REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 762 OF 2009

YUSUF KIFUMA CHANZU…….....…..……PLAINTIFF

VS

EQUITY BANK LIMITED…….…..……1ST DEFENDANT

CAPITAL CONSTRUCTION

COMPANY LIMITED……...2ND DEFENDANT

JUDGMENT

1. The suit in this matter arises from extension of banking facilities by the 1st defendant, Equity Bank Limited to the 2nd defendant Capital Construction Company Limited which facilities were secured by the plaintiff, as guarantor of the 2nd defendant. The security provided by the plaintiff was in form of two main legal instruments: a Legal Charge dated 2nd November 2007 over a property known as Land Reference Number 10198/6situate within Karen area of Nairobi and registered in the name of the plaintiff (hereinafter called "the suit property") and a Letter of Guarantee dated 2nd November 2007 duly executed by the plaintiff in favour of the 1st defendant. Both instruments expressly provide that they were perfected to secure a principal sum of Kshs. 19,000,000/- together with interest stated to be 18% per annum (with an additional 6% penalty in the event of default), fees, costs, charges and expenses as more particularly set out in the instruments.

2. In the plaint filed on 14thOctober 2009, the plaintiff claims that the charge instrument registered against the title to the suit property was registered without his authority. He further avers that the covenants contained in the charge document are gratuitous offers not supported by any or any sufficient consideration hence the charge is invalid, null and void *ab initio* and therefore unenforceable for want of valid consideration. The plaintiff further claims that the 1st defendant charged interest at a rate that contravened Section 44 of the Banking Act as no authority of the Minister for Finance was sought before the increase in the rate of interest applied to the facilities extended to the 2nd defendant. The plaintiff further claims that owing to various variations and restructuring of the secured facility by the 1st and 2nd defendants without his notice or approval, the plaintiff's guarantee was thereby discharged and the plaintiff fully discharged as guarantor. Failure by the 1st defendant to pursue the debt against the 2nd defendant as the principal debtor is also contended by the plaintiff to discharge him from liability as guarantor.

3. In the light of the foregoing, the plaintiff seeks for judgment against the defendants jointly and

severally in the following prayers:

a) A permanent injunction to restrain the 1st defendant, its servants and/or employees from charging, encroaching, taking possession, selling, leasing, trespassing, wasting away or alienating and or interfering with Land Reference Number 10198/6 (IR No. 66702) Nairobi.

b) A declaration that the charge in respect of the suit property is null and void and of no effect unenforceable against the plaintiff and that the plaintiff is released and discharged from the said charge.

c) Costs of the suit.

4. The plaintiff's suit was contemporaneously filed with a Chamber Summons application dated 14th October 2005 in which the plaintiff sought the following main orders:

a) That pending determination of the suit, a temporary injunction to restrain the 1st defendant, its servants and/or employees from charging, encroaching, taking possession, selling, leasing, trespassing, wasting away or alienating and or interfering with Land Reference Number 10198/6 (IR No. 66702) Nairobi.

b) That an order be made under Section 52 of the Transfer of Property Act 1882 of India that during the pending of this suit all further registration or change of registration in the ownership, leasing, user, occupation or possession r in any kind of right, title or interest in L.R. No. 10198/6 Nairobi be prohibited.

c) Costs of the suit.

5. The application was heard *inter partes* and a ruling delivered on 27th April 2010 in which the court granted the above orders. These orders have persisted since and throughout the hearing of the suit.

6. By a statement of defence filed on 1st December 2010, 1st defendant denied that the property was fraudulently charged to itself. It further denied that the charge was created without the authority of the plaintiff; that it charged interest at rates that were in breach of Section 44 of the Banking Act or that the indulgence extended to the2nd defendant and its subsequent insolvency in any way affected the liability of the plaintiff under the guarantee and Charge instruments. The 1st defendant therefore averred that the plaintiff's suit was misconceived and urged this court to dismiss it with costs.

7. It is worthy of note that the 2nd defendant never entered appearance in this suit and the suit proceeded as between the plaintiff and the 1st defendant.

8. Upon close of the pleadings, the parties attended to pre-pre-trial requirements but do not appear to have agreed on the issues for trial. Nevertheless, by an application dated 28th June 2011, counsel for the Plaintiff applied under certificate of urgency to this court seeking orders that the court do give a hearing date for the suit on priority basis on the grounds that pleadings had closed but the suit had been confirmed for hearing on two occasions but had been taken out of the hearing list due to shortage of judges. This application was heard *inter partes* on 18th October 2011 and allowed as prayed, the court fixing the matter for hearing on 24th November 2011.

