filed by the Defendants on or before 31st May 2010 and by consent of the parties the bundles be put in as evidence without the production by the makers thereof.**
    b. **THAT the Plaintiff do file and serve its written submissions on 30th June 2010.**
    c. **THAT Defendants do file and serve their written submissions on or before 30th July 2010 and the Plaintiff be at liberty to file a Reply on or before 15th August 2010.**
    d. **THAT the court do give judgment based on the written submissions.**
    e. **THAT the matter be mentioned to take a judgment date.**
h. Both parties complied with the consent whereupon Muga Apondi J who was seized of the matter reserved the judgment for 2nd December 2011. It is not clear why the said judgment was not delivered but on 3rd May 2013, the matter was referred to this court for determination. Counsel for both parties reiterated that they wished the court to deliver its judgment based on the documentation in the court file.
i. In the Plaintiff's written submissions dated 30th June 2010 and filed on 1st July 2010, the Plaintiff stated that the personal guarantees of the 2nd, 3rd and 4th Defendants were already in its possession and that they had executed the securities of the loans. It added that their Guarantees were in writing.
j. The Plaintiff submitted that the original Mortgage of 4th February 1983 formed the basis of the

loan between the Plaintiff and the 1st Defendant while the Further Mortgage and Second Further Mortgage incorporated the amount outstanding together with the new advances. It submitted that these Instruments were supplemental to the Mortgage.

k. It was the Plaintiff's case that the sum of Kshs 15,000,000/= advanced to the 1st Defendant attracted interest until payment in full. It argued that interest was provided in the respective clauses in the said Instruments and that it would have been illogical to restrict the interest accruing on the loan unless the loan was for a fixed period and interest calculated prior to the advancement of the loan and added to the loan to form part of the principle loan. It therefore prayed for judgment as had been prayed for in the Amended Plaint.

l. In their written submissions dated 9th September 2010 and filed on 13th October 2010, the Defendants argued that when the Plaintiff was placed under Central Bank of Kenya management on or about 1986, all its assets, liabilities and undertakings were vested in Consolidated Bank of Kenya as per Legal Notice 136 dated 25th July 2002.

m. They relied on Section 10 (1) of the Consolidated Bank of Kenya Act, 1991 which provides as follows:-

> **"No existing legal or arbitration proceedings or application to any authority by or against a subsidiary shall abate, be discontinued or be in any way prejudicially affected by reason only of any of the provisions of this Act but the same may be prosecuted or continued by or against Consolidated Bank and any judgment or award obtained against the subsidiary and not fully satisfied before the vesting day shall thereafter be enforceable by or against Consolidated Bank."**

