REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CIVIL CASE 672 OF 2002

DELPHIS BANK LIMITED (Under Statutory Management)….....PLAINTIFF

VERSUS

SHIELD HIRE PURCHASE LIMITED & FOUR (4) OTHERS.....DEFENDANTS

JUDGMENT

The **FACTS** in this suit are briefly as follows:-

In August 1995, the 1st Defendant SHIELD HIRE PURCHASE LIMITED, approached and obtained an overdraft facility from the Plaintiff, DELPHIS BANK LIMITED. The overdraft was for KShs.15 million, which, upon the request of the 1st Defendant, was increased from 15 to 20 million on 9th Mary, 1996.

The 2nd Defendant – SOUTHERN SHIELD HOLDINGS LIMITED is sued pursuant to a Corporate Guarantee, while the 3rd and 4th Defendants A.K. KURJI and S.K. KURJI respectively, are sued pursuant to personal Guarantees they had issued to secure the indebtedness of the 1st Defendant. The two are also Directors of the 1st and the 2nd Defendants.

The 1st Defendant defaulted in paying the amount utilized in the overdraft facility hence this suit, which seeks to recover K.Shs.21,863,070.56 with interest at 22.5% from 28/02/2002 till payment in full and costs from the 1st Defendant.

It is important to stress that the 3rd and 4th Defendants were the Directors of both the 1st and 2nd Defendant companies and hence through the appropriate resolutions, they signed for the 1st and 2nd Defendants, as directors, as well as signing their own personal and individual guarantees.

The facility was renewed annually at the end of every year, and so were the terms and conditions, which included new guarantees. The 1996 guarantees were to remain on a continuing basis for the facility commencing 9thJanuary 1999.

The last facility was offered on 29/2/2000 and confirmed on 29/2/2000 and included an additional term namely, a debenture for 20 million by the 1st Defendant over and above the guarantees by all the three Defendants in their respective capacities. In addition there was a 10% interest or such higher rates over and above the stipulated rates in the event the borrower exceeds the limit or was in default or delay in fulfilling any other conditions set out in the letter of offer. Personal Guarantees to support the letter of offer were given by the 3rd and 4th Defendants on 24/9/1999.

It is important to stress that the personal guarantees by the 3rd and 4th Defendants were given on 24/9/99 while the letter of offer, for the facility, was dated 29/2/2000.

Upon default by the 1st Defendant the Plaintiff wrote a demand letter, dated 21/2/01, addressed to the **Directors - Shield Hire Purchase Limited** – the 2nd Defendant. There were further demand letters on 26/7/01 and 5/3/02, but all addressed to the Directors of the 2nd Defendant.

The Plaintiff, further avers and contends that all the Defendants were notified of the default of the 1st Defendant and that the Directors 3rd and 4th Defendants are DEEMED to have been served with demand letters in both capacities as directors and in their individual capacities.

Finally, the Plaintiff contends that the Defendants withdrew their counter-claim, through their counsel.

The Plaintiff called only one, witness MR. HARPOON KIMANI KURIA, a Senior Credit officer with Plaintiff Bank, who narrated to the court on how the 1st Defendant approached and obtained the overdraft Facility from the Plaintiff, initially for K.Shs.15milliion, which was later increased to K.Shs.20million; the terms and conditions for such facility which was renewable every year; the securities for such facility which included a corporate guarantee by the 2nd Defendant company and personal guarantees from the 3rd and 4th Defendants who were also the Directors of both the 1st and the 2nd Defendant companies: Apart from the 1st facility, the witness was unable, and did not produce the guarantees by the three guarantors insisting that the guarantees were continuing guarantees, while admitting that each facility had to be renewed annually on pain of lapsing. Each had a renewable and expiry date of 31st August each year, effective from 1996. Effectively, testified the witness, every facility had to have fresh guarantees. But from his evidence and documentation the only fresh guarantees for the 2nd facility, which was produced in court, was the guarantee by the 2nd Defendant. The 3rd facility, for K.Shs.20million, required securities on top of a debenture by the 1st Defendant for 20 million. But the witness was unable to produce any guarantees for the 3rd facility, which was reviewable on 30/9/1999. Further, the witness stated that the 4th facility, which included, over and above the guarantees by the 2nd, 3rd and 4th Defendant guarantors, a debenture by the 1st Defendant, raised serious questions. Firstly, the renewal of the facility was 29/2/2000, while the Refresher guarantees were signed on 24/9/1999. For clarity, the guarantees were given before the facility was offered, much less given!

