REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT 86 OF 2000

- **Bank lending**
- **Effect of failure to specify interest rate**
- **Whether charge ineffectual**
- **Attestation of charge –whether it affects the validity thereof**
- **Agreement (if any)**
- **Between co-directors to split joint or several obligations to the Bank.**
- **Does not affect liability to Bank unless communicated to and agreed by bank.**
- **Validity of Statutory Notice, notice to Principal Debtor who is not the chargor not valid**
- **Guarantee – a separate liability from charge – enforceable separately.**

MWANIKI WA NDEGWA……PLAINTIFF

V E R S U S

1. NATIONAL BANK OF KENYA LIMITED

2. MARY MBUKI MUGAMBI .....…….DEFENDANTS

J U D G E M E N T

1. **The Pleadings**

By an Amended Plaint dated 18th July 2002, and filed on 19th July 2002, the Plaintiff sought the orders following:-

1. A permanent injunction to restrain the National Bank of Kenya Ltd (1st defendant) by themselves or their servants or their agents from in any way advertising and/or realizing the debt from the sale of the

Plaintiff property (L.R. No. 3734/198) (the property);

2. A declaration that the charge created over the said property (LR. No.3734 198) is invalid and of no effect in law and an order for the immediate Discharge of the suit property by the 1st Defendant and delivery of the title to the Plaintiff free of any encumbrances;

3. A declaration that the amount which is due in respect of the charge to the first Defendant is jointly owed in equal shares between the Plaintiff and Mary Mbuki Mugambi the 2nd Defendant and the Plaintiff has fully paid up his share thereof (Ksh.5,000,000/-) and is entitled to a refund of any sums paid over and above the sums given to him or the company;

4. A declaration that the Plaintiff was only liable to payment of half of the sum due to the Bank which he has duly paid;

5. A declaration that 2nd Defendant should pay the 1st Defendant (the Bank) her share balance of the loan together with all accrued interest thereon pursuant to the guarantee dated 22nd January, 1996 being her share of the liability for the loan;

6. A declaration that the Plaintiff has only paid his share of the loan advanced and his property LR. No. 3734/198 be discharged;

7. Costs of the suit with interest at court rates.

8. Such other or further relief that the court may deem fit and just to grant.

The Above prayers are premised upon the claims set out in the said Amended Plaint to the effect that;-

(a) The Plaintiff and Mary Mbuki Mugambi were both directors in a company called Mary Mbuki Distributors Ltd which dealt in beer distribution in Karatina Town and its environs (Para 4)

(b) The Plaintiff is the registered owner of the subject property LR. No 3734/198 (Para 5);

(c) The Bank (1st Defendant) granted an overdraft facility of Ksh. 2.3 Million to Mary Mbuki Distributors Ltd in 1995 (Para.6)

(d) The Property was charged to secure a sum of Ksh. 2.3 Million in 1991.

(e) Sometime (2.10.1996) a Further Charge was executed by the Plaintiff raising the secured sum Ksh.5 Million (para 6)

(f) The charge documents were void (paragraph 6A) because:-

(i) It was not executed by the Plaintiff in the presence of an advocate as required by law;

(ii) The charge bore a redemption date of only seven (7) days from the date of execution in contravention of requisite statutory provisions.

(iii) The certificate of execution by Maina Wachira is invalid fraudulent of no effect because-

- **The said Maina Wachira was not the Plaintiff's Advocate.**

- **The Plaintiff had never at any one time prior or after execution seen Maina, Wachira;**

- **The said Maina Wachira never explained (to the Plaintiff) the effect of sections 69(1) and 100A of the Transfer of Property Act 1882 of India (ITPA) as purported in the charge document.**

(iv) The Plaintiff further stated (in para 6D of the Plaint) that the guarantees signed by him were invalid to the extent of failure to comply with statutory provisions.

(v) The said Maina Wachira was not competent to issue a certificate and attest and the alleged breaches of statutory provisions make the securities invalid and of no effect in law.

The Plaintiff further charges against Mary Mbuki Mugambi that she failed to settle her share of the liabilities in Mary Mbuki Distributors Ltd and as a result of the failure by the said Mary Mbuki Mugambi, the Bank advertised the Property for sale.

