REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

Civil Case 231 of 2003

THE DELPHIS BANK LIMITED…..……..……..… PLAINTIFF

VERSUS

EZZYCON COMPUTER SERVICES LTD…..……..1ST DEFENDANT

EZEKIEL OSUGA ANGWENYI…….…..…2ND DEFENDANT

MARY KWAMBOKA NYAMWEYA…….....…….....…3RD DEFENDANT

J U D G M E N T

The plaintiff claims from the defendants the sum of KShs.23,718,716.12 being monies due from the 1st defendant as the principal borrower and the 2nd and 3rd defendants as guarantors together with interest thereon at 16% p.a. from 1.1.2003 until payment in full.

The circumstances leading to the suit are as follows: The plaintiff company carries on banking business. In or about May, 1998 the plaintiff granted financial facilities to the 1st defendant a limited liability company which facilities were guaranteed by the 2nd and 3rd defendants and were secured by a legal charge over L. R. No.2250/64 (hereinafter – "**the charged property"**) in favour of the plaintiff. There was default and the plaintiff sold the charged property in exercise of its Statutory power of sale but proceeds thereof did not redeem the 1st defendant's indebtedness with the plaintiff hence this suit.

In its plaint dated 9.4.2003, the plaintiff pleaded inter alia that in or about May, 1998 at the 1st defendant's request it granted the 1st defendant overdraft and/or financial facilities to the tune of KShs.10,000,000.00 and as security for the said facilities the 2nd defendant created a charge over the said property in favour of the plaintiff and the 2nd and 3rd defendants executed personal guarantees in favour of the plaintiff. The plaintiff also pleaded that under the said guarantees the 2nd and 3rd defendants covenanted and undertook on demand in writing to pay to the plaintiff all sums then or at any time remaining due and unpaid to the plaintiff from the 1st defendant together with interest and other bank charges. It was further pleaded that the 1st defendant defaulted and the plaintiff in exercise of its statutory power of sale sold the charged property on 28.5.2002 for KShs.7,000,000.00 but the proceeds thereof were not sufficient to redeem the loan sums. The plaintiff then further pleaded that vide letters dated 5.2.2003 the plaintiff called upon the 2nd and 3rd defendants to pay KShs.23,718,716.12 being the principal amount guaranteed together with interest at 16% p.a. as at 31.12.2002 in satisfaction of their guarantees which letters elicited no payment from the defendants.

The 1st defendant in answer to the plaintiff's claim pleaded inter alia as follows in its amended defence

dated 22.3.2004: That if the plaintiff issued any facility the same was in the sum of KShs.5,000,000.00 for purposes of purchasing a motor vehicle on hire purchase which facility in any event was settled. That through the said facility the 1st defendant bought motor vehicle registration number KAK 854 Q from Kingsway Motors and it was agreed between the plaintiff and the 1st defendant that upon registration of the motor vehicle, the interest of the plaintiff was to be noted in the Log book and by approval of the plaintiff a comprehensive insurance cover was taken out through Lakestar Insurance Company Limited; that the said motor vehicle was sometime in November, 1998 involved in an accident and upon inspection was declared a total loss; that the plaintiff being the financier of the motor vehicle was put on notice of the occurrence of the said accident and of the fact that the insurance company had declared it a total loss; that under the circumstances the contract between the plaintiff and the defendant was frustrated and became incapable of performance and the plaintiff cannot therefore make any claim of payment from the 1st defendant, that the insurance company was ready to pay the value of the motor vehicle but the plaintiff refused to release the Logbook for the motor vehicle to the Insurance Company or the 1st defendant and that any payments that were to be made by the insurance company for the compensation of the said motor vehicle was to be made to the plaintiff being the financier and owner of the said vehicle and not the 1st defendant. The 1st defendant further pleaded that if there was any legal charge over L.R. No.2250/64 the same ought to have been discharged as the facility had been fully settled and further that since the contract between the plaintiff and the 1st defendant had been frustrated the plaintiff ought to have released the charged property. The 1st defendant in the alternative denied owing the plaintiff the sum of KShs.23,718,716.12 or any money at all and averred that any demands made are illegal and fraudulent as the same arise from continuing to debit the loan account while knowing that no contract existed between the plaintiff and the 1st defendant since 1998. The 1st defendant also denied receiving any demand and notice of intention to sue from the plaintiff and further averred that even if any demand and notice of intention to sue were received, the 1st defendant was not under any obligation to comply with any such demand as it did not and does not owe the plaintiff any money.