The witness was unable to explain how a debenture dated 28/3/2000 had not been registered until 24/7/2000. In other words, the debenture had not been registered till 24/7/2000. In cross-examination, the witness admitted that by the time the Plaintiff procured guarantees in 1998, the 1st Defendant's account already had a debt – that is to say that the debt preceded the guarantees. And finally, the witness was unable to explain how the 1st Defendant was charged extra interest, amounting to over K.Shs.500,000/- for overdrawing the facility when out of the allowed limit of 20 milli9on, just over 18 million had been withdrawn.

In conclusion, whereas the witness stated that demands were made to all the Defendants, on cross-examination, he admitted that only one letter of demand was made, addressed to the 2nd Defendant, and that the addresses used were not those given by the guarantors in their personal and individual guarantees.

In their defences, the Defendants called two witnesses: one – ERICK OCHEING OUKO – by the 1st Defendant; and AKERALI KARIM KURJI – the 3rd Defendant/guarantor, who testified on behalf of himself and the 2nd and 4th Defendant/ guarantors.

The first Defence witness – D.W. 1 – admitted that 1st defendant had an overdraft facility with Plaintiff, but pointed out that there were several charges made while the account was not in excess of the limit. He stated that the Plaintiff had charged interest on both the overdraft and excess without cause as the limit had not been reached much less exceeded. The interest on the excess was K.Shs.513,702/60. The

witness admitted 1stDefenant's debt to the Plaintiff. He further told the court, on cross-examination, that the guarantors were not involved in the day-to-day activities and running of the 1st Defendant company. He further stated that as at 1998, the 1st Defendant's account was K.Shs.18,535,980/26,which was within the limit of K.Shs.20million authorized. He told the court that the guarantees for the 4th facility of 29/2/00 had not been produced by the Plaintiff. He further testified that normally, banks would not renew an unpaid or irregular facility. He further said that for every fresh guarantees given, the immediate last guarantees would lapse.

D.W.2 testified as under:

That the 1st facility was by an offer letter dated 8/8/95, and that the 1st Defendant enjoyed a facility of 15million. The second facility, for 20 million, was a letter dated 15/8/96, and was expiring on 30/9/97. The witness said that although the guarantors signed the guarantees for the 2nd facility the Plaintiff had not produced those guarantees. Similarly, Plaintiff had not produced the guarantees for 3rd facility for 20 million evidenced by letter of offer dated 9/1/1999.

On the so-called refreshers, the witness told the court that in the guarantor's understanding the re-freshers were of no consequence because, by 1999, the 1996 guarantees (not produced) had lapsed and been overtaken by fresh guarantees together with the lapse of the annual facility. The witness said that the expiry of each facility meant that either the facility had been repaid, terminated or new arrangements made about it; and for each new facility, new guarantees were required. The witness stated categorically that there was no knowledge of an agreement for the guarantors to provide security for the 1st Defendant's indebtedness. On the guarantees dated 24/9/1999 the witness confirmed that they had been properly signed, but there was no offer letter on which those guarantees stood, produced in court. For the 4th facility, the witness stated that there were no guarantees produced.

On the debenture the witness said it was anomalous because it had been signed and forwarded in March 2000, yet it was dated 24/7/00, and registered in august 2000. He stated that the debenture was not genuine. Further, the witness stated that the Plaintiff did not enforce the debenture before suing the guarantors.

The witness stated that there were no demand letters to all the guarantors before the guarantors were sued. The letter dated 5/3/02 was addressed to Box 34181, Nairobi, and addressed to 1st, 3rd and 4th Defendants – it was not sent to the 2nd Defendant. The witness told the court that no demand letters were sent to the guarantors in their respective addresses and those purported to have been sent were not addressed to the guarantors addresses. Further, the witness stated that guarantees are payable on demand and in the absence of demand, the guarantors are not liable to pay.

Finally, the witness stated that though the facilities ran throughout the relationship between the 1stDefendant and the Plaintiff, for every facility there were different terms and the offer letters. For the example offer letter of 29/2/00 were signed and sent on 28/3/00. The witness concluded that Plaintiff was relying on guarantees dated 24/9/1999 to support the offer letter dated 29/2/00, and such guarantees signed before the contract were not applicable.

The foregoing is the defence for the 2nd, 3rd and 4th Defendants who are the guarantors of the 1st Defendant company. They are represented by Mr. Mwangi Advocate.

