REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 1867 of 2001

TRUST BANK LIMITED (IN LIQUIDATION) ……...…....……. PLAINTIFF

VERSUS

AMALO INDUSTRIES LIMITED ……..……. 1ST DEFENDANT

HARISH NATERWLAL PATEL ……...…..…… 2ND DEFENDANT

ANILKUMAR DEVSHI SHAH ……3RD DEFENDANT

J U D G E M E N T

1. The Amended Plaint dated 15 March 2002 prays for judgement against the defendants jointly and severally for Kshs.10,915,612/-together with interest thereon at 15% per annum from 1 October 2001 until payment in full. The Amended Plaint details that both the second and third Defendants executed continuing guarantees in favour of the Plaintiff on 16 October 1997. The guarantees were limited to a sum of KShs 15 million in addition to such further sums by way of interest on that amount together with other banking charges in respect thereof as might accrue due to the Plaintiff from the date of demand of payment.

2. The first Defendant filed a statement of Defence on 11th of March 2002. The first Defendant denied that it was indebted to the Plaintiff in the amount of KShs.8,315,141/10 or indeed any sum at all. Paragraph 8 of the first Defendant\'s Defence detailed that there had been no interest agreed upon between the Plaintiff and the first Defendant and consequently none is therefore payable. The first Defendant also maintained that the Plaintiff had failed to obtain the requisite leave of this court prior to instituting this suit against it rendering the entire proceedings a nullity. As regards the guarantees as referred to in the Plaint, the first Defendant stated that it had no knowledge of the same.

3. The second Defendant in his Defence dated 6 March 2002 denied liability for any guarantee that he had given to the Plaintiff. The second Defendant repeated the position as taken by the first Defendant in that the entire suit was bad in law and a nullity. The second Defendant denied vehemently the contents of paragraph 4 of the Plaint that he had signed a continuing guarantee in writing dated 16 October 1997. In the alternative, the second Defendant stated that if he had executed guarantee documents dated 16 October 1997 then the same are void and unenforceable for a total failure of consideration. At paragraphs 7 and 8 of the Defence, the second Defendant stated that if he had executed the guarantee documents

dated 16 October 1997 he was fully discharged from any liability thereunder as a result of variations made by the Plaintiff in the terms of the alleged financial accommodation of the first Defendant and further as a result of material additions and alterations by the Plaintiff of the terms of the guarantee without the consent or knowledge of the second Defendant. The second Defendant also denied that he had been called upon by the Plaintiff in letters dated 25 September 2002 to pay or cause to be paid the sum of KShs.8,315,141/10 together with interest thereon. The second Defendant denied that he failed to pay the said sum and averred that he was not actively involved in the day-to-day running and operation of the first Defendant. Finally the second Defendant, in his Defence, averred that if he had executed the guarantee documents dated 16 October 1997, then the Plaintiff had failed to pursue its remedies against the first Defendant as the principal borrower on its default, timely and with diligence, which led to an accumulation of interest on the first Defendant\'s account. The second Defendant detailed that his said guarantee to the Plaintiff was discharged following the Plaintiff\'s failure to adhere or to stick to the conditions precedent to which the purported guarantee was issued.

4. The third Defendant\'s statement of Defence was filed in court on the same day as the Defence of the second Defendant and contained similar denials as regards the Plaintiff\'s claim. Further, the third Defendant maintained that the Plaint herein was bad in law and a nullity and also maintained that the verifying affidavit supporting the Plaint was incurably and fatally defective. In paragraph 5 of the third Defendant\'s Defence he maintained that he was a stranger to the continuing guarantee dated 16 October 1997. He then stated that in any event no monies were advanced by the Plaintiff to the first Defendant or indeed to himself pursuant to any of the alleged guarantees as referred to in the Plaint. The third Defendant maintained that if any guarantee was in fact signed by him then the same would be void *ab initio* for lack of consideration rendering any such guarantee unenforceable. The third Defendant maintained that he was unaware of any letters dated 25th of September 2002 from the Plaintiff calling upon him as a guarantor to pay or cause to be paid the sum of KShs.8,315,141/10. The third Defendant then went on to adopt the statement made by the second Defendant in his Defence in which he stated that even if he had entered into the alleged guarantee, he considered himself fully discharged from any and all liability as a result of variation by the Plaintiff of the terms of the alleged financial accommodation to the first Defendant, without the consent or knowledge of the third Defendant. Similarly, he maintained that he had no liability to the Plaintiff as the guarantee documents of 16 October 1997 were void as a result of material additions and alterations made by the Plaintiff, of the terms of the guarantee without the consent or knowledge of the third Defendant. The third Defendant in his said Defence then attacked the rates of interest charged by the Plaintiff upon the borrowing by the first Defendant, which, he maintained were excessive and exorbitant and which were never notified to the first Defendant or to the third Defendant by the Plaintiff. Both the Defences of the second Defendant and the third Defendant took the line that the Plaintiff was the cause of the downfall of the business of the first Defendant as a result neither the first Defendant nor the second and third Defendants are liable any longer to the Plaintiff for the payment of any moneys.

5. PW1 Canute Masaba gave evidence before court on 29th of November 2011. He stated that he was a former employee of the Plaintiff Bank and was employed by the bank for 7 years. He had prepared a witness statement which was filed in court on 25 November 2011 the witness having signed the same on the same day. From the witness statement, PW1 stated that he was fairly familiar with the accounts relating to the Defendants' herein, with the Plaintiff. The first Defendant had opened account number 005177-0001 at the Plaintiff\'s Kisumu Branch. The authorised signatories on the first Defendant's account were the second and third Defendants; he attached a signature card to this end. By letter dated 23rd of May 1995, following a request by the first Defendant, the Plaintiff agreed to offer it an overdraft facility of KShs 15 million. Interest thereon would be at 36% per annum and then an excess penalty of 45% per annum would be charged on any excess amounts over and above the agreed overdraft limits. The witness stated that the first Defendant did not execute the letter of offer to signify acceptance of the same, nevertheless it proceeded to overdraw its account and in the opinion of the witness, therefore accepted the terms attaching to the overdraft facility. PW1 also detailed that the Bank\'s normal terms and conditions of operation of accounts applied to the first Defendant.

6. PW1 stated that soon after the letter offering the overdraft facility was sent to the first Defendant, it proceeded to write a number of cheques on an account that it knew did not have sufficient funds to meet

the same. All the cheques were duly honoured upon presentation as could be seen from the first Defendant\'s bank statements produced by the Plaintiff. All the cheques were signed by the authorised signatories, who were aware that the first Defendant was running an overdraft facility. According to PW1 the first Defendant made intermittent payments to its account but the same remained overdrawn until 11 November 1996 when a deposit of KShs 27 million was made resulting in a credit in favour of the first Defendant of KShs.768,972/-. The witness continued to say that the first Defendant went on drawing on the account which eventually went into overdraft again. As at 31 July 1997, the account was overdrawn in the sum of KShs.233,257/15. The witness stated that given the performance of the account, the Plaintiff sought and obtained guarantees and indemnity from the signatories to the account namely the second and third Defendants. The guarantees were executed on 16 October 1997 and the witness stated that he witnessed the execution of the guarantees which the second and third Defendants readily signed. Thereafter, the witness went into an explanation of what the second and third Defendants had undertaken by signing the guarantees.