14. They submitted that the proper party in the suit herein was Consolidated Bank of Kenya Limited and not the Plaintiff herein. Hence, the non-joinder of Consolidated Bank of Kenya was fatal to the proceedings herein. They relied on the case of **C.A. No 4 of 1981 Haas vs Wainaina [1982] KLR 17** where the court held that judgment could not be entered *in vacuo* against a defendant without an amendment to the plaint which would make such defendant a party to the suit therein.
15. Further, they averred that matters of the guarantees ought to have been specifically pleaded in a Reply to Defence, which the Plaintiff did not file and not introduced in its Bundle of Documents. Under Order 6 Rules 4 (1), 7 & 8 (1) of the Civil Procedure Rules, this meant that the said issues had been admitted. This Order has since been replaced by Order 2 Rules 9, 10 and 12 of the Civil Procedure Rules, 2010.
16. They further contended that the Instruments of Guarantee did not indicate the amount of the indemnity and guarantee making the Guarantee and Indemnity void and unenforceable. The Defendants referred the court to **C.A. No 5 of 1984 Bakshish Singh & Brothers vs Panafric Hotels Limited [1986] KLR 538** where the court held that for a contract to be concluded, it must settle everything and leave nothing to be settled by agreement between the parties.
17. The Defendants also submitted that the said Guarantee was not valid as it was not under seal as had been alleged by the Plaintiff, it was not valid for want of due execution, mutuality, acceptance and consideration as the Plaintiff had not proved that it ever advanced any money to the 1st Defendant under the bill discounting facility. They argued that there must be *consensus ad idem* for the contract of guarantee to have been valid.
18. It was the Defendants' case that by entering into Second and Third Mortgages, the terms and nature of the Mortgage dated 4th February 1983 changed and as a result the 2nd, 3rd and 4th Defendants were discharged from any liabilities as they did not consent to the terms of the said Mortgage being changed. They stated that there was no evidence produced by the Plaintiff showing that the 1st Defendant actually accepted the offers in the Letters of Offer dated 4th October 1982 and 26th July 1983 unconditionally.
19. They relied on the case of **National Bank of Nigeria Limited vs Oba M.S. Awolesi [1964] 1 W.L.R. 1311** where the Privy Council discharged the Defendant as the bank had permitted substantial variation of the terms of the contract without the said Defendant's knowledge. The court also held a similar view in **Holme vs Brumskill [1878] 3 Q.B.D. 495** and **Reid vs National Bank of Commerce [1971] E.A. 525** also relied upon by the Defendants.
20. The Defendants also argued that the Statement of Accounts did not indicate which loan account

number the same related to and that considering the last bill of transaction reflected on the said Statement of Accounts was on 14th August 1986, the long silence by the Plaintiff until September 1990 when the suit herein was filed rendered the Guarantee to lapse due to effluxion of time.

21. They stated that the lack of a formal demand of notice to the 2nd, 3rd and 4th Defendants was in breach of Sections 48 and 49 of the Bills of Exchange Act Cap 27 and had the effect of discharging the 1st Defendant and by extension, the 2nd, 3rd and 4th Defendants.
22. The Defendants submitted that the court could not speculate as to what the entries thereon related to and urged the court to dismiss the Plaintiff's claim on the ground that the court had been denied the benefit of clear evidence to show:-
    a. **When the amount was advanced to the 1st Defendant.**
    b. **When the bills dishonoured (if at all) because no clear bank statements showing credits and debits on the account were produced.**
    c. **What account/ transaction the statements produced by the Plaintiff referred to or meant.**
23. The court has carefully analysed the submissions by the parties and finds that the question of the validity of the Guarantee and Indemnity of the Plaintiff and the liability of the 2nd, 3rd and 4th Defendants to the Plaintiff were relevant issues for determination. The issue of the amount that was due to the Plaintiff was also pertinent as the Defendants had argued that in the absence of evidence how the transaction occurred and how the advances were made, the court could not make any determination of the same.
24. What came out clearly from the Defendants' submissions was that they admitted that the only sum that could be said to have been due to the Plaintiff was a sum of Kshs 5,000,000/= which they had pleaded in their defence but which they submitted was not traversed by the Plaintiff. They pointed out that the Plaintiff never credited to the 1st Defendant's account, the sum of Kshs 10,000,000/= which was realised after the sale of the suit premises when the Plaintiff exercised its Statutory Power of Sale.
25. It will not be necessary for the court to determine the following issues as the same were not disputed:-
    a. **Whether there was a Mortgage, Further Mortgage and Second Further Mortgage;**
    b. **The purposes of the Mortgage;**
    c. **Whether the 1st Defendant defaulted in making payments;**
    d. **Whether the Plaintiff exercised its Statutory Power of Sale when it sold the suit premises.**
26. The Defendants had argued that the Plaintiff had not adduced evidence to show whether the same was oral or in writing. The court is not persuaded by the Defendants' argument that the failure by the Plaintiff to state how the agreement was entered into by the parties was fatally defective. This is because from the Defendants' own admission, the suit premises were sold after the Plaintiff exercised its power of sale. They have not demonstrated to this court how the sale could have taken place if there had been no agreement between the Plaintiff and themselves. The court therefore rejects the Defendants' submission that the claim herein should fail on the ground that there was no evidence that there was an agreement as aforesaid.
27. The court has found it necessary to consider the said Instruments of Mortgage to the extent that the same were tied to the Guarantee and Indemnity Form dated 20th January 1984. Although the Defendants contended that said Guarantee and Indemnity was not sealed, the same would not invalidate the said document. In any event, parties did agree by consent to admit all the documents as they were. Having acquiesced, the Defendants cannot therefore be heard to complain that the said document was not sealed. Even if the court were to find that the Guarantee and Indemnity Form was invalid by virtue of the fact that it was not sealed, it would not negate the fact that the 1st Defendant effected payment when the said Guarantee and Indemnity was not sealed and having acknowledged receipt of the monies, as was evidenced by payments seen, the debt of the loan facility did in fact accrue to the Plaintiff.
28. The Defendants' submission that the said Guarantee and Indemnity was invalid because the same did not indicate the amounts the 2nd, 3rd and 4th Defendants had bound themselves to pay to the Plaintiff would also not hold any water. It is clear from the provisions in the said Guarantee that the three (3) directors had guaranteed any monies that may have been advanced to the 1st