The 2nd and 3rd defendants in answer to the plaintiff's claim pleaded inter alia as follows:- That they did not apply for any loan facility from the plaintiff nor did they offer any personal guarantees in favour of the plaintiff. In the alternative they averred that if they made the alleged guarantees there was no consideration moving from the plaintiff in support of the same and in the premises the said guarantees were not and are not binding on them. They further denied that the 1st defendant had failed to pay the debt or had committed any breach of contract with the plaintiff. Further and in the alternative, the 2nd and 3rd defendants pleaded that it was a term of the guarantees that the plaintiff was to serve notices in writing specifying any default on the part of the 1st defendant and the 2nd and 3rd defendants' liability would only arise at the expiry of such notice and as no notice was served, the 2nd and 3rd defendants were under no liability to the plaintiff under the said guarantees. The 2nd and 3rd defendants admitted the creation of the charge over the said property and further that the plaintiff in purported exercise of its statutory power of sale without the knowledge of the 2nd defendant sold the charged property for KShs.7,000,000.00 which property at the time was valued at KShs.15,000,000.00 and in selling the property the plaintiff acted negligently thereby discharging the 2nd and 3rd defendants from liability under the alleged guarantees.

The plaintiff replied to the said defences and inter alia joined issue with the defendants upon their defences in addition to reiterating all the averments in the plaint. It specifically averred that the consideration for the 2nd and 3rd defendants' said guarantees was the plaintiff agreeing to grant to the 1st defendant the said financial facilities and the guarantees were binding upon the 2nd and 3rd defendants. The plaintiff further averred that notices specifying the 1st defendant's default were indeed served. The plaintiff also denied that the charged property was worth KShs.15,000,000.00 and that it was guilty of negligence in selling the same.

From the above pleadings, the parties framed and filed the following issues for trial:-

1) Whether or not the 2nd and 3rd defendants made an application for a loan from the plaintiff.

2) Whether or not the 2nd and 3rd defendants offered any personal guarantees in favour of the plaintiff.

3) Whether or not there was any consideration moving from the plaintiff to support the alleged guarantees and whether the same is binding on the 2nd and 3rd defendants.

4) Whether or not the 2nd and 3rd defendants defaulted in repayment obligations and whether in exercise of statutory power of sale the plaintiff sold the charged property on 28.5.2007 for Kshs.7,000,000.00.

5) Whether or not the 1st defendants failure to pay the debt was occasioned by the plaintiff or whether the plaintiff breached the contract.

6) Whether or not it was an express term of the said guarantee that the plaintiff should serve the 2nd and 3rd defendants with notice in writing specifying the default on the part of the 1st defendant.

7) Whether or not the liability of the 2nd and 3rd defendants should only arise until the expiry of the notice period.

8) Whether or not the 2nd and 3rd defendants are liable under the guarantee.

9) Whether or not the property was worthy at least KShs.15 million by 28.5.2002 and whether the plaintiff was negligent in disposing it for KShs.7 million.

10) Whether or not the plaintiff obtained any valuations of the property.

11) Whether or not the 2nd and 3rd defendants were served with statutory notice of sale.

12) Whether or not the notification of sale was served upon the 2nd defendant.

13) Whether or not it was incumbent upon the plaintiff to give the 2nd defendant opportunity to redeem the property and whether or not the property belonged to the 2nd defendant.

14) Whether or not the 2nd and 3rd defendants are discharged from liability under the guarantees.

