



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 15 of 1998 & 137 of 1998 (Consolidated)

FINA BANK LIMITEDPLAINTIFF

VERSUS

CMC MOTORS GROUP LIMITEDDEFENDANT

CONSOLIDATED WITH

CIVIL CASE NO.137 OF 1998

GUARDIAN BANK LIMITED..... PLAINTIFF

VERSUS

CMC MOTORS GROUP LIMITED.....DEFENDANT

JUDGEMENT

By an order of this court these two cases were consolidated because there are similar legal issues that arise in both suits. The issues for determination in both suits are generally the same and the cause of action of both plaintiffs is against one defendant who allegedly authored the two letters giving rise to the claims by the plaintiffs. It is therefore essential to deal with the facts and issues in a wholesome manner. It is also important to note that the plaintiffs herein each called one witness in support of its claim, while the defendant called one witness to rebut the allegation by the two plaintiffs.

The plaintiff in HCCC No.15/98 shall be referred to as Fina Bank, while I shall refer the plaintiff in HCCC No.137/98 as Guardian Bank. It is also worthy to mention that the two plaintiffs have a separate and distinct cause of action but the facts and issues are largely and primarily the same. In my understanding the basis of the consolidation was because the facts are similar and the causes of action are equally the same. And above all, the issues of law are the same meaning a determination in one suit would affect the outcome of the other suit.

The plaintiff in HCCC No. 15 of 1998 called only one witness who contended that he had no personal knowledge of the matter in issue but gave evidence on the strength of documents produced and filed in court. The plaintiff’s case is based on the documents produced by the same witness. The claim of the plaintiff is for Kshs 30 Million plus interest at 36% per annum together with costs from the defendant being the loss suffered in respect of hire purchase agreement entered into between the plaintiff and its customer Mytrade Limited. The basis of the plaintiff’s claim is that the defendant gave an irrevocable undertaking to do certain things which undertaking the plaintiff relied on to its detriment as the defendant

failed to do those obligations.

In essence the case of the plaintiff is that the bank received a letter dated 16th October, 1996 from the defendant. And that the bank acting on the representations in the said letter paid a sum of Ksh 30 million to Shah Motors Limited. It is important to reproduce the letter which is the foundation of the plaintiff's claim in this suit which reads as follows:-

"The Managing Director

F.I.N.A. Bank Limited

p. o. Box 29613

NAIROBI.

We hereby confirm that the Lorries mentioned below have been sold to Shah Motors Ltd and also give our irrevocable undertaking to register the same in the name of F.I.N.A. BANK LIMITED, P.O. BOX 20613, NAIROBI and MYTRADE LIMITED.

The details of chassis and engine numbers are as follows:-

<i>Model</i>	<i>Chassis</i>	<i>Engine No.</i>	<i>No.</i>
<i>Nissan CWB450</i>	<i>01328</i>		<i>117624A</i>
<i>" "</i>	<i>01329</i>		<i>117623A</i>
<i>" "</i>	<i>01341</i>		<i>117626A</i>
<i>CMC Trailers</i>	<i>18882-1</i>		
<i>" "</i>	<i>18882-2</i>		
<i>" "</i>	<i>18883-1</i>		

Yours faithfully

CMC MOTORS GROUP LTD

The vehicles being sold on hire purchase belonged to the defendant but were being sold to a company known as Shah Motors Limited. It is clear that Shah Motors Limited was a customer of FINA Bank. And Mytrade Limited who was seeking the hire purchase finance to purchase the lorries and the trailers was client or customer of Shah Motors Limited. It is also clear that as regards the Hire purchase facility, Shah Motors Limited took the vehicles on credit from the defendant and sold the vehicles to Mytrade Limited who bought them on finances and/or facilities secured by the plaintiffs. The facility was taken by Mytrade Limited who would then pay Shah Motors Limited for the vehicles and Shah Motors Limited would in turn pay the defendants hence there was no direct relationship between the bank and CMC Motors Limited. As regards the hire purchase the following events took place on 17th October, 1996;

- (1) Mytrade applied to Fina Bank for hire purchase facility for Kshs.30 million.
- (2) That the application was approved by the bank and a facility letter issued to Mytrade Limited.
- (3) A hire purchase agreement was made and executed between the bank and Mytrade Limited.