7. Mr. Masaba then informed the court that the first Defendant did not regularize its account after it went into overdraft again. He was aware that a meeting was held between the representatives of the Plaintiff and the second Defendant on 7 August 1998 in which the second Defendant, as the managing director of the first Defendant, admitted the latter\'s indebtedness and undertook to liquidate the same within two weeks. The second Defendant signed the minutes of that meeting. The witness went on to state that he was aware that demand was made on the first Defendant by the Plaintiff\'s lawyers by letter dated 12 February 1999 and that demand was made on the second and third Defendant\'s by separate letters from the Plaintiff\'s lawyers dated 25 September 2002. The time lag was on account of the fact that the Plaintiff, in the intervening period, was placed into liquidation. On cross-examination, Mr. Masaba recalled that he had made a normal note of the account opening and he had met with the directors of the first Defendant who were the second and third Defendants. It was these two directors who applied to the Bank for facilities. He prepared the initial documentation for the first Defendant\'s account which was a current account. He confirmed that he had a signature card but did not have a resolution of the first Defendant for the opening of the account that he could remember. The overdraft of KShs 15 million was advanced to the first Defendant and the second and third Defendants were the people drawing cheques in relation to that overdraft facility. The bank officials did allow them to go beyond the KShs 15 million facility. The witness confirmed that if the overdraft went beyond the facility amount then interest on the excess would be charged at 45% per annum. He agreed with counsel for the Defendants that the offer letter as regards the overdraft, was not signed by the directors to confirm the contents thereof. In his view, the interest rates that the bank was charging at the time were fair; he was not aware of any Legal Notice to cap the interest rate. He stated that the general terms and conditions of operation of accounts were not required to be signed by the client. All that the client was required to do was to sign the signature card.

8. Turning to the questions of the guarantees, PW1 confirmed that it was the practice of the bank to have its own officials witness the signatures of guarantors. He agreed that it would have been preferable for the guarantors’ signatures in this case to have been witnessed by independent individuals but he had been instructed by the Plaintiff\'s Branch Manager to witness the guarantees of the second and third Defendants. He stated that the second and third Defendants (both of them) went through the documents before him in the office before they signed the same. PW1 continued by stating that at paragraph 25 of his Witness Statement there appears an amount of KShs. 10,915,612/-which is the amount owing by the first Defendant and that amount did not include solely interest charges on the account. PW1 confirmed that throughout the period of the account, the interest rate was between 36% and 45% per annum. Later when the Bank was put under statutory management interest was being charged at 25%. The witness confirmed that the first Defendant has not fully paid back the bank. On re-examination, the witness confirmed that the Resolution for the opening of the account, allowing the two signatories to sign on the same, is on the flip side of the signature card. He confirmed that, at page 14 of the Plaintiff\'s documents, the balance outstanding at the time of the payment of the amount of Shs. 27 million, was Shs. 26,231,027/-. Finally, the witness confirmed that usually in the ordinary course of business, depending on the client, the Plaintiff Bank would honour a cheque presented beyond the facility amount. It was at the Bank\'s discretion to vary interest rates during the ordinary course of business. With that, the Plaintiff\'s Counsel closed the Plaintiff\'s case.

9. The Defence called the third Defendant Anil Kumar Devshi Shah as its first witness. DW 1 had signed a witness statement on the 6 January 2012, which he adopted as his evidence in chief in this matter. In that witness statement, DW 1 confirmed that the first Defendant had received a Letter of Offer from the Plaintiff in which it offered to the first Defendant an overdraft facility of KShs. 15 million. The witness stated that the offer was not accepted by the first Defendant as the same was not signed in acknowledgement and acceptance of the terms and conditions therein. He maintained that this was, in fact, an express requirement appearing at the penultimate paragraph of the said letter. He also confirmed that the first Defendant did not pass any board resolution authorising the taking of the said facility. DW 1 stated that he had been advised by the Interest Rates Advisory Centre that the said letter of offer contained unlawful terms by first of all, imposing an interest rate of 36% per annum when the prevailing interest rate under section 39 of the Central Bank of Kenya Act up to 17th of April 1997, had a legal maximum rate of 16.5%. Secondly, the imposition by the Plaintiff of an excess penalty interest at the exorbitant rate of 45% per annum was not sanctioned by the Minister as provided by section 44 of the Banking Act. DW 1 went on to say that from the Plaintiff\'s statement of account in relation to the first Defendant\'s current account, it was clear that the entire loan drawdown as per the letter of offer had been repaid in full on 12th of November 1996 and the account was actually in credit in the amount of KShs. 454,986.55 on that date. DW 1 maintained that after the repayment of the facility in full, any obligations of the Defendants under the letter of offer and the guarantees were extinguished. Further, if the Plaintiff allowed the first Defendant further facilities then the same needed a new agreement. It was the third Defendant\'s view that there being no new agreement for any further facilities, the Plaintiff cannot purport to claim on the extinguished contract for the said new non-contractual facility. DW 1 then referred to an entry at page 24 of the statement of account which indicated a balance of KShs. 00.01 as at 22 June 2001.

10. The third Defendant further noted in his witness statement that the Plaintiff as per its bundle of documents had stated that it was now imposing what DW 1 considered to be a very excessive rate of 39% per annum, on the facility. The first Defendant was not consulted on this variation of the interest rate. Further, DW 1 stated that he and the second Defendant, as purported guarantors, were also not informed of the interest variation. He maintained that assuming the guarantees are validated, then on that ground alone he and the second Defendant were discharged from any obligations thereunder. Paragraph 9 of the third Defendant\'s witness statement arrived at the crux of this matter. It read:-

"The cumulative effect of both the unlawful and non-contractual interest charged on the account is that the first Defendant\'s business was unnecessarily put under a lot of pressure to repay the Plaintiff when in fact there were no outstanding liabilities. As a result of the said pressure the first Defendant\'s business collapsed and the first Defendant now counter-claims against the Plaintiff for the sum of KShs. 1,005,525.63 from 30 June 2002, with interest, being the amounts calculated by M/s Interest Rates Advisory Centre as the unlawful interest overcharge."