2. **The Defence**

By an Amended Defence dated and filed on 2nd August 2002 the First Defendant, (the Bank) states that;-

i. It granted credit facility to the 2nd Defendant (Mary Mbuki Distributors Ltd in the sum of Ksh.2.3 Million.

ii. The said sum was secured by a charge over LR No. 3734/198 a property registered in the name of the Plaintiff.

iii. At the request of the Plaintiff and 2nd Defendant as directors of the said Mary Mbuki Distributors Ltd (the company) the Bank increased the facility by Ksh.2.7 Million to become Ksh.5 Million and a Further Charge and Guarantees was executed by the Plaintiff and the 2nd Defendant as additional security.

iv. The Bank denies all allegations or claims of non-compliance with provisions or irregularity in the manner in which the charge and guarantees were executed and put the plaintiff to strict proof.

v. The Bank also denied that the plaintiff made deposits to reduce the debt but instead averred that all the deposits were made in the name of the company Mary Mbuki Districutors Ltd.

vi. The intended realization of the suit property is lawful and in accord with the law to recover the amounts advanced to the company.

vii. The Bank is not obliged to pursue the 2nd Defendant; and that the sharing of the debt is an issue involving the Plaintiff and the 2nd Defendant as Directors of the Company and does not in any way affect the Defendant's statutory powers of sale.

viii. Prayed that the Plaintiff suit be dismissed with costs.

3. **The Reply to Amended Defence of the 1st Defendant**

By a Reply to Defence dated 16th September 2002 and filed on 23rd October 2002 the Plaintiff reiterated the contents of the Amended Plaint and stated that the 1st Defendant's exercise of statutory powers of sale is null and void as it stems from an invalid conveyance.

4. The Issues

Following the closure of pleadings, Mr. K'Opere the Plaintiff's learned Counsel drew up and filed a statement of agreed issues dated 23rd October 2002 and which Counsel for the Plaintiff submitted were only signed by him when counsel for the Defendants declined to do so. These issues were summarized by Counsel for the first Defendant into seven issues;-

1. Were the charge documents over the suit property LR. No.3734/198 properly executed?

2. If not properly executed what is the effect of such improper execution?

3. Were the guarantees properly executed by the plaintiff and the 2nd Defendant, if not what is the effect?

4. Is the1st Defendant obliged to split the debt owed by Mary Mbuki Distributors Ltd as a Company between the Plaintiff and the 2nd Defendant as Directors of the Company?

5. If the charge documents were properly executed, is the 1st Defendant entitled to exercise the statutory power of sale?

6. Does the Plaintiff have a cause of action against the 1st Defendant?

7. Who is entitled to costs?

The issues so framed by the Plaintiff's counsel dovetail into the above captioned issues, and concern matters which both from the pleadings are matters of fact and are not in dispute, namely-

(a) The Principal borrower was the limited liability company called Mary Mbuki Distributors Ltd which was a legal entity separate from both the Plaintiff and the 2nd Defendant, Mary Mbuki Mugambi; the directors of the company.

(b) The company applied for and was granted a loan of Ksh.2.3 Million in the year 1991.

(c) As security in the said loan, the Plaintiff offered his property, No. 3734/198 over which a charge was executed and registered.

(d) As additional security the Plaintiff and the 2nd Defendant executed personal guarantees for the stated loan of Ksh.2.3 Million.

(e) A further advance was made to the company for the sum of Ksh.2.7 Million making a total sum of Ksh.5.0 Million.

(f) A further charge was executed over L.R No. 3734/198 to secure the said aggregate advance, and similar personal guarantees were executed by the plaintiff and the 2nd Defendant.

5. **The Evidence**

P.W.1 was the Plaintiff himself. His evidence confirmed that a loan was advanced to the Company and a further advance was made. He also confirmed that the loan was secured by a charge over his property LR.No.3734/198. He confirmed that he executed the Charge and Further Charge. He also confirmed that he executed a further guarantee, and the second Defendant executed a similar guarantee. The Plaintiff however claimed that the charge and Further Charge were null and void and of no effect in law and therefore unenforceable.

P.W.1 also claimed that as Chargor, he was not given any notice before the First Defendant could as

chargee exercise its statutory power of sale. He applied for and was granted a temporary injunction to restrain the First Defendant from selling his property.

P.W.1 also testified that following the down turn in the Company's operations, which he attributed to the Second Defendant's diversion of funds into another business JOMAKI DISTRIBUTORS LTD he was locked out of the company's management. The company was unable to service its debt to the First Defendant in the sum of Ksh.5 Million. His property was threatened with sale. He therefore secured refinancing from Housing Finance Co. Ltd who granted him Ksh.2.0 Million, and out, of which he paid a Bankers cheque of Ksh.1,976,077.50. He also raised and paid a sum of Ksh.4,951,359.40 from his transport business. P.W.1 testified that he paid a total sum of Ksh.6,927,436.90. He also testified that he had other credits of nearly Ksh.2,100,000/- thus making a total of Ksh.8,027,436.90 In conclusion P.W. 1 testified that out of the sum of ksh. 11,687,630.90 due as at 1.01.2000 he had paid shs.8,027,436.90 leaving a balance of 3,660,194.00 if there was any sum owing at all, which P.W.1 denied.