- (4) A delivery receipt in respect to three motor vehicles and trailers were made and signed by Mytrade Limited.
- (5) A guarantee and indemnity by directors of Mytrade Limited in favour of the bank.
- (6) It is also clear the suppliers were Shah Motors Limited.
- (7) Although CMC Motors Limited were actual sellers of the motor vehicles nevertheless, they had no direct and/or actual contact with the bank in relation with subject matter in this suit.

In the Plaintiff, dated 9th February 1998, the plaintiff claims a sum of Kshs.30 million from the defendant being the loss suffered in respect of a Hire Purchase Agreement entered into between the plaintiff and its customer, Mytrade Limited. It is alleged that the defendant gave to the plaintiff an irrevocable undertaking to do certain things which undertaking the plaintiff relied on to its detriment as the defendant failed to undertake the conditions set out in the letter dated 16th October 1996. The case of the plaintiff is that its customer Mytrade Limited did apply for Hire purchase facilities and since that was not the first transaction, the plaintiff would issue the letter of offer which would spell out all the conditions to be incorporated and to be undertaken by the parties.

The plaintiff insists that the letter dated 16th October 1996 given by the defendant was the cornerstone or bedrock of the whole agreement between the parties. In essence the defendant was to register the motor vehicles jointly in the names of the plaintiff and its customer Mytrade Limited. And as the vehicles in issue belonged to the defendant, the defendant would issue a letter of undertaking to the plaintiff and the plaintiff would rely on that letter to process the facility. And it is on the strength of that letter, that the plaintiff disbursed monies to Shah Motors Limited after all the conditions were fulfilled. It is also the case of the plaintiff that it is only the defendant who could register said vehicles in the joint names of the parties hence making the undertaking contained in the letter dated 16th October, 1996 necessary.

From the documents on record it is clear that Shah Motors Limited took the vehicles on credit from the defendant and then sold them to Mytrade Limited who bought them on hire purchase facility provided by the plaintiff. The facility taken by Mytrade Limited would pay Shah Motors Limited and Shah Motors Limited would in turn pay the defendant.

The defendant through DW1 clearly admitted having issued the letter of undertaking to the plaintiff at the instance of Shah Motors Limited but only denied knowledge that the plaintiff had relied on that undertaking to its detriment. The defendant also stated that it does not know when the letter was received since the letter is dated 16th October, 1996 and funds were disbursed on 17th October 1996. It is the case of the defendant, that the plaintiff had not received the letter dated 16th October, 1996 at the time and the date of disbursement of the funds. It was contended on behalf of the defendant that there is absolutely no evidence that the letter dated 16th October, 1996 was delivered to the plaintiff prior to the plaintiff making payments to Shah Motors Limited. And that the legal burden of proof is entirely with the plaintiff to prove that they relied upon the letter dated 16th October, 1996. The defendant contends that for the defendant to rely upon the contents of the subject letter, it is required to prove receipt of the letter, taking contents of the letter into consideration and acting upon its contents. Mr. Ngatia learned counsel for the defendant urged this court to consider the following factors into consideration in determining the liability of the parties in this dispute.

- (1) The CMC letter does not bear a date of receipt.
- (2) It is unknown when the letter was delivered to the plaintiff and by what mode. If it was hand delivered the person who effected the delivery and when the delivery was made is unknown.
- (3) A cheque of Kshs.25 million was made by the plaintiff in favour of Shah Motors Limited on 17th October, 1996. The cheque was issued earlier enough for it to be presented to Bank of Baroda on the same day.

(4) The application by Mytrade, approval by Fina Bank and all the documentations regarding to hire purchase facility culminating to the issuance of the cheque were done on the same day 17th October, 1996.

(5) In the circumstances of this transaction which was done within one day it was incumbent to tender direct evidence to prove that the letter dated 16th October, 1996 did feature in the transactions carried out by the bank.

It is for those reasons that the defendant alleges the transaction between the plaintiff Shah Motors Limited and Mytrade Limited was not conducted at arms length and it is due to the banks rush to pay its customer Shah Motors Limited that facilitated any loss that may have been incurred by the plaintiff. And in any case, if any loss was incurred by the bank, it was compromised and/or settled through HCCC No.1608 of 1997 between Fina Bank Limited and Mytrade Limited.

Let me now address the issues and facts at stake in the Guardian Bank case. As stated the issues for determination are similar to the Fina Bank case. This case revolves around, as a similar letter as the one dated 16/10/96. The letter in question is dated 12/11/96 and reads as follows:

“The Managing Director

Guardian Bank Ltd

P. O. Box 46983

NAIROBI

Dear Sir,

We hereby confirm that the lorries mentioned below have been sold to Shah Motors Ltd and also give our irrevocable undertaking to register the same in the name of Guardian Bank Ltd, P. O. Box 46983, NAIROBI and MYTRADE LIMITED.