11. As regards the guarantees dated 16 October 1997, the third Defendant maintained that the same were of no effect as it was not supported by any consideration. The guarantee is dated 16th of October 1997 yet the facility was purported to have been given on 23rd of May 1995. DW 1 then stated that in any event, the Plaintiff failed to explain to the second and third Defendants as to the terms of the said document which was in fact witnessed by the Plaintiff\'s witness. He maintained that he was not afforded any opportunity to obtain independent legal advice on the same. In his examination in chief before Court, DW 1 was referred to page 84 of the Plaintiff’s Bundle of documents. This was the Guarantee bearing the third Defendant’s name on the first page thereof, to which the third Defendant agreed. He admitted that he signed the document. That said, he did so in 1995 when the facility was granted. It was surprising to DW 1 that it was dated 16 October 1997 because he had signed the same in 1995, when it was undated. He further went on to say that he and his co-director were in the process of buying a factory. They did not get time to read the whole document. The witness stated that he knew Mr. Masaba as one of the employees of the Plaintiff. He stated that they were not advised to seek any separate legal advice. DW 1 was taken to the evidence he had given in his witness statement. He repeated that he understood that once the first Defendant had paid off the Bank, the guarantees would be no more. He noted that the balance on the first Defendant\'s current account as at the 1 June 2002 stood at a debit figure of KShs 12,054,502.79. He stated that he could not pay this amount to the bank but claimed that when the Shs 27 million was paid in November 1996, he assumed that his guarantee to the Bank would not be continued. Finally in his

examination in chief, DW 1 referred to the first Defendant\'s Counterclaim filed on 9 May 2006. Prayer (c) thereof is a request for judgement in the amount of Shs 1,005,525.63. This figure, he confirmed, was obtained from IRAC.

12. In cross-examination DW 1 stated that he had been in business since 1971. As regards the borrowing of the first Defendant, DW 1 stated that the directors of the Plaintiff Bank in fact approached him in that regard, as it had recently opened a branch in Kisumu. He noted that the first Defendant company during the 1997 upheaval, had been ransacked and everything stolen. Referring to page 8 of the Plaintiff\'s bundle of documents, DW 1 confirmed that the first Defendant had withdrawn the amount of KShs 7.4 million in the first few days of opening the account. He stated that he and his fellow directors were in a hurry and they were aware of the monies being lent. He stated that they did not accept the letter of offer as they were negotiating interest at 22% per annum. He confessed that he had not read the terms and conditions of clause 5 (a)of the letter of offer in that the Bank was able to charge differing rates of interest on different accounts. DW 1 agreed that the first Defendant had drawn the Shs. 7.4 million before he had signed the guarantee. He did not know why the guarantee was dated in 1997, as it was signed when the account of the first Defendant was opened in 1995. On being referred to page 14 of the Plaintiff\'s bundle of documents, DW 1 stated that as at 20 September 1996 the amount outstanding at the time was Shs 23,537,490/-. The overdraft was still in place and he and his fellow directors might have asked for more time to pay the overdraft off. He stated that since the first Defendant\'s account was continuing, he had not written to the Bank for an extension of time. DW 1 maintained that the current account remained in credit until 31 July 1997. He confirmed and agreed with Counsel when he said that he may have spoken to the Manager of the Plaintiff Bank as regards the cheque issued on that day for Shs 776,250/-. Finally, in re-examination, DW 1 stated that if there had been a Resolution of the Company given to the Plaintiff Bank, such would be on the company’s letterhead and signed.

13. The Defence\'s second witness was Mr. Onono, a Certified Public Accountant working as a management consultant for the Interest Rates Advisory Centre Limited ("IRAC"). His witness statement, dated 11 January 2012 which he adopted as his evidence in chief, detailed that IRAC specialises in financial consultancy and undertakes objective and independent audit of borrowing contracts and interest recalculations. He stated that such entails revealing interest overcharge, interest and charges and confirming the exact amounts owed by a borrower to a financial institution and vice versa. He noted that IRAC’s objectives were achieved through a two stage process. First, the company extracted the terms of the contracts from the agreements signed by the parties. This is followed by extraction of applicable interest rates and the agreed mode of repayment as set out in the contracts. The second stage involves feeding the extracted contractual terms into the IRAC Credit Verifier. This software recalculates the interest chargeable on the figures in the statements of account and its accuracy is certified on a mathematical basis. The witness noted that it had been approached by the first Defendant to recalculate the interest charged on its current account held with the Plaintiff Bank. The witness had detailed the documents upon which he had relied in scrutinising the interest recalculation of the current account. In its recalculation report, the witness said that IRAC had found no documentary evidence of compliance by the Plaintiff with **section 44** of the *Banking Act* with reference to the various charges and fees as levied or varied by the Bank. The witness maintained that over the period in question, various charges were debited by the Bank in breach of **section 44.** IRAC calculated such amount to be KShs 281,066.20. DW 2 then stated that he looked at the Law prevailing at the time covered by the statements of account. In this case, he said, he had found that between 1995 and 17 April 1997 the maximum rate of interest that should have been applied by the Plaintiff Bank was 16.5%. That is the rates of interest that IRAC applied from May 1995 to 17 April 1997. He stated that the Central Bank of Kenya Act section 1 gave the Central Bank authority to issue maximum rates of interest and was still in place although supposed to have been introduced by Gazette Notice 3348 of 23rd of July 1991 which revoked the Gazette Notice of 1990. He stated that because section 39 of the Act was not repealed until 1997, during that period May 1991 to 1997, interest rates were being controlled. This was not understood by the Plaintiff Bank. It was for this reason why he had reworked the interest rate at 16.5% as per *Gazette Notice No. 1617 of 2 April 1990*. In 1991, the Governor revoked *Gazette Notice No. 1617* but *Gazette Notice No. 1417* stayed in place until Parliament revoked **section 39** of the Act effective 17 April 1997.

14. DW 2 continuing his evidence in chief stated that having applied the maximum rate of interest, he

found that with the payment of Shs. 27 million in 1996, the first Defendant\'s account was in credit until the end of June 2002 when there was a credit of Shs. 1,005,525.63. At that stage the Plaintiff Bank had the account in debit at KShs. 12,054,502.79. IRAC's recalculated balance on the account was a credit of Shs. 1,005,525.63. The witness noted that after the repeal of section 39 of the Act, IRAC had applied the rate of 42% per annum from the 18 April 1997. Further, DW 2 stated that he had attached to his record of calculation, a list of amounts charged contrary to **section 44** of the Banking Act from the 24th May 1995 to 31 December 2000 involving ledger fees and commissions. Such, he said, were not approved by the Minister. The same came to Shs. 281,066.80. According to the witness, the total overcharge by the Plaintiff Bank is Shs. 13,060,028.42. The witness was cross-examined as regards the various Gazette Notices and the position of the Governor of the Central Bank of Kenya. He stated that the advice of his in-house lawyer was that the Governor did not have the authority to exercise his discretionary powers. Such were taken away by Parliament in 1997. He however admitted that it was his client who was the one who informed IRAC that the account was being charged with interest by the Plaintiff Bank at 42% per annum. Similarly, the other charges and interest rate information was provided by the client. At the completion of DW 2\'s evidence, the Defendants closed their case.

15. The Plaintiff filed its submissions on 29 February 2012. Such opened by saying that in reference to the Amended Plaint filed in court on 15 March 2002, the Plaintiff is seeking judgement against the defendants jointly and severally for Shs. 10,915,612/-together with interest at 15% per annum from 1 October 2001 until payment in full. The Plaintiff also seeks costs of the suit. The Plaintiff then summarized what it considered to be the Defence of the Defendants in relation to the amended Defence and Counter-claim filed on 9 May 2006. The Plaintiff noted that the matter then proceeded for hearing on 29th of November 2011 when Mr.Masaba testified on behalf of the Plaintiff Bank and thereafter on 7 February 2012 when the third Defendant and the first Defendant\'s expert witness Mr Onono also testified. The Plaintiff noted that there was no appearance for the Second Defendant on either day and no evidence was led on his behalf. It was the Plaintiff\'s contention that the first Defendant, through its directors, opened a bank account with it on 20th of May 1995. The directors signed the mandate for the account by which they resolved to open an account with the Plaintiff and further agreed that the first Defendant\'s relationship with the Plaintiff should be subject to the Plaintiff Bank\'s General Terms and Conditions. The Plaintiff maintained that the resolution further confirmed that the said terms and conditions had been tabled at the meeting and confirmed. This document, it submitted, was to be found on the flip side of the signature card at page 1 of the Plaintiff\'s Bundle of documents.