The first Defendant called two witnesses. D.W. 1 was one Bernard Nyangi Gichuki; the First Defendant's Debt Recovery Officer. He testified that as at 18th February 1999 the loan account reflected a sum of Ksh.7.6 Million had been paid but because of interest only a net of Ksh.4.8 Million was credited to the company's account. D.W.1 testified that as at the time of giving evidence the total sum due was Ksh.21,236,213/60 comprising three accounts;-

(1) Loan A/C 0102044077700 Ksh. 10,748,670.80

(2) O.D. A/C 010244077701 Ksh. 9,790,594.10

(3) Recovery

Charges A/C 010244077702 Ksh. 696,948.70

Ksh.21,236,213.60

And this sum continues to accrue interest.

D.W. 2 was Maina Wachira an Advocate of 31 years standing as a Legal Practitioner whose principal Chambers are in Nairobi and a Branch Office at Karatina. He was the Advocate for the Bank, the first Defendant. He testified that he drew the Charge and Further Charge, and he had the same executed by the Plaintiff and in his presence. He testified that he explained to the Plaintiff the effect of section 69(1) and 100A of the **Transfer of Property Act of India** (ITPA) and he certified that the Plaintiff understood the effect of those provisions. He was taken aback by the Plaintiff's claims he signed the documents in the absence of the Advocate and that he was merely asked by Mr.Maina Wachira's Secretary to sign on the dotted line marked in pencil. D.W.2 testified that the Plaintiff informed him (D.W.2) that he (the Plaintiff) as a former Banker was familiar both with the form of Charge and Further Charge, as well as the form of Guarantee and was willing to and signed the said voluntarily. He did not hesitate that he would seek advice from an independent counsel. The Charge and Further Charge were in his evidence properly executed and attested.

6. **Analysis of Evidence & Law**

As already alluded to elsewhere above in this Judgment the facts of this case are quite simple. This was a case of a bank loan and working capital, with the usual practice of banks, an elaborate arrangement to secure the repayment of the principal and interest thereon, a security by way of charge or mortgage over the borrower's valuable (in the Bank's eyes) immovable property and occasionally movable property such as fixed machinery (Chattels Mortgage) and vehicles so far as the entity (principal borrower or debtor) is concerned, and a personal guarantee by the entity's directors so that they are committed to the proper management of the borrower to ensure servicing or repayment of the loan and interest thereon.

This case was not an exception from these traditional secured loan transactions.

The Plaintiff does not deny this. The Plaintiff pleads that the charge is unenforceable **firstly** because, it did not specify the interest rate, and **secondly** nobody explained to him the effect of Section 69(1) and 100A of the Transfer of Property Act of India/882 as amended by the transfer of Property Act (Amended) Act of India 1959.

The Plaintiff further contends that he was not given any notice here to redeem the property before the first defendant exercised its statutory power of sale.

The Plaintiff also contended that he had paid his portion of liability namely sh.5 million as per the personal guarantee, and the First Defendant should sue or demand the balance if any from the said Defendant.

THE PRINCIPAL ISSUE AND OTHER ISSUES

The principal issue in this entire case is the validity or otherwise of the Charge and Further charge. The other issues are peripheral to this main issue.

Mr. K'Opere learned counsel for the Plaintiff cited to the court no less than ten (10) authorities on the other matters which I have referred to as peripheral but also have a bearing on the ultimate decision on this matter. I will deal with these issues before reverting to the main question of the validity of the charge or otherwise and consequences either way.

(A) **OF THE RATE OF INTEREST**

The charge executed herein provided for a rate of interest to be charged by the Bank from time to time, clause 1(a)of the Charge dated 16th October 1991 the Further Charge dated 2nd October 1996. These provisions of the Charge and Further Charge superseded those of the letters of offer dated 23rd February 1996, which provided a lending rate of 28% for the loan and 30% for the overdraft facility. The effect of the covenants under the Charge and the Further Charge was to provide for a floating rate of interest, and not a fixed rate as provided for in the letters of offer.

Mr K'Opere relying on the case of **SHAH VS GUILDERS INTERNATIONAL BANK LTD [2003] KLR. 8** contended that Banks must specify the exact lending/interest rate in the instrument of lending i.e Mortgage or Charge. And where they do not a Chargor who is not the principal lender can only be liable to the extent of the sum secured and nothing more. The said Counsel also contended that any such variable interest charged would only be binding upon the principal debtor for the loan or overdraft and that on that basis the Plaintiff's liability not being the principal debtor would be limited to Ksh.5 million and which he had over – repaid, after default by the principal debtor.