9. At the hearing of the suit on 24th November 2011 aforesaid, each party called one witness. The plaintiff testified on his own behalf while Mr. Gerald Gakiri Wanjama, a Relationship Manager with the defendant bank testified on its behalf.

10. In his evidence, the plaintiff testified that he was a Member of Parliament representing Vihiga Constituency. He was the registered owner of the suit property L.R. No. 10198/6 situate in Karen Nairobi.

He was known to the 2nd defendant company through its Managing Director a Mr. Ganti. Mr. Ganti approached the plaintiff and requested him to provide him with a security to enable him procure a performance bond for construction projects. Mr. Ganti indicated that the guarantee would be for a sum of Kshs. 19 Million and the facility would be for a short term. After the project, the security would be released back to the plaintiff. The plaintiff agreed to give Mr. Ganti the title to the suit property whereupon a charge over the property securing the sum of Kshs. 19 Million was prepared between the plaintiff and the 1st defendant. He further signed a letter of guarantee dated 2nd November 2007 to facilitate extension of the facility sought by the 2nd defendant. Both the charge document and the letter of guarantee indicated that the security created was limited to the principal sum, interest at 18% per annum (with an additional 6% penalty interest in the event of default), costs and charges. After signing the two instruments, the plaintiff did not receive any communication from the 1st defendant until February 2009 when he received a statutory notice threatening sale of his property. The amount demanded in the statutory notice was Kshs. 604,814,172.32 as at 15thJanuary 2009. Upon receipt of the letter, he got confused and thinking that the sum claimed was erroneous called the 1st defendant whose officers confirmed that the demanded sum was what the bank owed the principal debtor. That is why he brought an application to court for injunction orders to restrain sale of the property which orders were obtained on 27th January 2009.

11. The plaintiff testified further that by letters exchanged between the 1st defendant and the 2nd defendant in the course of year 2009, the parties varied the terms of the guarantee and charge. These letters were dated 2nd February 2009, 9th March 2009 and 21st April 2009. The figure that the 1st defendant was now demanding was hefty and suggested possible fraud. He was therefore seeking from the court orders for discharge of the title and for the 1st defendant to be directed to pursue the principal debtor.

12. During cross-examination by Mr. Litoro, counsel for the 1st defendant, the plaintiff confirmed having signed the charge and the guarantee in favour of the first defendant. He also confirmed that clause 4 of the charge obligated him to pay interest at 18% per annum and in default to pay a further 6% per annum. He however contended that in the statutory notice dated 15th January 2009 the sum claimed of 600 Million was a variation of the charge. He however confirmed that the letter indicated that he had secured the debt to the tune of Kshs. 19 Million. He confirmed that he had not paid the sum of Kshs. 19 Million and further that the principal debtor had admitted owing the 1st defendant a sum of Kshs. 540 Million. He confirmed further that Clause 8 of the guarantee provided that the guarantee would not be varied on account of any accommodation given to the debtor. He was however not aware that the 2nd defendant had not responded to the suit. He denied liability to the 1st defendant and claimed that it owed him a sum of Kshs. 9 Million in costs awarded by the court.

13. The defence witness Mr. Wanjama testified that he knew the plaintiff and 2nd defendant. The plaintiff was guarantor to the 2nd defendant. He confirmed that the plaintiff had executed a charge and a guarantee to secure a facility of Kshs. 19 Million extended to the 2nd defendant by the 1st defendant together with interest at the rate of 18% per annum with an additional penalty interest of 6% per annum in the event of default. The 2nd defendant defaulted and admitted owing a sum of Kshs. 90 Million, but did not pay the amount. It merely made proposals through letters dated 2nd February 2009, 9th March 2009 and 21st April 2009. The debt had to-date not been paid. The plaintiff had also failed to pay the amount guaranteed. The 1st defendant was therefore claiming from the plaintiff the amount guaranteed under the charge and the letter of guarantee. He denied that the terms of the facility had been varied and maintained that the charge and guarantee instruments were valid and enforceable.