15) Whether or not the plaint is bad in law and raises no cause of action.

16) Whether or not the 2nd and 3rd defendants have been served with notice to institute suit.

17) Whether or not the suit should be dismissed.

18) Who bears the costs of this suit?

The plaintiff called one witness Mr. Wilfred Kennedy Machini an officer in its credit department. In his evidence in chief, he testified that the plaintiff a commercial bank changed its name to Oriental Commercial Bank in 2003. He produced a Certificate of Change of Name as P.EX1. The basis of the plaintiff's claim according to PW1 was that, in March 1998 the 1st defendant approached the plaintiff for banking facilities in the form of an overdraft and a loan to the tune of KShs.10,000,000.00. To that end letters were written applying for the said financial facilities and the purpose for the same. The letters were produced as P.Ex.2 (a) and (b).

On 9.5.1998, the plaintiff made an offer to the 1st defendant for the said facilities which offer was duly accepted by the 1st defendant by signing a copy of PEX.3. Before disbursing the sums comprised in the said facilities, the plaintiff obtained a Memorandum and Articles of Association of the 1st defendant which was produced as P.EX. "4 (b)". The 1st defendant also furnished its resolution allowing it to

borrow from the plaintiff which resolution PW1 produced as P.EX.5. The 1st defendant offered as security, a legal charge of the said piece of land which was registered in the name of the 2nd defendant. The charge was duly executed and a copy thereof was produced. PW1 explained that the original thereof had been released to its advocates M/S Waweru Gatonye & Company Advocates when the charged property was sold. The said copy of the charge was produced as P.EX. 6 (a). The 2nd and 3rd defendants further executed personal guarantees which PW1 produced as P.Ex. 7(a) and (b). The legal charge was duly registered and the facilities disbursed. PW1 also produced statements of accounts [P.EX. 9(a) and (b)] for the two facilities. According to him the 1st defendant was to repay in monthly instalments of KShs.191,900.00 which was done for 6 months and then repayments stopped. The bank demanded repayment through M/S Musyoka & Wambua Advocates. The same was produced as P.EX 10(a). The certificate of posting was also produced as P.EX.10(b). The 2nd defendant responded by calling upon the plaintiff and a meeting was held on 25.3.1999. The 1st defendant also responded vide its letter of the same date which letter was signed by the 2nd defendant. This letter was produced as EX.10 (c). By 7.4.1999, the 1st defendant had not honoured its promise to settle prompting the plaintiff to remind it of the proposal in its letter of 7.4.1999. That letter was produced as P.EX 10(d). The 1st defendant did not honour its proposal and infact made another proposal in its letter dated 1.7.1999. That letter was produced as P.Ex.10 (e). The plaintiff requested the 1st defendant to honour its obligation in its letter of 14.7.1999 produced as P.EX 10(f).

PW1 continued to testify that the 1st defendant made more proposals signed by the 2nd defendant but failed to honour the same. The relevant correspondence was produced as P.Ex.10(g) and (h) – (j) and P.EX.11.

When no positive response was elicited from the 1st defendant, the plaintiff instructed its said Advocates to serve a Statutory Notice of Sale dated 17.11.2001. The same was addressed to the 2nd defendant as the registered owner and copied to the 1st defendant. The outstanding sum then was KShs.26,826,315/22 and was attracting interest at 20% p.a. The notice was produced as P.EX.12(a). The notice was sent under a certificate of posting which was produced as P.Ex.12(b). As there was still no response from the defendants the plaintiff instructed auctioneers to advertise the property for sale by public auction. The auctioneers gave 45 days notice of redemption and issued a notification of sale of the charged property. The redemption notice and the notification of sale were produced as P.EX.13 (a) and (b). The property was then sold but prior to the sale the same was valued on 14.2.2002 and KShs.9.5 million was given as the market value and KShs.7 million as forced sale value. PW1 produced the valuation report as P.EX.14. The sale took place on 28/5/02 and the charged property was sold to the highest bidder for KShs.7 million. The auctioneers letter and the Memorandum of sale were produced as P.EX. 15 (a) and (b). The auctioneers fee notes, advertisements in the press were all produced as P.Ex.16.