I have perused the case of **Shah vs Guilders International Bank Ltd [2003] KLR. 8**. It has no such holding as those suggested by learned counsel for the Plaintiff. The Court of Appeal held that Banks ought to specify in their lending agreement what interest is payable, because if they do not do so, they risk leaving that discretion to the court to fix interest rate under 26(1) of the Civil Procedure Act, Cap 21 Laws of Kenya.

Mr. K'Opere's propositions would only have been correct where the Guarantee had a specified rate of interest and the principal instrument of loan had a variable interest rate or a clause giving the Bank the right to vary the Interest rate. A variation in the principal or main Agreement without reference to the Guarantor would of course not be binding upon the Guarantor, as he would not be party to it.

In the case at hand both the Charge and Further Charge in clause 1 (a) 2 thereof the last 13 lines of that clause, the Mortgagor that is to say, the Plaintiff, covenanted with the bank, the First Defendant on 24th

October 1991, to pay the sum of Ksh.2,300,000/- as may then be due and owing by the borrower (Mary Mbuki Distributors Ltd) together with bank charges legal and other costs, charges, expenses and together with interest at such rate or rates as the Bank shall in its sole discretion from time to time decide with full power to the Bank to charge different rates for different accounts, such interest to be calculated on daily balances and debited monthly by way of compound interest (PROVIDED ALWAYS) that the bank shall not be required to advise the borrower or the mortgagor prior to any change in the rate of interest so payable nor shall any failure by the Bank to advise the Borrower or the Mortgagor as aforesaid prejudice in any way howsoever the recovery by the Bank of Interest charged subsequent to any such change.

Clause 1(a) of the Further Charge dated 2nd March1996 is in similar vein. The Charge and Further Charge were duly signed by the Plaintiff in the presence of an Advocate Maina Wachira who has testified that the Plaintiff was well aware and/or familiar with the terms of these instruments having been a banker with the First Defendant bank. Although the rate of interest to be charged is not spelt out in figures the covenant is clear, the rate shall be that determined by the Bank from time to time and notice to the plaintiff was dispensed with. That is what the Plaintiff covenanted with the Bank. That was his contract, the court will not rewrite it for him. The authority of **Shah vs Guilders Internationl Bank Ltd [2003**] is of no help to the Plaintiff.

(B) OF WHETHER THE GUARANTEES WERE VALID AND OF THE EXTENT OF LIABILITY.

The Plaintiff signed two guarantees. One dated 16th October 1991 in which the Plaintiff guaranteed to pay ksh.2,300,000/- advanced to Mary Mbuki Distributors Ltd (the borrower). Upon the enhancing of the credit by 2,700,000/- the total sum advanced to the borrower rose to Ksh.5,000,000/-. The Plaintiff consequently executed another fresh guarantee for shs.5,000,000/-. The said document is in the Bank's standard form, and interest would be calculated with the usual rests at the ruling rate from time to time for bank advances in Kenya [(Clause 2 proviso (i) (ii)).

Again, that is what the Plaintiff covenanted under the guarantee. What is a ruling rate is a question of fact which could be ascertained at any time by the Plaintiff. The court will not rewrite the covenant for him. That is what he covenanted, and must live with it. The point of inquiry is what amount is the Plaintiff liable for under the guarantee.

Clearly under clause 2 of the guarantee the plaintiff liability is stated to be Ksh.5,000,000/- plus interest at ruling rates. The plaintiff claimed in his evidence the amount outstanding as at December 1996 was Ksh.6,162,117/-. Of this sum, the plaintiff claimed that he had between April 1997 to April 1998 paid Ksh.5,301,354.41, and further pleaded that if the 2nd Defendant had also paid her portion of the liability to the extent of Ksh.5,000,000/- the debt to the First Dependant would have been paid in full and the charged property would not have been affected. The Plaintiff attributed this fault to the 2nd Defendant.

Whereas this may be so it does not exonerate the plaintiff from liability under his own guarantee for the principal, interest, and other costs and charges. The Bank is not obliged to follow the Second Defendant if it can recover all the outstanding moneys from the plaintiff as guarantor. The Plaintiff is at liberty to follow the Second Defendant for indemnity. The court will not therefore absolve the Plaintiff from such liability or direct the 1st Defendant to pursue the Second Defendant as co-guarantor.