The 1st Defendant is represented by Mr. Mukuha Advocate and their case and submissions can briefly be summarized as under:

The 1st Defendant avers that the Plaintiff is the Bank with which the Defendant opened an Account, yet the Statements of account, reflect two Banks – Delphis Bank Limited (now under statutory management) and Oriental Commercial Bank Limited to which the Plaintiff claims to have changed its name to. But there is no documented evidence of such change. Further, the Plaintiff never bothered to amend its

pleadings to reflect the change. The name Oriental Commercial Bank was casually introduced by P.W. 1 during the hearing in court.

Further, the Defendant contends that it opened its account with Delphis bank Limited, Account No. 01042391, yet the account by which the Defendant is sued is No. 010016718, an account the Defendant knows nothing about and did not consent to at any given time. The Plaintiff's counter to that is that the new Account No. came about when the Plaintiff was moving from one system to another. The Plaintiff does not controvert that the Defendant was neither consulted nor did it consent to the new account No. 0100167018. On this basis, the Defendant avers that parties are bound by their own pleadings and the Plaintif cannot deny its own existence as related to its dealings with the Defendant. To that end, avers the Defendant, the Plaint and claim cant stand and should he dismissed with costs. Further, the Defendant states that the suit is time barred given that the overdraft facility started in August 1995 and the suit was filed in 2002, long after the period of limitation had expired and/or lapsed.

The other line of defnce is that the amount overdrawn by the defendant is stated to be K.Shs.1,853,590/26 as at 1/11/98 while the Plaintiff's witness told the court that the overdrawn amount was K.Shs.18,535,980/26. The sum claimed in the Plaint is different from any of the above figures.

The Defendant further avers that the Debenture charge was defective since it is dated 24/7/2000 while it was signed and forwarded to the Plaintiff on 28/3/2000; and hence this was prejudicial to the Defendant. The Defendant maintains that it should not have been sued prior to enforcement of the said debenture.

The truth is that by the time the debenture was registered, it was time barred, and hence illegal and unenforceable.

The Defendant denied, through D.W. 1, ever defaulting in repayment, as had it done so, the facility would not have been renewed, as it was for 4 times. Through D.W. 1, and D.W. 2 (the 3rd Defendant) the Defendant denied ever operating outside the authorized limit, and hence the claim of overdrawing by K.Shs.1,853,590/26 was neither proved nor tenable, as the limit had not even been reached, much less overstepped.

Finally, the Defendant, through D.W. 1 told the court that the Plaintiff dishonestly kept the account of the Defendant. To support that,, it showed payment of K.Shs.8million paid on 24/7/1997, which was not credited, hence instead of reducing the debt it increased the same. The defendant further pointed at the opening of Account No. 0100167018, without consent of the Defendant, as evidence of dishonestly. Further on the same point of dishonesty, the defendant pointed at penalty charged when all along it had operated under the limits of 15 million initially, and 20 million later on after the limit had been increased.

On the above basis, Defendant avers that the Plaintiff had failed to prove its case on the balance of probability and the suit should therefore be dismissed with costs to the Defendant.

Having closely studied the pleadings, analysed the submissions by counsel for all the parties and taken into account the authorities cited and relied upon by parties I have reached the following findings and conclusions.

I begin with the case-dispute- between the Plaintiff and the 2nd, 3rd and 4th Defendants which turns on the validity/legality and therefore enforceability of the guarantees offered by each of the three Defendants to the Plaintiff Bank to secure the overdraft facilities accorded to the 1st Defendant by the Plaintiff bank. I must also add that within the securities – guarantees – fall the Debenture charge by the 1st Defendant as a term for the 3rd and 4th Overdraft facilities whose limit was K. Shs. 20 million.

I must underline the fact that on the validity and enforceability of those securities stand or fall the Plaintiff's case.

It is thus imperative to analyse the facilities and the terms thereof to establish the validity and

enforceability of each of them against the Defendants, and the take off point, for all the facilities, is the term that each facility was only for one year, reviewable before or at the end of the twelve months. The 1st facility was for K.Shss.15million and the offer letter was 8.8.1995, repayable upon demand, with or without notice, and was subject to annual review with the first review falling on 31/8/1996. Interest and penalties are stipulated as one of the terms, with the right to vary the interest rates being reserved and at the absolute discretion of the Plaintiff Bank.

The 1st facility required no guarantees and thus it was strictly between the Plaintiff and the 1st Defendant Company.