16. The Plaintiff maintained that, in his evidence, the third Defendant confirmed that the Bank's General Terms and Conditions were shown to him at the time of opening the account. Thus, in a nutshell, the Plaintiff submitted that the first Defendant had requested the Bank to honour any instructions that it may give, notwithstanding that the carrying out of those instructions would result in the account being overdrawn. It had agreed that the Bank was entitled to debit its account with interest on any overdraft, loan accounts or any other facility granted by the Bank, at such rate or rates that the Bank, in its sole discretion, may from time to time decide. The Defendants, according to the Plaintiff, also agreed that the Plaintiff Bank need not notify them of any change in the interest rate charged. The Plaintiff commented that the third Defendant's evidence revealed that the Defendants were in a hurry to secure finance for a property that the first Defendant company intended to purchase. That was why the directors had rushed through the account opening procedures and had expended Shs 7,454,776/55 within 3 days of the opening of the account without paying any moneys into the same. The Plaintiff asked the question as to on what basis the Defendants were drawing cheques for not insubstantial amounts of money, had they not agreed to the Plaintiff Bank's General Terms and Conditions and the letter of offer which granted the first Defendant the Shs 10 million overdraft facility?

17. The Plaintiff then referred the Court to its list of authorities, more particularly **Brogden v Metropolitan Railway Company (1876-7) L. R. 2 App Cas. 666** wherein the **House of Lords** held that acceptance of a written contract/offer can either be explicit or implicit (by words or by conduct). Their Lordships held in that case that the defendants, despite not having communicated their acceptance of the terms of their written contract, were nevertheless bound by the same by virtue of their conduct without any objection to its terms. It was the Plaintiff's contention in this case, that the Defendants accepted the Plaintiff's letter of offer by their conduct on 26 May 1995 when they drew the said cheques as against the

account. The Plaintiff also submitted that the test laid down by the **English Court of Appeal** in **Day Morris Associates v Voyce (2003) EWCA Civ 189** equally applied to this case before Court in that contractual acceptance had to be a final and unqualified expression of assent to the terms of the offer by detailing:-

"Conduct would only amount to an acceptance if it was clear that the offeree did the act in question with the intention of accepting the offer. The test as to whether there had been such agreement was an objective one and it followed that conduct which demonstrated an apparent intention to accept could be sufficient, despite uncommunicated mental reservations of the offeree".

The Plaintiff submitted that by drawing the cheques against the first Defendant's account with the Plaintiff, the Defendants accepted the terms of the offer and became bound by the terms of the same.

18. As regards the evidence of the third Defendant as to when he executed the Guarantee in favour of the Plaintiff Bank, the Plaintiff commented that it was interesting that this fact had not been included in any of the Defences of the Defendants herein. Further, the Plaintiff submitted that the fact that the third Defendant had not read the terms of the Guarantee that he had signed, nor been advised to seek legal advice, does not amount to a defence to the Plaintiff's claim and the third Defendant cannot claim to be unaware of the explicit terms and conditions therein. As to the Defendants' allegation that the guarantees were void for want of consideration, the Plaintiff submitted that this was wholly inaccurate. It submitted that the guarantees given by the second and third Defendants to the Plaintiff, were continuing and binding upon the two of them for as long as the first Defendant owed any moneys to the Plaintiff. It maintained that, by its very nature the overdraft facility could be utilized by the first Defendant at any time and from time to time. The Plaintiff pointed out that even assuming that the guarantees were limited to the moneys advanced after its execution, the statement in relation to the bank account revealed that the first Defendant used the facility after October 1997.

19. The Plaintiff invited the court to look the provisions of the guarantees themselves contained at page 81 of the Plaintiff\'s bundle. It was the Plaintiff\'s contention that the second and third Defendants by signing the guarantees had accepted that, subject only to the limit of the amount of the sum guarantee under clause 3 which, as per the Plaintiff\'s submissions was:

"their liability hereunder shall extend to all moneys and liabilities of whatsoever nature owing or incurred by the Customer in any account and on whatsoever footing whether the same be arranged advanced or incurred before or after the date hereof and whether or not the facility or arrangement by virtue whereof the same shall be due or incurred shall have been within my knowledge or contemplation at the date hereof."

Try as I may, I did not read of such in the Guarantee signed by the second and third Defendants. As I read clause 1 (a) of the Guarantee document as signed by both the second and third Defendants, it read as follows: –

"I shall pay and satisfy to the Bank on demand by the Bank all and every the sum or sums of money which are now or at any time shall be owing to the Bank anywhere on any account whatsoever whether from the Customer solely or from the Customer jointly with any other person or persons or from any firm in which the Customer may be a partner including the amount of notes or bills discounted or paid and other loans credits or advances made to or for the accommodation of either the Customer solely or jointly or any such firm may be or become liable as surety or for any moneys or other facilities guaranteed by the Bank for and on behalf and at the request of the customer solely or jointly or any such firm or in any other way whatsoever together with all cases aforesaid all interest (at such rate or rates as may from time to time be charged to or payable by the Customer under the arrangements from time to time in force between the Customer and the Bank) discount and other charges including legal charges as between advocate and client occasioned by or incident to this or any other security held by or offered to the Bank for the same indebtedness or by or to the enforcement of any such security…….. and in addition I shall pay to the Bank interest on all sums recoverable from me pursuant to this Guarantee from the date of demand upon

me by the Bank at the rate or rates charged by the Bank to the Customer at the time of such demand……."

I have no doubt that the guarantee was continuing as submitted by the Plaintiff but, from the above, I am not at all sure as to the complete meaning of the quote that I have detailed above from clause 1 of the Guarantee. I cannot agree with the Plaintiff\'s submission that it was clearly stated that the guarantee was to cover any sum or sums of money which shall for the time being constitute a balance from the Customer. The only thing that I am sure of is that the Customer was described and detailed as the first Defendant.

20. The next submission made by the Plaintiff was that the Defendants\' claim about the guarantee being discharged after the lump sum payment made in November 1996 was unfounded in law and in fact. I think that this is the correct position, bearing in mind, as pointed out by the Plaintiff, that the third Defendant did admit the debt and undertook to repay it. Such was recorded in the minutes of a meeting held with the Plaintiff\'s officials on 7 August 1998, which he signed. It appears from those minutes that the third Defendant promised that the sums outstanding on the first Defendant\'s account with the Plaintiff Bank would be liquidated in two weeks. It is to be noted that no payment was made at all, which was why this suit was eventually filed.