14. In cross-examination by Mr. Wachakana, counsel for the plaintiff, Mr. Wanjama testified that the sum claimed from the plaintiff was Kshs. 19 Million plus interest and clarified that the sum of Kshs. 604 Million indicated in the statutory notice was the total debt owed by the principal debtor to the bank, as it had several facilities with the Bank. He testified that the Bank had no obligation to notify the plaintiff of changes in interest rates.

15. In re-examination, Mr. Wanjama clarified that the 1st defendant duly served a notice to the plaintiff as charger of the 2nd defendant's default, that the indulgence given to the debtor did not discharge the plaintiff from the guarantee and that no variation to the interest rates indicated in the charge and guarantee instruments had been varied.

16. At the conclusion of the hearing, counsel for both parties put in written submissions which I have considered in this judgment.

17. I have carefully considered the evidence placed before the court by the parties, documentary and oral. I have also considered the submissions by counsel for both parties as well as the authorities cited. I am therefore in a position to make my view on the contested issues in this suit.

18. In my review, the following issues arise for my determination in this judgment:

1) Whether the charge and guarantee instruments created by the plaintiff in favour of the 1st defendant were fraudulently created;

2) Whether the rate of interest levied by the 1st defendant on the facility extended to the 2nd defendant was in breach of the law and/or the terms of the charge and guarantee;

3) Whether there was variation of terms of the charge and guarantee as would vitiate enforceability of the instruments;

4) Whether the indulgence extended to the 2nd defendant by the 1st defendant had the effect of discharging the plaintiff from liability under the charge and guarantee instruments; and

5) Whether in any event the plaintiff is liable to the 1st defendant under the charge and the guarantee instruments and, if so, to what extent.

19. With regard to the contention that the charge and guarantee documents were created fraudulently, the claim in paragraph 7 of the plaint is that the plaintiff did not authorize the creation of the charge instrument dated 2nd November 2007 against his title. However, in his evidence in chief as well as in cross-examination, the plaintiff admitted having been approached by the Chief Executive of the 2nd defendant company and having agreed to give him the title to the suit property for use as security for a performance guarantee facility. Secondly, the plaintiff admitted having executed both the charge and guarantee documents in favour of the 1st defendant as a guarantor for the 2nd defendant company in respect of the facility extended by the first defendant. The contention by the plaintiff that he did not intend to have the property charged or that the charge was done without his authority is therefore devoid of merit. Being an enlightened member of society and a political leader, the plaintiff is a person commanding sufficient education and experience to have understood the commitment he was getting himself into and cannot now claim not to have understood that the charge and guarantee documents committed him to the sum of Kshs. 19 Million together with interest, costs and other charges stipulated in the charge. In my judgment therefore, the plaintiff voluntarily and consciously proffered the title to his property L.R. No. 10198/6 as security for the facility extended to the 2nddefendant company which title was properly charged and which charge remains valid and enforceable. That charge was supplemented by the letter of guarantee dated 2nd November 2007 through which the plaintiff personally bound himself to liability for the said sum of Kshs. 19 Million together with interest, costs and charges in the event the principal debtor defaulted.

20. With regard to the question of whether the interest levied against the facility extended to the 2nd defendant was in breach of the law and the contract between the plaintiff and the 1st defendant, the plaintiff claims that the interest charged was in breach of Section 44 of the Banking Act and was therefore illegal; that the 1st defendant breached the terms of the contract constituted under the charge in that the interest charged was in breach of Article (b) and Article 4(i) and (ii) of the charge and that it was

incumbent upon the 1st defendant bank to notify the Plaintiff of any increase in monthly rate of interest on installments before effecting any adjustments to interest chargeable under the contract. The basis for this contention is essentially that in the statutory notice served upon the plaintiff by the 1st defendant on 15th January 2007, the sum demanded was Kshs. 604,814,172.32 which sum the plaintiff contends could have escalated from the facility granted to the 2nd defendant of Kshs. 19 Million.