Defendant by the Plaintiff. The relevant Clauses in the Guarantee and Indemnity provided as follows:-

“ (1) (a) We shall pay and satisfy to the Company on demand all sums of money which are now or at any time shall be owing to the Company anywhere or on any account…

(b) This Guarantee and Indemnity shall be a continuing security and shall remain in force as such notwithstanding any change in the name or style of the customer on in the person or persons carrying on business in the name of the Customer…

(2) In addition to the Guarantee hereinabove stated for the consideration aforesaid we shall indemnify the Company and keep the Company indemnified against all losses damages costs charges and expenses which the Company may at any time suffer by reason of any default on the part of the Customer….”

29. It was therefore not correct as the Defendants contended that by entering into Second and Third Mortgages, the terms and nature of the Mortgage dated 4th February 1983 changed and as a result the 2nd, 3rd and 4th Defendants were discharged from any liabilities. In any event, the Defendants did not show this court how the Mortgage was varied, if at all or that the same exceeded the liabilities they were to bear.
30. In addition, the Defendants did not also provide any evidence before this court to show that their consent to the terms of the said Mortgage being changed was required, if at all. The 1st Defendants’ arguments that the Plaintiff had not demonstrated that 1st Defendant actually accepted the offers in the Letters of Offer dated 4th October 1982 and 26th July 1983 unconditionally and that the said Guarantee had not shown the exact amount the 2nd, 3rd and 4th Defendants had guaranteed any amounts would therefore not be sustainable.
31. In that regard, the court has no hesitation in finding that the 2nd, 3rd and 4th Defendants undertook to guarantee the Plaintiff for all the monies lent to the 1st Defendant and indemnify the Plaintiff against all the losses, damages, costs and expenses which the Plaintiff may suffer by reason of the default of the 1st Defendant. In the circumstances, the said Guarantee and Indemnity did not cease to operate in respect of the Plaintiff due to the further Mortgage and Second Further Mortgage dated 6th September 1983 and 4th May 1984 respectively.
32. The Plaintiff did not rebut the Defendants’ argument that it did not give them any formal notice. The court would, however, note place much weight on this argument as the Plaintiff exercised its Statutory Power of Sale. The lack of a valid notice was not an issue for determination by the court. The court would therefore be in order to presume that the Defendants did in fact receive some form of notice from the Plaintiff.
33. Turning to the issue of interest, the Letter of Offer of the Bill of Discounting dated 4th October 1982 shows that the interest that was chargeable was 1% flat per month. It indicated that all charges were subject to review at the Plaintiff’s discretion. The Mortgage, Further Mortgage and Second further Mortgage were executed after the execution of the Letters of Offer and they alluded to the fact that interest was payable. Several other letters by the Plaintiff to the 1st Defendant showed the variation of the interest.
34. In the letter of 16th December 1982, the Plaintiff informed the 1st Defendant that interest had now been varied from 12% to 15% per annum. Interest was also showed in the Statements of Accounts. The court finds that the Plaintiff and the 1st Defendant were at all material times *ad idem* as far as levying of interest was concerned. For those reasons, the court is not convinced by the Defendants’ submissions that the sum of Kshs 15,000,000/= that had been lent to the 1st Defendant by the Plaintiff was inclusive of interest but it is in fact persuaded by the Plaintiff’s submissions that the aggregate sum of Kshs 15,000,000/= was exclusive of interest.
35. The Statement of Loan Account No (Combined Account – 17/0026 and 28/0924) indicated an outstanding balance of 28,870,622/= as at 31st July 1990. The rate of interest therein is said to have been 19%, having been raised from 18%. Another Statement shows the outstanding balance