21. The Plaintiff continued its submissions in attacking the evidence of DW 2, particularly as regards the fixing of maximum and minimum rates of interest under the provisions of **section 39 (1)** of the *Central Bank of Kenya Act* and the Gazette Notices made thereunder in the 1990s. The conclusions are, as per the Plaintiff\'s submission in this regard, was there was no prescribed maximum interest rates by the Central Bank and consequently the figures computed by DW 2 and later presented to the Defendants are erroneous as the same were predicated upon a flawed interpretation of the subsisting interest regime over the loan period. The Plaintiff went on to say that the offer letter to the first Defendant clearly stipulated that interest on the overdraft facility would be calculated at 36% per annum and also that a 45% per annum interest rate would be applied on any excess amounts over and above the agreed overdraft limit of Shs. 15 million. The Plaintiff also pointed to the provision in the Plaintiff Bank\'s General Terms and Conditions which allowed the Bank to debit the customer with (unless otherwise agreed in writing) interest on overdrawn accounts, at such rate or rates as the Bank should in its sole discretion from time to time decide, not exceeding that allowed by the Central Bank of Kenya and that the Bank need not notify the customer of any change in the rates of interest charged. It was the Plaintiff’s continued submission that as per the letter of offer and the Plaintiff\'s General Terms and Conditions, that it was in the absolute discretion of the Plaintiff to levy whatever amount of interest rate on the first Defendant\'s overdrawn account without any need to inform it. Similarly, the Plaintiff attacked the evidence of DW 2 as regards the rates of banking or other charges in accordance with section 44 of the Banking Act. It was the Plaintiff\'s point that DW 2 had erroneously interpreted the law. In its submission, the Plaintiff maintained that such provision referred to only prohibiting the increase of bank rates and charges but does not prohibit the charging of the bank fees. The Plaintiff therefore maintained that the figures in relation to accumulated interest and bank fees and charges as put forward by DW 2 were erroneous and could not be relied upon to support the Defendant\'s Counterclaim.

22. Finally, the Plaintiff referred the court to the two cases of **RLCO Steel Fabricators Limited& Mavji Ramji Ladha Patel v Commercial Bank of Africa & 3 Ors** *Civil Case No. 22 3 of 2004* as per **Ibrahim J.** and **Daniel Kamau Mugambi v Housing Finance Company of Kenya Limited (2006) eKLR** as per **Ochieng J.** In the former case, the learned Judge had allowed the first defendant bank to recover interest rate charges levied against the plaintiff contrary to the provisions of section 39 of the Central Bank of Kenya Act, since the contract between the parties had explicitly indicated and sanctioned the levying of the same. Similarly, the Plaintiff submitted that **Ochieng J.** had indicated in the **Mugambi** case that where there is an explicit agreement/contract between the parties as to the fees/charges to be levied by the bank/financial institution, then the same should be upheld and contractually enforced by virtue of section 52 (1) of the Banking Act. The Plaintiff reiterated that at no time during the suit period from May 1995 to June 2002 did the Defendants ever write to the Plaintiff bank with a view of terminating the overdraft facility, neither did they write to the bank in protest of what the Defendants now term as *“other lawful/unfair terms of the overdraft facility contract and the*

guarantees”.

23. In turn, the submissions of the first and third Defendants emphasised at the outset, that the letter of offer dated 23 May 1995 had the notification on it that the same should have been signed and returned by way of acknowledgement and acceptance of the Bank\'s terms and conditions stipulated therein. The Defendant maintained that it was the evidence of DW 1 that the letter had never been signed for and on behalf of the first Defendant, and therefore there was no acceptance of the contract. Further, there were no minutes of the first Defendant authorising the overdraft facility, in any event. The Defendants maintained that the document detailed on the flip side of page 1 of the Plaintiff\'s documents, could not by any stretch of imagination, be construed as being the minutes/resolution of the first Defendant as suggested by the Plaintiff. The Defendants said that it was not disputed that the first Defendant had an overdraft facility with the Plaintiff. They maintained that the same was on an *ad hoc* basis without any security. The Defendants submitted that, in the case of the Plaintiff against the third Defendant, such was based on an alleged guarantee dated 16 October 1997. It noted that DW 1 had testified that he indeed had signed the said guarantee but that the same was not signed in October 1997 but in May 1995. The Defendants maintained that DW 1\'s evidence on this point was not shaken in cross-examination. The Defendants then went on to say that as is evident from the statement of account at page 8 of the Plaintiff\'s bundle of documents, it was clear that the first drawdown of the overdraft facility was on 26 May 1995. They maintained that the logical conclusion to be drawn from that fact was that the third Defendant must have signed the guarantee before the May 1995 date and not on 16 October 1997. They noted that DW 1 also testified that when he signed the guarantee document the same was not dated. The main point of the Defendants\' submissions was that, even assuming that the guarantee was properly given by the third Defendant, the same stood discharged as at 12 November 1996 when the facility was repaid in full and the first Defendant\'s account went into credit.

24. The Defendants then referred of the court to the authority of **"Law of Guarantees", third edition by Geraldine Andrews and Richard Millet** as follows:

"Since the purpose of a guarantee is to secure the performance of the principal\'s obligations towards the creditor, the surety will be discharged from his liability under the guarantee if the principal pays the debt or performs the obligation which the surety has guaranteed, or if the principal\'s liability is forgiven".

It was the Defendant\'s sincere submission that once the first Defendant\'s account had gone into credit, then the Plaintiff needed to take a fresh guarantee from the third Defendant. It did not assist the Plaintiff to say that the same was a continuing guarantee. At law and as set out in the extract from **Andrews and Millet** as above, the guarantees stood automatically discharged once the facility, for which the guarantees were given as security, was fully repaid in November 1996. The Defendants then referred me to the authority of the **Court of Appeal** in **National Bank of Kenya Limited v Kwanza House Limited** *Civil Appeal No. 236 of 1996 (Nakuru)* in which the Court therein considered the legal effect of the general wording of a charge which purported to cover liabilities in addition to those for which the charge was given to secure. The Defendants maintained that as in this case, the appellant in the said appeal was contending that by virtue of the express terms of the charge, it covered the borrower\'s other indebtedness to it. The Defendants submitted that notwithstanding and despite the general wording of the guarantee, it was only intended to secure and cover the facility granted under the letter of offer (even assuming that was binding) which in any case was very specific in the amount and even the termination date. In the Defendants’ view, the Plaintiff was mistaken in thinking that the guarantees secured all indebtedness of the first Defendant even after the repayment of the facility given in the letter of offer. The Defendants went on to quote the learned authors of **Chitty on Contracts, Volume 2, 28th edition (1999) at page 1324** as follows:

"Difficult questions frequently arise as to the extent of the liability which the surety has undertaken. These are essentially questions as to the true construction of the contract in each particular case, and it is sufficient here to indicate the general approach of the courts to these questions and to draw attention to some of the principle types of difficulty which have arisen. Despite contradictory dicta in the cases, the general approach seems to be that contracts of this

kind must be strictly construed in favour of the surety and that no liability is to be imposed on him which is not clearly and distinctly covered by the contract…. the reasons for this strict construction are that, in general, the surety receives no benefit from the contract which is, so far as he is concerned, gratuitous; and secondly, that in most cases these days, the contract is drafted by the creditor and in accordance with the *contra proferentem* **maxim, is accordingly to be construed in favour of the surety in cases of doubt. It may be that where these reasons are inapplicable, the court would not construe the contract so strictly."**

It was also the Defendants\' submission that the third Defendant, as a guarantor, is discharged from his guarantee to the Plaintiff, it having varied the interest rates without informing him and without his consent. The Defendants maintained that it is trite law that any variation that adversely affects a surety\'s liability, without his consent, will discharge the surety.