21. I have reviewed the evidence before the court and am unable to find any evidence suggesting that the 1st defendant charged interest upon the facility guaranteed by the plaintiff which was in excess of the contractual rate of 18% per annum together with a further penal interest rate of 6% per annum. Conversely, the defence witness Mr. Wanjama did testify that the 2nd defendant had other banking facilities with the 1st defendant which explained the said figure of Kshs. 604 Million stated in the statutory notice. The witness further agreed that the sum payable by the plaintiff was limited to the principal sum guaranteed of Kshs. 19 Million together with interest at the rate of 18% per annum and in addition a penal interest at the rate of 6% per centum per annum. In the premises, the fact of stating the total debt due to the 2nd defendant in the statutory notice aforesaid cannot *ipso facto* be taken as an indication that the 1st defendant levied interest that was in breach of the terms of the charge and the guarantee. Such contention would only have been successful if the plaintiff had tendered evidence of a running statement of account showing the flow and fluctuation on interest charged upon the 2nd defendant's loan account from inception to the date of demand.

22. With regard to the claim that the interest charged was in breach of Section 44 of the Banking Act, this claim cannot stand in the light of lack of evidence of the actual interest levied on the facility guaranteed by the plaintiff. However, even if that evidence was available, this court thinks it opportune to clarify that Section 44 of the Banking Act does not mandate banks to seek Ministerial authority every time they wish to adjust interest rates. Interest rates do not fall within the purview of bank charges which section 44 of the Banking Act contemplates. That is why Section 44A of the Act recognizes that a bank may levy interest "in accordance with the contract between a debtor and institution" and only puts a curb on interest if the same exceeds the principal sum borrowed. The contention by the plaintiff that interest charged by the Bank was illegal would only be sustainable if the interest charged exceeds the *in duplum* rule entrenched in Section 44A of the Banking Act.

23. On the contention by the plaintiff that the 1st defendant was obligated to notify him of any adjustment in the rate of interest applied to the secured facility, my take is three-fold:

1) Clause 2 of the charge document dated 2nd November 2012 committed the plaintiff as charger to pay to the 2nd defendant as chargee the principal sum with interest thereon as contained in the duly signed Letter of Offer dated 11th October 2007,

"At an interest rate of eighteen per centum (18%) per annum or such other rate as determined bt the charge from time to time. The Chargee reserves the right to amend interest charges without prior notice to the Chargor or as the Chargee may require under the provisions of sub-clause(iii) of Clause 4 hereof".

The charge document did not therefore impose upon the 1st defendant an obligation to notify the plaintiff of any changes in the rate of interest applied to the facility extended to the 2nd defendant.

2) The Letter of Guarantee dated 2nd November 2007 at Clause 1 committed the guarantor to pay interest "at such rates and upon such terms as may from time be payable by the Principal Debtor". This connoted that as long as interest claimed was such as the Principal Debtor was liable, it was not open for the plaintiff to contest such interest as long as it was limited to the contractual sum guaranteed.

3) In his evidence, defence witness Mr. Wanjama confirmed that the 1st defendant was under no obligation to give notice of any change in the interest applied to the facility extended to the 2nd defendant.

This contention was not tested in cross-examination.

I therefore find it merited to conclude that the 1st defendant was under no obligation to notify the plaintiff of any changes in the rate of interest applied and that if any such adjustments were made, the same did not in any way vitiate the liability of the plaintiff to the 1st defendant under both the charge and the letter of guarantee.

24. The next issue that I am required to consider is whether the indulgence extended to the 2nd defendant by the 1st defendant in connection with the debt secured by a charge over the plaintiff's property had the effect of discharging the plaintiff from his liability under the charge and the guarantee. Counsel for the plaintiff submitted that such accommodation entitled the plaintiff to be discharged from liability. He cited **Halsbury's Laws of England Vol. 18 PG 16** where the proposition is made that variation in terms of the contract between the creditor and the principal debtor will discharge the surety who is relieved from liability by the creditor with the contract the performance of which is guaranteed. Likewise, the plaintiff relies on the case of **Washington Otieno Ogindo vs. The Co-operative Bank of Kenya, HCCC No. 20 of 2002 where Tanui J (as he then was)** discharged the Appellant from liability to a bank under the guarantee and the charge on the basis that a request for extension of time for repayment of the loan without seeking the consent of the guarantor was material variation of the contract. On its part, the 1st defendant relies on Clause 11 (b) of the Letter of guarantee which provides that the liability of the guarantor shall not be affected by the granting of time, indulgence or concession to the Principal Debtor. Counsel for the 1st defendant also cited the case of **Perry vs. National Provincial Bank Limited (1919) 1Ch** where it was held that express terms of a guarantee must be upheld.