The details of chassis and engine numbers are as follows:-

<i>Model</i>	<i>Chassis No.</i>	<i>Engine No.</i>
<i>Nissan CWB450</i>	<i>01328</i>	<i>117624A</i>
<i>“ “</i>	<i>01329</i>	<i>117623A</i>
<i>“ “</i>	<i>0342</i>	<i>117625A</i>
<i>CMC Trailers</i>	<i>18882/1</i>	
<i>“</i>	<i>18882/2</i>	
<i>“</i>	<i>18883/3</i>	

Yours faithfully

CMC MOTORS GROUP LTD

RV SCHALCH

GENERAL SALES MANAGER – HCVD

The plaintiff called one witness who produced two bundles of documents i.e. the one filed in court on 2nd February 2005 and the additional document filed in court on 14th January 2008. The case stands on the documentations produced more than, the oral evidence because the plaintiff's witness was not a party to the manner and mode that was used to complete the Hire Purchase transaction. From the documents produced it is clear that Mytrade Limited applied for a hire purchase facility from the plaintiff. The facilities were approved on the same day and the letter of offer was issued as indication of the said approval. Mytrade Limited was supposed to produce security to the plaintiff since the vehicles had not been registered. And since Mytrade did not have the logbook, it approached its suppliers Shah Motors Limited who in turn approached the dealer, the defendant herein to give a letter of undertaking subject to this litigation. The application was made on 11th November 1996 and the letter of undertaking by the defendant was given on 12th November, 1996. It is important to note that the funds were disbursed on the same day but the plaintiff maintains that it got the letter of undertaking on 12th November 2006, after all security documents was completed and thereafter funds disbursed.

The defendant takes the position that indeed, it wrote the letter of 12th November 1996 but it does not know when it was delivered to the defendant. It states that this could have been on 13th November 1996 or even a later date but there is no evidence to show whether the letter was delivered and when it was delivered. The advocate for the plaintiff contended that if the letter was delivered on 12th November 1996, then the plaintiff relying on the undertaking contained in that letter has actionable claim against the defendant for its breach. He also contended that all the requirements of the letter of offer by the plaintiff was fulfilled save for the log books while the letter of undertaking stood in for those log books. Thus it is the position of the two banks that they have proved their claims on a balance of probability, therefore the defendant's representation are actionable to warrant judgement to be entered as prayed in the two plaints together with costs.

I have considered the issues at stake in these two matters. I have also considered the pleadings, the documents filed herein by respective parties and the well reasoned arguments presented by the two advocates who appeared on behalf of the parties in this matter.

Having undertaken that monumental obligation, I recognize that the basis and foundation of the two causes of action is the undertaking given by the defendant. I also recognize and reckon the two witnesses who gave evidence on behalf of the plaintiffs were not persons directly concerned with the matters in question or in dispute. In essence the two witnesses had no personal and/or direct knowledge of the events that led to the dispute before me, but largely relied on documentation prepared by third parties who did not come to support the assertions of the plaintiffs. In weighing the divergent positions, that consideration would be a determining and/or defining factor.

The central question is whether the two banks actually relied on the two letters that are the subject of this litigation. And whether the said letters amount to a misrepresentation that could give rise to actionable claim against the defendant. It is clear from the documents presented before court, that the defendant was not a central player in the transaction that gave rise to the dispute before this court. The major players were Shah Motors Limited and Mytrade Limited. It is common ground that Mytrade Limited entered into a hire purchase agreement with the two banks allegedly after fulfilling all the relevant conditions that were prerequisite for such transaction. The question that arises is whether any reliance was placed upon the two letters issued by the defendant.

Secondly whether there was consideration that flowed between the plaintiffs and the defendant as a result of the undertaking subject of this litigation. It is the case of the plaintiffs that there was sufficient consideration between the plaintiffs and defendant by virtue of the fact that at the end of the transaction the defendant was to receive monies borrowed by Mytrade and paid to Shah Motors as the sellers of the motor vehicles. It is also the case of the plaintiffs that the failure of the defendant to register the subject motor vehicles in the joint names of Mytrade and the two banks amounted to a misrepresentation. And that as a result the plaintiffs lost and/or incurred huge damages. It is further contended by the plaintiffs that the defendant by its letter of undertaking dated 16th October, 1996 and 12th November, 1996 made a clear and unequivocal promises or assurances that it would register the vehicles in the joint names of the

plaintiffs and the plaintiff's customer. In my view a representation or misrepresentation is statement of fact made by one party on behalf of another person to or with intention that it will come to the notice of another which relates by way of affirmation, denial, description or otherwise to a matter of fact.