At this stage, it should be stressed that the 3rd and 4th Defendants were Directors of both the 1st and the 2nd Defendants. This status of the 3rd and 4th Defendant seems to be confused to untold heights by the Plaintiff in that whereas Directors and company officials are totally separate and independent legal entities from the company of which they are Directors/officials, that difference does not seem to have registered in the thought process of the Plaintiff Bank, and by extension, the Plaintiff's Counsel. This is evident from the evidence and submissions by the Plaintiff where signing of Defend\ant's resolutions and documents by the 3rd and 4th Defendants, is confused with their personal capacities. Thus, knowledge of the 1st Defendant's communication with the Plaintiff has been seen as knowledge of such transactions by the 3rd and 4th Defendants in their personal capacities.

That confusion and legal misconception has caused untold legal implications throughout this case, as is apparent in the cause of this judgment.

The 2nd facility of 1996, required fresh guarantees provided by the guarantors in addition to 1st Defendant's Board Resolution. The offer letter for the 2nd facility is dated 15/8/96. It is that letter of offer that increased the facility from 15 to 20 million and required a Corporate Guarantee by the 2nd Defendant company and individual guarantees by the 3rd and 4th Defendants. Each of the guarantors guaranteed the total facility - that is 20 million. The offer letter was accepted by the 3rdand 4th Defendants, for the 2nd Defendant on 11/9/96.

No personal guarantees by the 3rd and 4th Defendants were produced in evidence by the Plaintiff. The only guarantee produced is that of the 2nd Defendant company.

The 3rd facility offer letter is dated 9/1/99 and is also for 20 million, with 30/9/99 as its review date or expiry date. It required securities as follows: a debenture by the 1st Defendant for 20million; a corporate guarantee by the 2nd Defendant company for 20 million and personal guarantees by the 3rd and 4th Defendants for 20million each.

No guarantees were produced by the Plaintiff for the 3rd facility.

The evidence shows that the guarantees for the 3rd facility were signed on 24/9/99, and that guarantors renewed their guarantees through refresher guarantees dated 25/10/99 and 5/11/99, by the 3rd and 4th Defendants.

The 4th facility was renewed on 29/2/2000, and included a debenture by the 1st Defendant, dated 24/7/2000.

From the foregoing, I find and conclude that the guarantees were not valid and hence not enforceable against the guarantors and the Debenture was null and void as against the 1st Defendant for the following reasons.

Each facility was for a year reviewable at the end or before the expiry of the 12 months; and unless

reviewed, such facility lapsed or expired, as each subsequent facility had its own offer letter and terms and conditions including securities (guarantees, and debenture in the case of the 1st Defendant). An overdraft is money lent by a Banker to its customer following an agreement between the two parties. Such an agreement is governed by terms and conditions spelt out in the offer letter. Accordingly, if 1st Defendant overdrew the authorized limit, without an arrangement with the Plaintiff, the Plaintiff is not entitled to charge interest, as there is no contract or terms upon which such an overdrawing is underpinned.

In the case before me there was no consideration for the guarantees given to the Plaintiff by the 2nd, 3rd and 4th Defendants for the 1996, 1999 and 2000 facilities. And if there was, that has not been proved as no guarantees were produced in court in support of such claim by the Plaintiff. Thus, for the 1999 facility, the guarantees are signed by the three Defendant/guarantors on 24/9/99. But the offer letter in support of such guarantees were not produced. Accordingly, the guarantees were not proved and hence not enforceable against the guarantors. Put differently, a guarantee contract cannot exist without the offer letter in support of which the guarantee is given. Further, if such offer letters existed, they were not produced by the Plaintiff. The result being that the so-called guarantees were in the air in the absence of the offer letters. Needless to add, such guarantees don't exist and are not enforceable against the 3 guarantors/Defendants.

To reiterate, in the absence of guarantees being produced in court, no liability can be pinned onto the guarantors – See PRUDENTIAL BANK LIMITED VS. JASSI HOLDINGS LIMITED & 2 OTHERS, HCCC NO. 1718 of 1998.

In the Plaintiffs evidence, it was admitted that as on 1/11/98, there was an outstanding debt of over K.shs.18million, and the guarantees dated 24/9/1999, by the 3 guarantors, were intended to cover that indebtedness. That is legally untenable. Past consideration is no consideration at all. It is clear to me that the guarantees by the 3 Defendant/guarantors, dated the 24/9/1999, lacked consideration given that they were meant to secure an existing debt by the 1st Defendant to the Plaintiff.