25. The Defendants then moved on to submit as regards DW 2's evidence in relation to interest rates and bank fees/charges. The Defendants' view was that under **section 39 (1)** of the *Central Bank of Kenya Act*, the Central Bank's power to regulate interest rates was only repealed on 17 April 1997. Prior to that, with the revocation of *Gazette Notice No. 1617, Gazette Notice No. 1458* continued to apply. That being the case, the Defendants submitted that the cap of 16.5% on interest rates as provided for in *Gazette Notice No. 1458* was in effect and consequently, the Plaintiff's rates of interest at 36% on overdraft and 45% penalty interest were illegal. The Defendants then adopted the figures given by DW 2 as calculated by IRAC. The Defendants also urged the Court to accept DW 2's evidence as to banking fees and charges levied without the consent of the Minister under section 44 of the Banking Act. The Defendants maintained that in re-examination, DW 2 had pointed out with reference to the Bank statements provided by the Plaintiff, just where the Plaintiff had increased its fees and charges since the opening of the first defendant's current account. It was therefore the Defendants' conclusion to their submissions, that the figures to support their Counterclaim were entirely justified and had been proved.

26. From the court file, the advocates for the Plaintiff forwarded a draft Statement of Issues to the advocates then acting for the Defendants under cover of their letter dated 22 August 2005. Only Harit Sheth, Advocate then acting for the third Defendant approved the draft and the same was filed in court on 9 March 2006. The Statement of Issues detailed such as follows:

"1. a. Is the suit a nullity for failing to comply with the provisions of the Civil Procedure Rules?

b. Did the plaintiff obtain leave before filing this suit?

c. If it did, was the said leave obtained contrary to mandatory provisions of the Company's Act?

d. Is the affidavit sworn to verify the contents of the plaint incurably defective?

e. If yes, should the suit be dismissed with costs?

2. a. Are the guarantees dated 16th October 1997 valid?

b. Were the guarantees executed by the 2nd and 3rd defendants?

c. Are the guarantees void for total failure of consideration?

d. Are the 2nd and 3rd defendants discharged from liability under the guarantee for material alterations of the terms of the guarantee by the plaintiff?

3. Was the 1st defendant indebted to the plaintiff in the sum of Kshs.5,62,775/= as at 31st January 1999?

4. a. Are the defendants jointly and severally liable to the plaintiff in the sum of Kshs.10,915,612/= with interest at 15% per annum from 1st October 2001?

b. Did the plaintiff agree on interest with the 1st defendant?

c. Did the plaintiff unilaterally increase interest charged on the 1st defendant?

d. Is the interest claimed by the plaintiff excessive, exorbitant, penal, illegal, unconscionable and harsh and offensive to public policy?

5. Costs.

27. As regards the issues under paragraph 1, not one of the 3 Defendants challenged the issues or procedure at the hearing of this matter under the provisions of the Civil Procedure Rules and I can only presume that such was waived. Issue number 2 involved the validity of the guarantees dated 16 October 1997. I have perused both the guarantees signed by the second Defendant at pages 72/79 of the Plaintiff\'s documents as well as the guarantee signed by the third Defendant on the same date found at pages 80 / 87 of the Plaintiff\'s documents. First of all, both guarantees are signed and witnessed at page 7 of the guarantee document. PW 1 confirmed that he had witnessed both the signatures of the second and third Defendant as Guarantors. The guarantees have been properly stamped by the Collector of Stamp Duties but I note that upon each, a Stamp Duty Penalty has been paid presumably as a result of late stamping. One the defences as raised by the third Defendant as regards the validity of the guarantees was that he recalled signing the same in May 1995 while the actual documents were dated 16th of October 1997. Even if the third Defendant is correct in his evidence, I can see no reason why the late dating of the guarantee documents, would render the same invalid. Consequently in answer to the issue as to whether the second and third Defendants were discharged from liability under the guarantees for material alterations of the terms thereof by the Plaintiff, I would say "No". However, was there a total failure of consideration rendering the guarantees void? It was the third Defendant\'s submission that once the first Defendant had paid into its account, the sum of Shs. 27 million on 12th of November 1996 so putting the account into credit, the second and third Defendant\'s liability under the guarantees came to an end. It was the third Defendant\'s further submission that if the Plaintiff wished to revive the validity of the guarantees, then once the account went back into debit, a new letter of offer was called for as well as fresh guarantees.

28. Here again, I have perused the guarantee documents. At paragraph 1 (b) the same reads as follows:

"This Guarantee shall be a continuing security and shall remain in force as such notwithstanding any change in the name style or constitution of the Customer and it shall not be considered as satisfied notwithstanding any intermediate payment or satisfaction of account or the payment or liquidation at any time hereafter of the whole or any part of any sum or sums of money due from the Customer to the Bank as aforesaid but shall extend to cover only sum or sums of money which shall for the time being constitute the balance due from the Customer to the Bank upon any such account as hereinbefore mentioned;"

In **Chitty on Contracts 24th Edition** in relation to specific contracts, the learned authors of the volume have this to say as regards continuing guarantees:

"It is often a difficult question whether a guarantee, for example, of the price of goods to be supplied, or money to be lent up to a specified amount, is intended to extend to a single or definite number of transactions, or whether it is intended to be continuous. In the former event, payments by the principal debtor for the goods sold, or repayment of the money lent, brings the surety\'s liability to an end; in the latter event, the surety remains liable if further goods supplied or money lent up to the limit of the guarantee. Whether the guarantee is continuing in any given case is a question of construction; no hard and fast rule can be laid down, and the construction of one document affords little or no guidance to the construction of another. Each case depends entirely on the language used, and the document must be looked at with reference to the circumstances under

which it has been given."

29. To my mind, what has been expressed at paragraph 1 (b) of the guarantees quite clearly involves what is termed the "latter event" as per the quotation above. My reading of that paragraph indicates that even where monies were paid into the first Defendant\'s account to put it into credit, if it went back into debit, the guarantees continued to cover the liability to the Plaintiff. Thus to answer issue No. 2, I find that the guarantees were not void for total failure of consideration, the same are valid. I am supported in arriving at such conclusion as to the construction of the contract by the contents of **paragraph 44 – 050** of the extract from **Chitty on Contracts, 28th Edition, Volume 2** which was provided to me by the first and third Defendants. This reads as follows:

"The principle of strict construction does not mean that the court cannot look beyond the terms of the written instrument. As in all cases of construction, the court is entitled to look at the surrounding circumstances in order to see what was the subject matter which the parties had in contemplation at the time the contract was made, and to determine the scope and object of the guarantee. A guarantee of a tenant\'s obligations under a lease may extend, on its true construction, to the liabilities of the tenant under a statutory continuation of the lease, but prima facie it seems that a guarantee of the covenants of a tenant on a lease do not so extend. On the other hand, the court should not "disregard the clear wording of a document simply on the basis of an abstract expectation as to the bargain the parties might have struck". Instead, they should be an indication in the document itself that general words were not intended to cover a particular circumstance."