(C) OF WHETHER THE CHARGE AND FURTHER CHARGE WERE VALID AND THEREFOR ENFORECEABLE

This is by far the jewel in the Plaintiff's contention that he was not liable under the Charge and Further Charge because **firstly** the said instruments were not properly executed and attested, and

secondly even if the said documents were valid he as Chargor was never been given or served with any notice as is required by law and that by reason thereof the said instruments are invalid and unenforceable.

C(i) Whether The Charge And Further Charge Were Properly Executed And Attested.

The Charge was prepared and executed and registered in terms of the Registration of Titles Act Chapter 281 Laws of Kenya. Section 46 of the said Act provides for the form of charge as set out in the First Schedule thereto. There was no challenge that the form of charge were in accord with that Section.

Section 58(1) of the said Registration of Titles Act, provides that every signature to an instrument required to be registered under the Act and required to be deposited with the Registrar (of Titles), shall be attested by one of the persons enumerated under the Act. An Advocate is one of the persons prescribed and empowered to attest such instrument as aforesaid.

D.W.2 was is one Maina Wachira an Advocate of the High Court of Kenya and of 31 years standing. His evidence was that the Plaintiff executed the Charge and Further Charge in his presence at his Karatina Office or Chambers. I found the said Advocate's evidence straight forward, and I have no cause to doubt that the Plaintiff actually executed the said instruments in the presence of said Advocate and that he attested to such execution as is required under section 58(1) of the Registration of Titles Act.

C(2) Of Whether The Charge And Further Charge Over The Suit Property Are Valid.

This question was partially answered by holding that the Charge and Further Charge were properly executed and attested as by law required. What has not been answered is the question whether the Charge and Further Charge are valid and enforceable in terms of Section 69 and 100A of the Transfer of Property of India (1882), and whether the Certificate issued under said provisions was valid.

Section 69(1) of the Transfer of Property Act (ITPA) confers upon a mortgagor or any person acting on his behalf statutory power to sell the mortgaged property without intervention of the court once the mortgage money has become due for payment. Such money becomes due for payment either the day fixed for repayment thereof by the mortgage instrument has passed or some event has occurred which according to the terms of the mortgage instrument, renders the mortgage money, or part thereof immediately due and payable.

It was common ground among the parties that the mortgage money had become payable principally because, the day fixed for payment had passed. The Plaintiff however contended that the first Defendant was not at liberty to exercise its statutory power of sale because it had not complied with the statutory requirements of Sections 69A of the ITPA, namely that a mortgagee shall not exercise the mortgagee's statutory power of sale unless and until;-

(a) a notice requiring payment of the mortgage money has been served on the mortgagor, or one or more mortgagors,

(b) Default has been made in the payment of the mortgage money or part thereof for three months after service of such notice.

(c) Some interest under the mortgage is in arrear and remains unpaid for two months.

(d) There has been breach of some provision in the mortgage on in the Act, on the part of the mortgagor or some person concurring in the making of the mortgage, besides a covenant for payment of the mortgage money.

In addition to the above captioned restrictions on the exercise of statutory power of sale the ITPA also requires by section 69(4) that the mortgagee's statutory power of sale is only applicable or valid where;-

(a) Mortgagor's signature to the instrument has been witnessed by an Advocate to the effect that he has explained to the mortgagor the effect of subsection (1) of the section (69(1) and he was satisfied that the mortgagor understood the same;

(b) A contrary intention is not expressed in the mortgage instrument;

(c) The mortgage instrument is executed after the commencement of the Indian Transfer of Property Act (Amendment) Act, 1959 (i.e. 5th May 1959)

The Plaintiff's thrust of evidence was that he signed the Charge and Further Charge on a dotted line marked in pencil, which was shown to him by the Advocate's Secretary that the Advocate never explained to him the effect of section 69(1) of the Transfer of Property Act of India. This evidence was however never corroborated by any one not even the Secretary concerned. There was no indication that he called the Secretary to come and testify and that the Secretary refused to do so.

On the contrary Maina Wachira testified that the Charge and Further Charge were executed by the mortgagor/chargor, the Plaintiff in his presence. The Advocate testified that the Plaintiff joked and said to him that as a former banker, not only with the Defendant Bank but also ABN AMRO Bank his last employer, the plaintiff was familiar with the instruments of Charge and Further Charge. There was no contravention of that evidence in cross – examination of Mr. Maina Wachira by the Plaintiff's Counsel.