Accordingly such guarantees were null and void and un enforceable as against the 2nd, 3rd and 4th Defendant/guarantors.

The evidence before me shows that the said guarantees were signed on 24/9/99 just before the Review of the facility which was expiring on 30/9/99.

As stated herein earlier, the securities for the 3rd and 4th facilities required a debenture from the 1st Defendant, in addition to the guarantees by the 2nd, 3rd and 4th Defendants. The 1st Defendant provided the debenture, just as the three other Defendants provided guarantees, to secure the K.Shss.20million facility. Just as with the guarantees, the debenture is not enforceable because the Plaintiff negligently failed to register it in time, as required by Section 96 of the Companies Act, Cap. 486, Laws of Kenya

requires that such debenture shall be void against the Liquidator and any creditor of the company, (here the Plaintiff) unless it is registered, with the Registrar of Companies within 42 days after the date of its creation.

In the instant case the debenture was created on 28/3/2000, but was not registered until 24/7/2000. That was way outside the 42 days stipulated in the Companies Act, above. Hence, such debenture was void as against the company (the 1st Defendant) and the creditor – the Plaintiff in the case.

I need to stress a point that is often taken to be obvious, but it is not, and needs underlining. Where, as in this case, guarantors are jointly and severally liable, a release of one or more of such guarantors, by the creditor, whether intentionally or negligently, prejudices the others as such release overburdens the remaining guarantors. In the instant case, the 1st Defendant, the principal borrower, had given a debenture for 20 million, just as each of the guarantors had guaranteed the repayment of the 20 million facility. To

release the 1st Defendant from such an obligation means that instead of 4 there are only three securities in the event of liability to share the burden of the facility. That is the rationale behind the guarantors submission that the act of not perfecting the debenture also releases them from liability.

I agree with that submission by the three guarantor/Defendants.

The imperfection of the debenture raises an even more important point that a creditor –here the Plaintiff bank – should first exhaust his remedies against the principal borrower – the 1st Defendant – before reverting to suing the guarantors. That is the law, and local authorities have reiterated the position. See KENYA NATIONAL CAPITAL CORPROTION VS. THAMMO HOLDING LIMITED & 3 OTHERS, HCCC No. 1301 of 1985; and KENYA COMMERCIAL BANK LIMITED VS. SUN CITY PROPERTIES LIMITED & 5 OTHERS. HCCC NO. 1304 of 2001.

Learned Counsel for the Plaintiff has difficulty with the above legal positions. For example, he submitted, and contended, that the Plaintiff chose to pursue the guarantors rather than enforce the Debenture because the 1st Defendant was in default and had no assets. This is a dishonest submission, which also reveals the true character of the Plaintiff Bank. The truth of the matter is as stated herein earlier, that by violating the provisions of Section 96 of the Companies Act, the debenture was void as against the company – 1st Defendant - and the creditor – the Plaintiff. That is why the Plaintiff dared not exhaust its remedies against the principal borrower. Nor is it true that the delay in registering the debenture lay with the Government agencies.

In brief, the imperfection of the debenture by the Plaintiff put the 1st Defendant beyond the reach of the Plaintiff, and by extension the three guarantor/Defendants.

The submission also exposes the Plaintiff as a less than prudent Bank. Which bank would accept or take a debenture from a creditor without first thoroughly checking and confirming the status of the assets over which the debenture is created? The admission by the Plaintiff that it had not checked on the status of the 1st Defendant's assets speaks volumes.

Be that as it may, no party may benefit by its mistakes or conduct, at the expense or detriment of the others.

The final reason why the guarantees are not enforceable against the 2nd, 3rd and 4th Defendants has to do with demand letters. The plaint avers that demand letters were sent to the defendant/guarantors. The evidence before me is to the contrary, and buttresses my opening remarks that the Plaintiff, and its counsel, have failed to appreciate the clear legal separateness of the 3rd and 4th guarantor/defendants dual capacities as Directors of both the 1st and 2nd Defendant Companies, and their personal individual capacities.

The correspondence before me and the evidence of defence witness No. 1 is that letters were sent to the 1st Defendant, and replied to by the 3rd and 4th Defendants, but in their capacity as Directors of the 1st Defendant, not their own personal capacities.

To aver that correspondence with the 1st Defendant's Directors is the same as with the two individual guarantors is unmitigated misconception of the legal separation of company officials from the company itself.