30. The next issue raised was whether the first Defendant was indebted to the Plaintiff in the sum of Shs. 5,682,775.55 as at 31 January 1999. From the bank statement detailed at page 23 of the Plaintiff\'s documents, it is quite clear to me that this was the amount to the debit of the first defendant’s account as at that date. However, having said that, I necessarily have to consider the first and third Defendant\'s submissions that there was no contract in existence between the Plaintiff and the first Defendant in relation to the overdraft borrowing of Shs. 15 million. It was alleged by PW 1 that the resolution for the borrowing was detailed on the reverse side of the signature card at page 1 of the Plaintiff\'s bundle of documents. I am afraid that I cannot agree with him. The resolution on the reverse side of the signature card is as regards the opening of the account not the borrowing of Shs. 15 million by way of fluctuating overdraft. There has not been produced before this court any resolution of the first Defendant company approving the overdraft facility. Further, it was submitted that the letter of offer from the Plaintiff bank dated 23rd of May 1995 had not been signed by the directors of the first Defendant company in acceptance of the terms of the borrowing. The Defendants submitted that, as there was no contract as between the Plaintiff and the first Defendant, this suit was not enforceable, first of all against the first Defendant under the terms of a non-existent contract and secondly, against the second and third Defendants as the guarantees that they had signed were issued under such non-existent contract. To my mind, although there was no written acceptance of the terms of the lending contract as between the Plaintiff and the first Defendant, the conduct of all three Defendants in embarking upon the borrowing constituted acceptance of the Plaintiff bank\'s offer by conduct. To this end I received some assistance from the general principles expounded in **Chitty on Contracts, 30th edition, Volume 1 at paragraph 2 – 030** which defined acceptance by conduct as follows:

"An offer may be accepted by conduct. For example, an offer to buy goods can be accepted by supplying them; an offer to sell goods, made by sending them to the offeree, can be accepted by using them, and an offer contained in a request for services can be accepted when they begin to render them, where a customer of a bank draws a cheque which will, if honoured, cause an account to be overdrawn, the bank, by deciding to honour the cheque, impliedly accepts the customer\'s implied request for an overdraft on the bank\'s usual terms. Conduct will amount to acceptance only if it is clear that the offeree did the act of alleged acceptance with the intention (ascertained in accordance with the objective principal) of accepting the offer."

31. The third issue was whether the first Defendant was indebted to the Plaintiff in the sum of Shs. 5,682,775.55 as at 31 January 1999. From the page 23 of the Plaintiff\'s bundle of documents, it appears it quite clear that this was the sum in minus (or debit) as at that date. The next issue was whether the

Defendants are jointly and severally liable to the Plaintiff in the sum of Shs. 10,915,612/-together with interest at 15% per annum from 1October 2001? Again, from the Plaintiff\'s bundle of documents page 27, it would appear that as at the 30 September 2001 the first Defendant\'s indebtedness on its account with the Plaintiff bank was Shs. 10,915, 611.99. Although, as per PW 1\'s witness statement, interest accrued thereon at 15% per annum from the 1 October 2001 until payment in full. I accept that this amount is due and owing by the first Defendant to the Plaintiff as at that date. It should be noted that the interest rate of 15% per annum is the rate to be applied after the appointment of the liquidator of the Plaintiff.

32. The next two issues was whether the Plaintiff agreed rates of interest with the first Defendant in relation to the latter\'s overdraft and further, whether the Plaintiff unilaterally increased the interest rate charged to the first Defendant\'s account. On the flip side of the Signatory Card which I have no doubt was signed by the second and third Defendants, as directors of the first Defendant, it clearly states that:

"All funds which the company has or may have with the Bank and the Company\'s relationship with the Bank shall be subject to the Bank\'s General Terms and Conditions, a copy of which has been tabled at this Meeting and is hereby approved, and by any amendments thereto may by the Bank and from time to time in force."

Further, the letter of offer dated the 23rd of May 1995 after detailing “Security” states:

"See also the annexure of other general terms and conditions".

To my mind, the second and third Defendants were perfectly well aware that the overdraft facility offered to the first Defendant were to be governed by what was detailed in the letter of offer and the Plaintiff Bank\'s General Terms and Conditions. The second and third Defendants were experienced businessmen well aware of banking practices and for them to turn round to say that the Plaintiff\'s General Terms and Conditions of banking did not apply to the first Defendant is laughable to say the least. Clause 5 (a) of those General Terms and Conditions details as follows:

"unless otherwise agreed in writing, interest on overdrawn accounts, loan accounts or on any other facility granted by the Bank, at such rate or rates as the Bank shall in its sole discretion from time to time decide, not exceeding that allowed by the Central Bank of Kenya, with full authority to the Bank to charge different rates for different accounts and said interest to be calculated on daily balances and debited monthly by way of compound interest. The Bank need not notify the Customer of any change in the rate of interest charged. Where a higher rate of interest has been agreed between the Bank and the Customer in any security given by the Customer, that higher rate may be charged by the Bank."

From that, it seems quite clear to me that the Plaintiff herein had the right to unilaterally increase interest charged on the overdraft facility enjoyed by the first Defendant. Also, the letter of offer dated 23rd May 1995 quite clearly detailed under the heading "INTEREST" that such would be at 36% per annum payable monthly in arrears as calculated on daily closing overdrawn balances. The fact that the overdraft facility was utilised by the first Defendant and it accepted for many months the rates of interest charged by the Plaintiff bank would imply that it accepted that the Plaintiff bank could charge such rates and alter or vary the same from time to time as it saw fit. I find therefore that the first Defendant did agree on interest with the Plaintiff that its overdraft would attract.

33. The penultimate issue as per the Statement of Issues filed on 9 March 2006 was whether this court felt that the interest claimed by the Plaintiff was excessive, exorbitant, penal, illegal, unconscionable and harsh as well as being offensive public policy. Unfortunately in the Kenyan banking industry, economic circumstances pertaining from time to time do affect rates of interest charged by local banks. Sometimes such rates of interest when viewed at in terms of rates that can be attained abroad, seem exorbitant more particularly rates of interest applied on a penalty basis. On the whole however, rates of interest charged by local banks to their customers for loan and borrowing facilities tend to be fairly similar only varying by a few percentage points from bank to bank. Banks make their living by lending money and thus have to fix

their interest rates on borrowing, in order to achieve profits, based on the interest rate they are paying to borrow either from other banks or from their customers in terms of customer deposit and deposit accounts. Borrowing conditions at the time when the first Defendant obtained its overdraft facility from the Plaintiff bank would depend upon the economic conditions pertaining at the time and as such, I do not consider that the interest claimed by the Plaintiff herein on its overdraft facility detailed to the first Defendant was excessive, exorbitant etc.