Mr. Gitonga Murugara learned counsel for the plaintiffs submitted that the plaintiffs acted on the confirmation of the defendant that it had sold the vehicles to Shah Motors and that it would register the motor vehicles in joint names of the plaintiffs and Mytrade Limited. The only difficulty in such argument is the conduct of the plaintiffs and the insufficiency to show that the two letters formed part and parcel of the entire transaction. One may be tempted to assume a great deal of facts before that line of argument is accepted.

However, it is essential to state certain issues which are not in dispute between the parties. Firstly it appears the letters dated 16th October 1996 and the one dated 12th November 1996 by CMC Motors Limited was procured by Shah Motors in order to fasten the process of securing the loan facility from the two banks. In the case of Fina Bank, Shah Motors gave three proforma invoices on account of Mytrade which indicated the price and chassis numbers of the subject motor vehicles. Again in a letter dated 17th October 1996 Shah Motors brought to the attention of Fina Bank that it was not possible to register the motor vehicles covered under Hire Purchase agreement within a short period. And owing to the expected delays in registration of motor vehicles, Shah Motors gave an irrevocable undertaking authorizing the bank to recover the net purchase price of Kshs.30 million from its account with the bank should there be a failure to submit an official receipt of registration of the motor vehicles. And on the strength of that letter, Shah Motors Limited requested and obtained payment from the bank of the whole sum covered in Hire Purchase Agreement on the same date the letter was written. It is also clear that Mytrade signed all the necessary documents indicating delivery and/or receipt of motor vehicles. The directors of Mytrade also signed guarantee and indemnity in favour of Fina Bank. Mytrade also provided an insurance cover for the three motor vehicles in a letter dated 16th October 1996. However, in a letter dated 31st May 1997, Mytrade indicated that two of the motor vehicles covered under invoices No.112 and 114 have actually been delivered to them under finance from another bank. It also asked Fina Bank to seek clarification from both CMC Motors Limited and Shah Motors as to the circumstance that led to the change of the earlier transaction. In a letter dated 7th July 1997, Fina Bank requested from CMC Motors the circumstances that led to the change of the earlier transaction and why the vehicles were not registered in their joint names. Fina Bank also brought to the attention of CMC that two of the motor vehicles were registered in the joint names of Diamond Trust Bank of Kenya Ltd and Mytrade Limited.

In the case of Guardian Bank, Mytrade after signing all the relevant documents and acknowledging receipt of the said motor vehicles addressed a letter dated 7th May 1997 to the bank stating that the vehicles covered under Hire Purchase Agreement No. 0028, 29 and 30 have not been delivered to them. And on the same breadth they requested the bank to follow up the matters with Shah Motors Limited. The bank replied in a letter dated 9th May 1997 stating that the vehicles in question relate to payment made by the bank on 12th November 1996 at the instance of Mytrade to Shah Motors Limited. The bank also stated that if the vehicles were not delivered within a reasonable period, the same should have been followed up for quick possession by Mytrade Limited. The bank also reminded that primarily Mytrade was liable for the Hire Purchase Agreement executed and registered with the Registrar of Hire Purchases and that non receipt of the vehicles could not be an excuse for non payment of installments owed and guaranteed. In both scenarios and situations the defendant position was that the vehicles and trailers were ordered by Shah Motors who subsequently obtained finance for their client Mytrade Limited from a different source other than the two banks herein. And that it was Shah Motors who cancelled the earlier orders and entered into new transactions.

In my humble view the letters dated 16th October 1996 and 12th November 1996 cannot be regarded, construed and/or interpreted in isolation from the circumstances and events surrounding the Hire Purchase Agreements that gave rise to the dispute before this court. Time and again it has been the position of the plaintiff that the defendant gave an irrevocable undertaking to register certain motor vehicles mentioned in the two letters in joint names of Mytrade and the two banks. For that contention to succeed it is important to look at the wordings of undertakings given by the defendant which is '*we give an*

irrevocable undertaking to register certain vehicles in the name of the banks and Mytrade Limited’.