The alleged demand letter, dated 5/3/02, was addressed to the 1st Defendant, using that company's address, which letter was also copied to the 3rd and 4th Defendant guarantors BUT using the address of the 1st Defendant. The letter was thus, not addressed to the 3rd and 4th defendants as their addresses were different from that appearing on the demand letter. The Plaintiff witness admitted that no proper demand letters were made against the 2nd, 3rd and 4th Defendants. This is the evidence before me.

From that evidence, I find and conclude that in the absence of demand letters to the guarantors, no liability to pay arose. Without a demand, a guarantor has no obligation to honour the guarantee – See **KENYA COMMERCIAL FINANCE CO. LTD. V. KIPNGENO ARAP NGENY & ANOTHER, (2002) 1 KLR 106.**

This legal position is reproduced in the guarantees themselves which require written demand by the Plaintiff to the guarantors.

I find and hold that no demand letters were ever addressed to the three guarantors, and in the absence of that, the Plaintiff has no cause of action against the 2nd, 3rd and 4th Defendants/guarantors.

Counsel for the Plaintiff, just like the counsels for the Defendants, cited numerous authorities which I have closely looked at, even if not directly referred to in my judgment. However, with all due respect, most of the authorities are either only persuasive or clearly distinguishable. Of those that are relevant, they are of no assistance to the Plaintiff's case. I have in mind the English case of MOSCHO V. LEP AIR SERVICES LIMITED (1973) A C 331 where Lord Diplock, quoting from LAW OF GUARANTEE by Geraldine Andrews and Richard Mullet, 2nd edition, at P. 3 said:

'**The liability of the guarantor has been defined as a liability not only to perform himself if the principal fails to do so, but to procure that the principal performs his obligations."**

For the above obligation to be pinned on the guarantor, I have no doubt that the guarantor has also a right to be notified, by the Creditor, that the principal borrower has or is failing in his obligations. And this should be well before the demand letter addressed to him (the guarantor). Otherwise, how would the guarantor procure the principal to perform unless he is made aware that that is not happening.

In the case before me, even the demand letters to the guarantors were not written, much less notice that the principal – 1st Defendant- was not living up to its obligations. The evidence before me in this case is that the guarantors were never involved in the day-to-day activities of the 1st Defendant Company, even though they were Directors thereof. How then would they know that the 1st Defendant was not performing its obligations towards the Plaintiff in the absence of notice?

All in all, and for reasons given above, I find and hold that the Plaintiff has failed to prove its case on the balance of probabilities against the 2nd, 3rd and 4th Defendants. Accordingly, I dismiss the suit against the 2nd, 3rd and 4th Defendants with costs, at higher level, given the complexity of the case, to the three Defendants/guarantors and against the Plaintiff. Such costs to be with interest, at court rates, from the date of entry of appearance and defence till payment in full.

With respect to the case against the 1st Defendant, I find and hold that whereas there is no doubt that overdraft facilities were accorded to the 1st Defendant, there is no doubt, both factually and legally that the 1st Defendant was clearing, and cleared the debts as required in the overdraft facility offer letters. Otherwise, it is not possible to explain how the facilities were reviewed and renewed annually, and accepted 4 times. Had the 1st defendant not cleared the previous facilities; there would have been no renewals at the expiration of the preceeding facilities.

Regarding the last two facilities, the ones for 1999 and 2000, I find and hold that the 1st Defendant had provided adequate securities – including the Debenture charge and the Guarantors, as required in the offer letters. The failure to perfect those securities lack of demand letters and registration of the debenture, lay squarely on the Plaintiff and the 1st Defendant should not carry the cross of the Plaintiff for the sins of the Plaintiff.

I have also noted the irregular management of the 1st defendants account by the Plaintiff whereby the account number was changed, without notice or consent of the 1st Defendant. No doubt that caused the confusion of which Account the Statement produced in this court referred to and where, and when the

first account was closed, if at all it was closed, and when the 2nd account became operational.

Here, the Defendant is also to blame for not rectifying the anomaly when it first arose.

I have also taken note of the penalty/interest charged against the account for apparent overdrawing on the account when the evidence clearly shows that the authorized limit had not been reached, much less exceeded.

All in all, I find and hold that the Plaintiff has failed to prove its case on a balance of probability against the 1st Defendant.

Accordingly, I dismiss the claim and case against the 1st Defendant with costs in favour of the 1st Defendant and against the Plaintiff.

The said costs to be with interest at court rates from the date of this judgment till payment in full.

DATED and delivered in Nairobi, this 23rd Day of May, 2007.

O.K. MUTUNGI

JUDGE