of the Loan Account as at 30th June 1987 to have been a sum of Kshs 9,069,423.10. In yet another Statement for past due Bills Accounts as at 30th June 1987, the outstanding balance is shown to have been Kshs 15,073,242.60. In the last two (2) statements, though interest has been charged, the rate thereof has not been spelt out.

36. The Plaintiff sued for a sum of Kshs 28,780,622/= together with interest thereon at 19% from 1st August 1990 until payment in full which is the figure that may appear to have been the figure in the Combined Account as aforesaid. It is not clear whether the other figures were factored in the said amount or if the said monies were paid by the 1st Defendant. The entries in the Statement of Accounts are not self- explanatory more so because interest could be varied at the discretion of the Plaintiff. It was incumbent upon the Plaintiff to demonstrate to the court how the interest accrued on the three (3) accounts so as to come to the figure that it had claimed herein. The court will also not place much weight to the Defendants argument that the Guarantee was invalid due to effluxion of time because the last transaction appears to have been on 31st July 1990 and not 14th August 1986 as had been alleged by the Defendants.
37. The court finds itself unable to order payment for the said amount for the reason that perusal of the said Statements of Accounts does not reflect whether the Plaintiff credited the sum of Kshs 10,000,000/= it realised after selling the suit premises. This is because the said amount would definitely have had a bearing on the amount of interest that would have accrued and in effect the final figure paragraph 4 of the said Amended plaint only refers to the fact that the Plaintiff realised a sum of Kshs. 10,000,000/= but it does not say when this was done. The court therefore finds itself in agreement with the Defendants' submissions that it would be very difficult to make a determination of the Plaintiff's claim on that ground.
38. The court notes that Section 3 of The Consolidated Bank of Kenya Act, 1991 provides that the Minister may by a notice in the Kenya Gazette make a Vesting Order. The vesting order came into effect on 15th July 2002 vide Kenya Gazette Notice issued on 2nd August 2002 and included the Plaintiff herein.
39. Section 10 (2) of the Consolidated Bank of Kenya Act (Cap 5 laws of Kenya) further provides as follows:-

    " In any legal or arbitration proceedings concerning any right or liability transferred to or vested in Consolidated Bank by this Act, a certificate under the hand of the manager of a branch of a branch of a Consolidated Bank that such right has been transferred or vested shall be prima facie evidence of that transfer or vesting."

40. Section 15 of the Act also stipulates as follows:-

    "The production of a Government Printer's copy of a vesting order shall be conclusive evidence in all registries of the transfer or vesting in accordance with this Act of any property, security or undertaking which is transferred and vested by virtue of this Act."