In the premises I am satisfied that the Plaintiff did execute the Charge and Further Charge in the presence of an Advocate, Maina Wachira, who upon witnessing such signature explained to the Plaintiff the effect of section 69(1) read together with section 100A of the ITPA that a chargee under charge executed in accordance with the provisions of 46 of the Registration of Titles Act and duly registered under that Act has the same rights, powers and remedies (including the right to take proceedings to obtain possession from occupiers and the persons in receipt of rent and profits or any of them) as if the charge were an English mortgage to which section 69 of the Act applies.

Mr. K'Opere learned Counsel for the Plaintiff brought in argument and cited authorities to the effect that the Charge and Further Charge were invalid because the Applicant did not get independent advice, and signed blindly those instruments and the same cannot therefore be valid. The premier authority for the that proposition was my decision in the case of **MONICA W. GICHIMU VS KENYA COMMERCIAL BANK & 2 OTHERS** (Milimani Commercial Courts **HCCC No. 2708 of 1998).**

That case concerned the fraudulent acts of a son who procured his mother an elderly and almost bed-ridden lady to thumb print documents of charge and a personal guarantee without either taking her to an Advocate or even explaining to her the purpose for which she was signing the documents. On that basis I held that a charge secured by undue influence from the son without explaining the nature of the transaction and in favour of a third party Bank was not enforceable or effective. It was the same in the English case of **AVON FINANCE CO LTD VS BRIGER AND ANOTHER [1985] 2 All E.R. 281** a son securing the signature of his elderly parents to a charge to secure a loan for the son's company. In that case the court held that it could not enforce a transaction entered into without independent advice where the terms of the transaction were very unfair and there was inequality in bargaining power with undue influence. Such transaction is voidable in equity.

The unfairness and undue influence relate to the events or actions precedent to the execution of the security instrument and not to the subsequent scenario following the execution. It is in appropriate circumstances, the duty of the Creditor Bank to take reasonable steps to satisfy itself that the party entered the obligations freely with full facts and independent legal advice. This is the ideal position. It is not always so often times borrowers are not choosers. The borrower is in a hurry to get funds. He/she

does not mind going to the Creditor Bank's Advocate to execute the security instruments. The duty to obtain independent legal advice is not a statutory duty. It is a common law right to prevent avoidance of contracts on grounds of undue influence or duress. Each case must however depend on its own particular facts.

In this case the Chargor is a director in a prosperous beer distribution company. He is desirous of enhancing that company's working capital. He with a co-director approach the 7bank who makes an offer for a loan on terms, one of which is a security by way of charge over the Plaintiffs property. The Plaintiff and co-director the 2nd Defendant by way of acceptance sign the offer letter. Without executing the (charge) there would be no loan. The Plaintiff a former banker would surely understand what it means if he defaulted in payment of the loan. The Bank would in exercise of its statutory power of sale, dispose of the charged property. I doubt that "**independent**" legal advice would be different from what he already knew, and had as a banker practiced for the bank he had worked. He cannot plead the case of the elderly **Monica Wairimu Gichumu** nor that of the eldery **Bridger** in the England Case of **Avon Finance vs Bridger and Another** (supra). These cases and others cited by counsel for the Plaintiff are of no avail to the Plaintiff. I must therefore find and hold that the Plaintiff executed the Charge and Further Charge freely with full facts and was aware of the legal consequences which were in addition explained to him by Maina Wachira the first Defendant's Advocate and the said Charge and Further Charge are valid and enforceable.

C(3) Of the Equity of Redemption and Repayment Date

It was one of the Plaintiff's contentions that the Charge and Further Charge were defective and he was not liable thereunder because the Charge and Further Charge bore a repayment date of only seven (7) days from the dates of execution in contravention of the Statutory requirements.

This is, with respect to learned counsel for the Plaintiff a misconception of the law regarding a mortgagors/ Chargor's equity of redemption and the date fixed for repayment after which date the chargor is at liberty to redeem his property by paying off the amount received as loan. This date is not to be confused with the statutory notice which must be given before a chargee or Mortgagee may exercise his statutory power of sale.

Under the law governing charges and mortgages, a Mortgagor can deal with his property the way he likes, but consistent with the rights of a mortgagee or chargee. He has an equitable right to redeem the property after the day fixed for payment has gone by or past, but his right or equity of redemption is no longer an equitable estate or interest.

Under our present system of creating legal mortgages, the mortgagee only takes security by way of charge and even in conveyances under the Government Lands Act (Cap 280 Laws of Kenya) the **transfer or conveyance is by way of charge** and the mortgagee takes a term of years leaving the legal free hold or leasehold reversion on the mortgage term in the mortgagor or chargor.