25. I have perused the letters of 2nd February 2009, 9th March 2009 and 21st April 2009 which contain the proposals that the plaintiff claims amounted to accommodation whose effect was to discharge his liability under the charge and guarantee documents. The letter of 2nd February 2009 proposed a rescheduling of the loan by allowing payments in monthly installments of Kshs. 7 Million. The letter of 9th March 2009 reiterated the 2nd defendant's proposal and sought extension of time within which to pay the loan. The letter of 21st April 2009 again sought a meeting between the 2nd defendant and the 1st defendant with a view to restructure the loan repayment schedule. In my view, all these proposals were requests for accommodation or indulgence within the purview of Clause 11(b) of the Letter of Guarantee. In that regard, the liability of the guarantor under the guarantee could not be affected by the fact that the principal debtor was seeking indulgence. The guarantee remained fully enforceable under the said Clause 11(b) of the Letter of Guarantee. This position was recognized by Tanui J in the Washington Ogindo (supra) where he cited with approval the case of **National and Grindlays Bank Limited vs. Patel & Others (1969) EA 403** where it was held that a bank was at liberty without affecting its rights under a guarantee to vary the amounts of credit extended to the principal debtor as consent to this had already been obtained in the guarantee.

26. In the present case, by the plaintiff executing the Letter of Guarantee which contained Clause 11(b) which clause expressly saved the obligations of the plaintiff to the 1st defendant even in the event of indulgence to the 2nddefendant, the plaintiff had effectively consented to the eventuality that the 1st defendant was at liberty to give indulgence or concessions without affecting the liability of the plaintiff under the guarantee. The express terms of the guarantee were therefore incapable of vitiation on the ground of such accommodation.

27. In any event, it is not unanimous that the 1st defendant did indeed accord the 2nd defendant any indulgence as very scanty evidence was tendered of the positions the 1st defendant took to the various proposals made by the 2nd defendant. That such accommodation may never have been extended is demonstrated by the statutory notice dated 15th January 2009 which the 1st defendant had issued to the plaintiff when the 2nd defendant had not even made the repayment proposals through the letters said to constitute indulgence. That the statutory notice preceded such letters is itself conclusive of the position that by the time the 1st defendant sought to enforce the terms of the charge and the guarantee, no material

variation of the contract had been made.

28. I am therefore inclined to make the finding that the indulgence extended to the 2nd defendant by the 1st defendant, if any, did not discharge the plaintiff from his liability under the charge and guarantee instruments.

29. Ultimately, the court must now consider whether in the totality of the above facts and analysis the plaintiff is liable to the 1st defendant and, if so the extent of such liability.

30. The plaintiff without any ambiguity confirmed that he offered the title to his property L.R. NO. 10198/6 (I.R. NO. 66702 situate in Karen Nairobi to the 2nd defendant to secure a bank facility with the 1st defendant. A charge was created over the title in favour of the 1st defendant to secure a sum of Kshs. 19 Million together with interest thereon at 18% per annum and, in the event of default, an additional penalty interest of 6% per annum. The plaintiff executed the charge document without any coercion, misrepresentation or non-disclosure of any material fact. The plaintiff further executed a Letter of Guarantee dated 2nd November 2007 as additional or supplementary security in favour of the 1st defendant. Again, the plaintiff did this without any compulsion or deceit. The facility was duly extended to the 2nd defendant. Subsequently, the defendant defaulted in servicing the facility. The 1st defendant then sought to enforce its rights under the charge and guarantee instruments to recover the guaranteed exposure. The plaintiff commenced this suit to challenge the exercise of the 1st defendant's powers under the charge and the guarantee. Upon hearing of this suit on its full merits, it has been demonstrated that the terms of the charge and the guarantee instruments remain in force and have not in any way been vitiated on the grounds relied upon by the plaintiff. Consequently, I am satisfied that on a balance of probabilities, the plaintiff is truly indebted to the 1st defendant in the amount of the principal sum set out in the charge and guarantee interest, together with interest, costs and charges as stipulated in the two instruments.

31. For the above reasons, I decline to enter judgment for the plaintiff as prayed for in the plaint and is inclined to dismiss the plaintiff's suit together withall consequential orders hitherto issued in the suit.

32. Costs of the suit are awarded to the 1st defendant.

IT IS SO ORDERED

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26THDAY OF APRIL 2012.

J. M. MUTAVA

JUDGE