In my humble view for that transaction to be completed it was essential for each party to play his role in the transaction, by ensuring the rights, obligations and duties of each party are protected. In order to protect their interests the two banks were required to ensure that all documentations necessary for the completion of the Hire Purchase Agreement was properly executed and registered by all the relevant parties. Secondly, the two banks were also required not to release the loan facilities to Shah Motors before there were adequate measures to protect the interest of the banks in case there was failure by one party not to complete his part of the bargain. By releasing the purchase price to Shah Motors the two banks did not exercise sufficient duty of care that was required and/or necessary in such transactions. It is also my opinion obvious that, by releasing the loans sums to Shah Motors before registration and proper documentation, the plaintiffs herein altered the true position and cannot now be allowed to recover an indemnity appropriate to relieve them from the consequences that was induced in the two letters of undertakings. The two banks were under a duty to use reasonable care, to see that the undertaking given by the defendant was incorporated in Hire Purchase Agreement or that it was a condition precedent for the completion of the agreement. I think a clause that incorporated or embodied the undertaking into the Hire Purchase Agreement was mandatory in order to assign liability to the defendant. That was not done, clearly showing the laxity of the plaintiffs to act in a diligent and responsible manner.

Once again in the case of Fina Bank there is no application by Mytrade for the loan facility that was given by the bank. In essence there was no request for facility by Mytrade in order to justify the urgency and lack of diligence that was expected in a transaction of such magnitude. The Hire Purchase Agreement was completed and signed on 17th October 1996, the three vehicles were allegedly delivered on the same day, guarantee and indemnity was made on the same day and the insurance of the said vehicles was strangely made on 16th October 1996 before Mytrade made an application for a loan facility. Such a conduct and/or circumstances is a clear manifestation that the whole transaction was shrouded in mystery and conducted at the behest connivance of the two banks and Shah Motors Limited. As stated the money was paid on 17th October 1996 and although the loan facility was Kshs.30 million Shah Motors was given a cheque of 25 million. There is no indication how the balance of Kshs. 5 million was disbursed. Again if the letter by CMC Motors dated 16th October 1996 found its way to Fina Bank, the option was to include it in the Hire Purchase Agreement but it was not included. Curiously all the bank documents make no reference to the letter dated 16th October 1996. Moreso there is no evidence from the bank that the letter was ever acknowledged.

It is therefore my position that if the letter dated 16th was not received on 17th October 1997, then it could not have been relied upon by the bank or Shah Motors Limited. The bank did not produce any documents even by way of internal memo to show that it relied upon the letter dated 16th October 1996. The first letter to CMC by Fina Bank dated 7th July 1997 meaning that it was written one year after the bank disbursed the money. According to the evidence and documents on record as at 17th October 1996 the bank through its client Mytrade had possession of all the units that was allegedly not registered in the joint names. It is my humble opinion that the foundation of the Hire Purchase Agreements and all loan facilities, ceased to exist when the two banks failed to incorporate all the relevant, proper, and/or appropriate steps and conditions into the said Agreements. That is evidenced by the fact that the loan amount was remitted to Shah Motors Limited prior to the trucks being registered and physically delivered to the bank and/or its customer Mytrade. I therefore cannot understand how and why payments were made or effected by the banks on the same day when registration was to take place within a reasonable period. There are no circumstances to show that disbursements of funds could not await registration and proper documentation. The fact that end user did not take physical possession of the units is a clear indication that the bank did not follow the correct procedure that was expected from a prudent businessman. There is also clear indication that Fina Bank did not follow with CMC Motors to see if registration was done or not. It is a basic principle of equity that an indolent cannot benefit from his own wrongs.

It is important that it was not possible for the defendant to register the units with joint names of the two banks and Mytrade when there is no evidence to show that it was provided with relevant documents to

effect registration. The documentation for registration was to be provided to the defendant by the persons who were concerned or interested in the said registration. It was not possible to register the motor vehicles in the names of the banks and Mytrade when there is no evidence that payments had been made to the owners. In my understanding that is why the documents for registration was not availed to the defendant. I also make finding that it was not fairly reasonable for the two banks to make a demand against the defendant after the lapse of a considerable period of time. That is a clear indication of a party who was not acting in good faith and with expected due diligence. There is also ample evidence to show that Mytrade had not written any letter of authority permitting the two banks to pay Shah Motors. And a reasonable man would not make disbursement of such huge money before ensuring its interests was adequately protected by way of registration and availability of the relevant documents. The way the transaction in dispute was conducted, shows there were some elements of collusion and deceit perpetrated by the employees of the two banks, directors of Shah Motors and Mytrade Limited in order to achieve their goal without ensuring the interests and rights of the two banks were protected. To my mind the bank's position that it suffered loss as a result of undertaking by the defendant is an attempt to introduce extraneous matter which may not have been intended by the parties to the actual transaction.