Thus the mortgagor/chargor retains his legal freehold or leasehold estate and cannot at the same time have an equitable estate co-extensive with it. Hence instead of an equity of redemption constituting an equitable estate or interest, it subsists only as a right in equity to redeem the property.

The fixation of a repayment date did not therefore take away the Plaintiff's equity of redemption or contravene any provision of applicable law.

C(4) Of Whether The Plaintiff Was Given A Statutory Notice Before the Exercise By The Bank Of its Statutory power of Sale.

In the case of **KOSITANY & ANOTHER VS ICDC & ANOTHER [2004] 2 KLR 440**; I held that where a charge is valid the statutory notice must be sent to the chargor and not the principal debtor, even

where the chargor is a director of the principal debtor of the Company.

The reason for that holding is clear. The Principal debtor is not the chargor. The law as cited above required the notice to be sent to the chargor or mortgagor unless of course the principal debtor and the chargor are one and the same person juridical or natural.

The issue here is whether a valid notice was sent to the plaintiff by the plaintiff or the plaintiff's duly appointed agents. A record of the documents filed shows that such a Notice was sent to the Plaintiff per letter dated **5th August 2003**. This was a valid notice but its effect was vitiated by the fact that there was at the time an existing court order restraining the First Defendant from selling or advertising the suit property till the 13.08.2003. In view of the existing Order any attempt at realization of the security was in contempt of court. Although the order lapsed, the contempt of court was never purged by the first Defendant. Any further attempt by the First Defendant to realize the property were thwarted by the fear that the plaintiff might invoke the futile attempt made in clear violation of the court order and hardly for any altruistic motives by the first Defendant.

The position as of now is that there is no valid notice given by the First Defendant to the Plaintiff in terms of the statutory requirements of Sections 69A of the Transfer of Property Act of India. Until and unless such notice is given the First Defendant is not in a position to exercise its statutory power of sale. I might add that statutory notices dated 9th January and 25th December 1998 to the Principal debtor were not in law notices to the Chargor and were therefore invalid, and unenforceable. See the case of **KOSITANY VS ICDC & ANOTHER** (Supra).

C(5) Whether The Guarantees executed By The Plaintiff And The 2nd Defendant Are Valid And If So To What Extent?

A guarantee in law is an undertaking by one or more persons to another person or persons to be liable and make good the liability or obligation of another person or persons. The consideration usually is in the form of some benefit accruing from that other person to the person whose liability is being guaranteed. This is a covenant which attaches to the person natural or juridical who gives the undertaking or guarantee.

In the case at hand the Plaintiff and second Defendant gave personal guarantees to the first Defendant. The consideration was the loan by the first Defendant to the third party Mary Mbuki Distributors Ltd. The Plaintiff and Second Defendant both signed letters of offer from the First Defendant the terms of which included the execution of guarantees by the Plaintiff and the Second Defendant. Although the second Defendant opted not to give any evidence, there was no evidence by the Plaintiff that his signature of the letters of offer was procured by undue influence or duress by the First Defendant. The guarantees were therefore duly executed and are binding upon the Plaintiff and the 2nd Defendant in accordance with their terms.

Learned Counsel for the Plaintiff contended that if the guarantees were valid, then the liability of the plaintiff and the Second Defendant extended to the sum in the guarantee, and not any other or subsequent debts and charges. **BOLTON VS SALMON [1891]2 CH(CP) 48.**

There is no question of subsequent debts or other charges. The Plaitiff's and Second Defendant's guarantee was for the principal sum of Ksh.5,000,000/-. In addition thereto was the interest and other bank charges which the Plaintiff and the Second Defendant covenanted to pay. The Plaintiff's and Second Defendant's liability is therefore for the principal sum, interest and costs, inclusive of allowable bank charges which the Plaintiff and Second Defendant covenanted to pay. Neither the Plaintiff nor the Second Defendant can be discharged from such liability under the guarantees.

C(6) - <u>Of Whether The Plaintiff Has Discharged His Obligation To The Bank (First Defendant) As Chargor And Guarantor Of The Debtor Company</u>.

From the above analysis of the obligations of the Plaintiff as chargor as well as guarantor of the loan to **Mary Mbuki Distributors Ltd,** the principal debtor, it should be clear that the plaintiff has not discharged his obligations either as chargor or guarantor. This is not to deny that the Plaintiff made substantial payments to the Bank – 1st Defendant towards the discharge of his obligations as both chargor and guarantor. Unfortunately for the Plaintiff he failed to negotiate with the Bank to split his personal liability as such chargor and guarantor from the liability of the Principal Debtor, **Mary Mbuki Distributors Ltd**. The consequence of this failure is that whatever payment he made to the Bank, the first Defendant, went not to his Credit but to the Credit of the said Principal debtor. Whatever arrangement (if any) made between the Plaintiff and the Second Defendant to split the debt did not get the sanction of the Bank with the consequence now of both the Plaintiff and the Second Defendant remaining heavily indebted to the Bank the First Defendant.