34. The said Statement of Issues filed on 9 March 2006 did not include any issues as between the parties with regard to the first Defendant\'s Counterclaim. There have been repeated argument before these courts as to whether *Gazette Notice No. 1458 of 27 March 1990* was superseded by *Gazette Notice No. 1617* of second of April 1990. It is the Plaintiff\'s contention *Gazette Notice No. 1617* expressly indicated that it superseded *Gazette Notice No. 1458* that consequently when the *Gazette Notice No. 1617* and was revoked, there was no longer any prescription on the maximum rate of interest applicable that banks could charge. The first Defendant however, maintained that with the revocation of *Gazette Notice No. 1617, Gazette Notice No. 1458* continued to apply until the repeal of **section 39** of the *Central Bank of Kenya Act by Parliament on 17 April 1997*. The first Defendant maintained that the maximum rate of interest that the Plaintiff could levy on the facility to the first Defendant was 16.5% per annum pursuant to *Gazette Notice No. 1458*. Taking into account the evidence of DW 2 to this end, the first Defendant maintained that as per its Counterclaim, the Plaintiff had as at 30 June 2002, overcharged the first Defendant by Shs. 13,060,028.42 by way of interest which upon recalculation of the amount claimed as against the first Defendant in the Plaint would result in a credit in favour of the first Defendant in the sum of Shs. 1,005,525.63 as at that date. Further, the Plaintiff had imposed bank charges amounting to Shs. 281,066.20 as against the first Defendant\'s account, contrary to **section 44** of the Banking Act, maintaining that the said charges were not sanctioned by the Minister for Finance under that Act. In this regard, the Plaintiff submitted to court three authorities as regards rates of interest to be charged as per the Central Bank of Kenya Act as well as fees and charges under **section 44** of the Banking Act. These were the cases of **RLCO Steel Fabricators Limited** and **Mugambi v Housing Finance Company of Kenya Ltd** (both supra) and the case of **Prof David Ndetei v Housing Finance Company of Kenya Limited** *HCCC No. 456 of 2006* **(2007) eKLR.** In contrast, the first Defendant produced no authorities to court on this point. Be that as it may, I find myself in agreement with the submissions of the Plaintiff herein that Gazette Notice No. 1617 of 1990 superseded Gazette Notice No. 1458 of 1990 and consequently supplanted the earlier one which left the only regulations governing the rates of interest that banks could charge their customers were those contained in *Gazette Notice No. 1617*. When later *Gazette Notice No. 1617 of 1990* was revoked, there were no longer any controls on the maximum rate of interest applicable. All such Gazette Notices at the time were issued under the provisions of **section 39** of the Central Bank of Kenya Act which was later repealed by Parliament on 18 April 1997. Up until then, the Central Bank of Kenya the discretion to prescribe maximum interest rates that banks could charge their customers. I take cognizance of two points raised in that regard by **Ibrahim J.** in the **RLCO Steel** case (supra) as follows:

"It would appear that even if the first Defendant continued to impose interest rates after repeal of section 39 of the Central Bank Act which were no longer permitted by law, if such interest rates were provided for in the contracts between the Bank and its customers then they would not be illegal per se and could be recoverable under the contract but not through court action." Earlier the learned judge had stated: **"Be that as it may, with respect, it would appear that even if the Applicants were to succeed on this point, it would not assuage the provisions of Section 52 of the Banking Act which provides that: –**

"52. (1) For the avoidance of doubt, no contravention of the provisions of this Act, or the Central Bank of Kenya Act shall have effect or invalidate in any way contractual obligation between an institution and any other person.

(2) the Provisions of subsection (1) shall apply with retrospective effect to the Banking Act (now repealed) and the Central Bank of Kenya Act;……."".

35. **Ochieng J.** took time to dwell on the point in the **Mugambi v Housing Finance Company of Kenya Limited** (supra). Quoting from the finding of **Kasango J. i**n the **Prof. Ndetei** case (supra), the

learned Judge quoted as follows:

"**The issues that I believe are needed for consideration of this court are as follows: –**

(1) whether the defendant was entitled to debit the various charges and varying interest in the plaintiff\'s account.

The answer to that I believe is in the negative. The evidential burden of disproving that the charges were not contrary to the requirements of the Central Bank of Kenya Acts and the Banking Act were squarely on the defendant. It is only the defendant who could prove that the interest rates complied with Section 39 Cap. 491, when the restrictions were there, and it is only the defendant who could have proved that the Central Bank approved the increase charges according to Section 44 Cap. 488".

Of course, the defendant in that case was the bank and **Ochieng J.** Continued:

"As the defendant failed to discharge the burden of proof, the learned judge held that the defendant had failed "to prove the legality of the charges is debited in the plaintiff\'s account, having debited amounts not authorized by the plaintiff…..".

My comment about that authority is that it comprises a final judgement, after a full trial. Secondly, it is to be noted that the attention of the trial court does not appear to have been drawn to Section 52 of the Banking Act, which recognizes the right of banks to agree with their borrowers on such interest rates as they may deem appropriate. I therefore have no idea what decision the learned trial judge in that case would have arrived at, had her attention been drawn to the statutory provision."

It is agreed that both the **RLCO Steel** and the **Mugambi** cases involved Rulings delivered as regards interlocutory applications. The **Prof. Ndetei** case in contrast, had gone to full trial. **Kasango J.** was satisfied that the defendant bank therein had failed to prove that consent had been obtained to the charging of both interest and bank fees and charges to the plaintiff customer\'s account. In this case, I am satisfied that the Plaintiff has demonstrated to court that the interest rates agreed with the first Defendant were correctly applied and I do not accept the evidence of DW 2 as to the proposition that he made in evidence that *Gazette Notice No. 1458 of 1990* imposed a maximum interest rate of 16.5% per annum applied to the first Defendant\'s overdraft account with the Plaintiff. Further, I take cognizance of the provisions of section 52 of the Banking Act which I hold were applicable to the transaction as between the Plaintiff and the first Defendant herein. I do not consider that the Plaintiff debited unauthorized fees and charges to the first Defendant\'s overdraft account.

35. The outcome of the above is that I give Judgement for the Plaintiff as against all three Defendants jointly and severally in the amount of Shs. 10,915,612/-together with interest thereon at 15% per annum from the 1 October 2001 until payment in full. I dismiss the first Defendant\'s Counterclaim. I award the costs of the suit including the Counterclaim to the Plaintiff. I should comment that this case is not alone amongst many where defendants come to court hoping to avoid liability on technical matters. The Defendants herein would do well to consider the provisions of *Article 159 (1) (d)* of the *Constitution of Kenya 2010* which provides that justice shall be administered without undue regard to procedural technicalities. To my mind, the second and particularly the third Defendant have shown no remorse in attempting to wriggle out of their liabilities to the Plaintiff and I note that in the 11 years since this case was filed, no attempt has been made to repay or come to some compromise with the Plaintiff herein.

DATED AND delivered at Nairobi this 25th day of September, 2012.

J. B. HAVELOCK
JUDGE