From the evidence on record, it is not clear when the two letters were received by the banks. It is not also clear whether the banks disbursed the monies before the receipt of the said letters. The witnesses who gave evidence on behalf of the plaintiffs confirmed that payment was made to Shah Motors Limited following a letter of undertaking written by Shah Motors Limited. In particular Guardian Bank witness was categorical that she did not know when the letter dated 12th November, 1996 by CMC was received by the Bank. In the Fina Bank case similar evidence was adduced that payment was effected pursuant to the request made by Shah Motors Limited.

In my understanding a common denominator in both suits is pivotal role played by Shah Motors Limited in introducing Mytrade to Fina as well as Guardian, procuring approval of two hire purchase facilities on the date of application, notwithstanding that Mytrade Limited was not a customer of either banks. In my consideration I make a finding that there is no evidence to show that the two banks relied on the two letters as a basis of offering the two facilities to Mytrade Limited. The facts in the two transactions is a clear testimony of parties who were not operating and/or transacting at arms length. The two banks were in clear contravention of their own rules by rushing to pay Shah Motors Limited before the vehicles had been registered and before all the documentations were complete. In my humble view the two banks should not be heard to complain as they invited upon themselves what befell on them. It was due to the bank's rush to pay its customer that facilitated any loss that may have been incurred by them. I think it would be unfair to punish the defendant for the wrongs committed by the agents of the banks and its customer or clients. From my own assessment, the employees of the two banks, together with Shah Motors capitalized on a significant lapse in the management and operation of the banks, by releasing and/or getting funds for a transaction, which was improper and fraudulent. I do not think, it was the intention of Mytrade Limited or Shah Motors Limited to finalize the two transactions subject of this dispute. The money was released by the bank before ensuring all documentations were properly in place. The lightning manner in which the two facilities were approved and monies released to 3rd parties (Shah Motors Limited) is a clear testimony, that the two banks did not act in a prudent and/or reasonable manner. It is therefore my decision that the claims against the defendant by the two banks is manifestly ill-founded or incompatible with the intention of the central players namely Shah Motors and Mytrade Limited.

Having meticulously considered all the evidence and the documents on record it is clear in my mind that the sole author of any loss or actions were the employees of the bank who were acting in cahoots with Shah Motors Limited in order to complete the transaction within the shortest time possible so that the central players could benefit. It is clear that the documentations was done on the same day and payment effected in a simulated manner in order to benefit Shah Motors Limited who was the brain and architect behind the two transactions. In my humble view the non action against the Shah Motors Limited by the two banks explains the position that the banks' employees were conducting business in a manner which was not transparent.

In conclusion it is my humble view that the assertion that the two banks relied on letters dated 16th

October 1996 and 12th November 1996 is utterly misplaced. It is misplaced because the real perpetrators of any loss suffered by the two banks were themselves together with their primary client Shah Motors Limited. My answer to the claim by the plaintiffs is that it is an attempt to hide under the guise of a document which they did not intend to use or incorporate in their transaction with their client. It is also clear in my mind that the failure of the two banks not to pursue the primary culprit, Shah Motors Limited gives credence to the fact that they were birds of the same feather enjoying the fruits of their transaction which was not above board and which was meant to defraud innocent third parties. I do not think such an attempt would succeed before this court and it is for the reason stated hereinabove I make a finding that the two suits by the plaintiffs are unmeritorious and are hereby dismissed.

The issue that remains is costs. Ordinarily costs follow the events but the question is whether the defendant should enjoy costs against the plaintiffs herein. It is clear that the two suits were consolidated and heard together. The advocates for the parties expended their energies once and not in separate matters. In the premises the defendant shall be entitled to half costs against each of the plaintiffs. It means that the plaintiffs shall be liable to pay costs on one suit which would be elected by the defendant. Of course the defendant shall be entitled to disbursements against each of the plaintiffs. Orders accordingly.

Dated, signed and delivered at Nairobi this 16th day of January, 2009.

M. A. WARSAME

JUDGE