C(7) <u>Should the Bank follow the 2nd Defendant and/or the Principal Debtor Company for the balance of the Loan</u>?

So long as a debt is outstanding and is not barred by limitations of action law, or is otherwise compromised, the First Defendant as lender is always at liberty to seek redress or payment not merely from the principal debtor or borrower but whosoever became bound under the terms of the lending instrument. Such persons include any guarantor or chargor under the separate instrument of charge and guarantee.

<u>C(8) - what orders as to costs or any other relief as sought in the Amended Plaint</u>

This is a last prayer, and I will address it in the last orders.

<u>CONCLUSION</u>

Having surveyed the pleadings, the evidence, and analysed the evidence and the law I find and hold as follows:-

1) The Principal Debtor is of course, Mary Mbuki Distributors Limited, to whom the loan was made, and not either the Plaintiff or the Second Defendant who were the directors of the Principal Debtor.

2.) The Plaintiff and the Second Defendant are liable not as directors of the Principal Debtor but under their personal covenants under the instruments of guarantee.

3) The Plaintiff is, in addition to the Guarantee, separately liable under the charge and further charge, which are valid and enforceable in accordance with their terms;

4) Similarly the guarantees for the original sum of Ksh.2.3 million, and further consolidated by an additional sum of Ksh.2.7 Million to Ksh.5.0 Million are valid and enforceable in accordance with their terms.

5) Neither the Plaintiff nor the 2nd Defendant has discharged his/her respective obligations to the bank, as chargor or guarantor.

6) In view of the existence of the liabilities by the plaintiff as chargor to the bank, the Charge and Further Charge over LR. No. 3734/198, (Lavington) will only be discharged once those liabilities are settled by payment or write off by the Bank.

7) The First Defendant as the lender, is at liberty to follow all or any of the guarantor or guarantor as guarantor or as chargor; so long as the original debt is outstanding.

8) The Plaintiff is therefore not entitled to any of the declarations and or further reliefs as prayed in the Amended Plaint dated 18th July 2002.

9) The Amended Plaint did not reveal any cause of action against the Second Defendant in relation to her actions of kicking out the Plaintiff from the premises where the Principal Debtor conducted business and starting a separate Beer Distribution business under the same agency in the same premises. There was for example no Plea that as result of the loss of the agency to another company the Plaintiff paid off the bank for the outstanding debt of the principal debtor and for which the Plaintiff claims from the second Defendant. Instead the Plaintiff's thrust of attack was to impugn the Charge and Further Charge and guarantee, which as I have held above failed.

D COSTS

It is painful for the Plaintiff but costs do follow the event and in this matter as aggrieved as the Plaintiff has demonstrated, he failed to look back and say, the business to which the Second Defendant invited him after resigning his lucrative .job with ABN AMRO Bank had failed, how do we settle the outstanding liabilities to the Bank?

Instead the Plaintiff acted a lone ranger, he arranged for re-financing of his major obligations through Housing Finance Company of Kenya Ltd and took proceeds from his transport business and paid into the account of the principal debtor. He might have talked to and said to the Bank, I am putting this, my money, into an escrow account pending the settlement with Principal debtor. That way, the Bank might have recognized his contribution at least under the guarantee. The Plaintiff however put his money into the bottomless pit of the principal debtor's account and by so doing he unwittingly contributed to his own financial burden, and having engaged in protracted litigation and failed to win, costs on his part are inevitable.

The Plaintiff's suit comprised in the Amended Plaint dated 18th July 2002 is therefore dismissed with costs to the first Defendant only. The second Defendant is not entitled to any costs having largely contributed to the collapse of the Principal Debtor by moving the beer distribution agency from the Principal Debtor to another entity controlled by her under the name JOMAKI DISTRIBUTORS LTD., and thus leaving the Principal Debtor existing merely in name, but otherwise a worthless shell, and also because the Second Defendant failed to testify in the matter.

For the avoidance of doubt there is no valid subsisting statutory notice to the Plaintiff as chargor, and the First Defendant has no statutory right to sell the suit property, directly or by agent until compliance with the requirements of the law.

For all those reasons, and save as specifically found and held as stated above, the Plaintiff suit is dismissed with costs to the First Defendant only.

Dated and delivered at Meru this 4th day of April 2008.

M.J. Anyara Emukule

JUDGE