41. The Plaintiff did not rebut the Defendant's submissions that its undertakings vested in Consolidated Bank of Kenya Ltd. In view of the fact that the Defendant raised the issue of the vesting order and furnished the court with a copy of the vesting order in its submissions, the court is satisfied that the vesting order in respect of the Plaintiff herein was an undisputed fact.
42. Although the Plaintiff did not respond to the Defendants submissions that the proper party ought to have been Consolidated Bank of Kenya after the said vesting order came into effect and that failure to amend the suit to substitute Consolidated Bank of Kenya Ltd as the proper party of the proceedings made the proceedings herein defective, the court finds that Section 10(i) of the said Act envisages a situation where a judgment or arbitral award can be obtained by or against the subsidiary for enforcement by or against Consolidated Bank Ltd.
43. It is clear from Section 10(1) of the Consolidated Bank of Kenya Act that the proceedings herein did not abate and were not discontinued by virtue of the said vesting order and that further, the Plaintiff could obtain judgment which could be enforced by Consolidated Bank of Kenya Limited. The subsidiary and Consolidated Bank of Kenya Limited appear to have retained their distinct entities.

44. The distinct nature of the subsidiaries and Consolidated Bank of Kenya Ltd was evident in the case of **Civil Appeal No 107 of 2004 Jimba Credit Corporation Limited and Consolidated Bank of Kenya ltd vs Mombasa Development Limited** (unreported) where both the Plaintiff herein and the bank herein were parties to the appeal proceedings therein in 2004, which was two (2) years after the afore said vesting order. In **HCCC No 3231 of 1985 Nationwide Finance Co Ltd vs Meck Industries Ltd & 2 Others** (unreported), Osiemo J (as he then was) made the following observations in 2005 which was again, after the said vesting order:-

> **"The order obtained by Consolidated Bank was a nullity for it did not establish any *locus* on the basis of which it instructed Hamilton Harrison & Matthews to apply for sale of 18th March 1999 to be set aside. This ought to have been done by Nationwide Finance…."**

45. In the circumstance foregoing, the court therefore rejects the Defendants' submissions that the suit herein was invalid because the Plaintiff did not amend the suit herein to join Consolidated Bank of Kenya as the proper party of the proceedings herein.
46. The court did find hereinabove that it would be difficult for it to determine the exact amount of money that the Defendants owed the Plaintiff as it was not clear when the said property was sold. The court cannot also guess what the amount would have been after amortization as this is evidence that should have been provided by the Plaintiff.
47. However, it is not dispute that after the sale of the suit premises, there was a balance of Kshs. 5,000,000/= as the loan was Kshs. 15,000,000/=. The court agrees with the Plaintiff that that amount was not inclusive of interest. The Plaintiff claimed interest at the rate of 19% per cent. This is the rate that appears in the statements and which the court finds was not rebutted by the Defendants.
48. Having been satisfied that the Plaintiff has been able to establish that a sum of kshs. 5,000,000/= remain unpaid, the court hereby enters judgment in favour of the Plaintiff against the Defendants jointly and severally in the sum of kshs. 5,000,000/= together with simple interest thereon at the rate of 19% per annum from 1st August 1990 till payment in full. The Defendants will also jointly and severally bear the Plaintiff's costs of the suit.
49. Finally, the court wishes to observe that its duty is to give a conclusive judgment based on the evidence before it and not to leave the parties seeking interpretation of what the court intended. In the circumstance foregoing, for the avoidance of doubt, the court hereby wishes to point out that any interest recoverable by the Plaintiff against the Defendants must be as has been stipulated in Section 44A of the Banking Act Cap 488 (laws of Kenya). Parties made their final submission before Muga Apondi J. on 9th May 2013. They both requested this court to deliver its judgment based on the said submissions. The matter was conducted by documents only. The court wishes to observe that the issue of amount due and the interest payable by the Defendants to the Plaintiff were hotly contested and could have best been resolved by tending of oral evidence by the parties. Be that as it may, parties are at liberty to choose who they wish to conduct their cases. It is for that reason that the court delivered its judgment based on the submissions and documents that have been submitted by the parties.
50. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 20th day of September 2013

J. KAMAU

JUDGE