PW1 further testified that the sum of 7 million recovered from the sale did not settle the 1st defendant's indebtedness with the plaintiff. The plaintiff then instructed its present advocates to demand for the outstanding balance of KShs.23,718,716/17 from the 2nd and 3rd defendants. The sum attracts interest at 16% p.a. The letters of demand were produced as P.EX.17(a) and (b). The 2nd and 3rd defendants did not pay the said sum hence this suit.

PW1 denied that the plaintiff offered only a KShs.5 million facility to the 1st defendant and further denied that the 1st defendant had settled its liability. He further denied that the purpose of the financial facilities was to purchase a motor vehicle for the 1st defendant. He reiterated that the 2nd and 3rd defendants had executed personal guarantees and had failed to repay the sums claimed on the default by the 1st defendant.

In cross-examination PW1 stated that the 3rd defendant is not a director of the 1st defendant but was sued as a guarantor and was served with notice of demand as well as the 2nd defendant. He later changed his stand and denied that any demand was sent to the 2nd and 3rd defendants. He stated that the liability

of the 2nd defendant arose both under the charge and the guarantee and that the loan to the 1st defendant was for working capital secured by the charge and a motor vehicle log book. The subject motor vehicle was involved in an accident and no money was secured by the same nor was the vehicle purchased from loan sums. PW1 further testified that the plaintiff was not paid any insurance sums in respect of the said motor vehicle. In any event, the insurance sums would not have significantly reduced the defendants' indebtedness with the plaintiff according to PW1. He also testified that the 1st defendant's loan was reduced by 7 million and charges debited on the account were as per the charge documents and that interest accrued at the rate of 36% p.a. which rate was variable. He did not know the value of the property at the time the same was charged.

In re-examination PW1 testified that he had infact produced letters of demand and certificates of posting which constituted notice to the 2nd and 3rd defendants that they would be sued for any shortfall on the sale of the charged property.

The defendants called one witness who was also the 2nd defendant Ezekiel Osuga Angwenyi. He testified for himself and on behalf of the 1st defendant. His evidence in chief was that the 1st defendant had an account with the plaintiff. It applied for a loan from the plaintiff which granted the same in the sum of KShs.5,000,000.00. The loan was secured by the said property registered in his name. He also executed a guarantee in favour of the plaintiff. The loan was to provide working capital for the 1st defendant and for the purchase of motor vehicles for the 1st defendant's business. The conditions for the loan were accepted and motor vehicles including KAK 854 Q were purchased from Kingsway Motors and paid for by the plaintiff. DW1 produced D.Ex.1a letter from the plaintiff dated 2.10.1999, acknowledging receipt of the Log book for motor vehicle KAK 854Q. According to DW1 the plaintiff received the said log book because it had financed the purchase of the same. The vehicle was however involved in an accident on 10.11.98. The vehicle had however been insured by M/s Lakestar Insurance Company who approved a claim made in respect of the said vehicle and as the plaintiff had the log book it could have sought payment from the said Insurance Company. However as the Log book was not availed by the plaintiff the said claim was never paid. With regard to the guarantee, DW1 did not remember receiving any demands thereunder nor did his co-directors. Eventually the charged property was sold by public auction by the plaintiff for KShs.7,000,000.00. DW1 who was living in the premises then left the same after the said sale. He admitted that the said sum of KShs.7,000,000.00 was credited to the loan account.

According to DW1 the 1st defendant was supposed to service the said loan and did so by installments until it started experiencing problems when the said motor vehicle was involved in the accident aforesaid. The plaintiff however continued debiting the 1st defendant's loan account. DW1's expectation was that the Insurance Company would release payment for the said motor vehicle to the plaintiff. However, there was delay in releasing the log book and in the interim the said insurance company collapsed. According to DW1 the insurance company was to pay KShs.1,796,000.00 and if this payment had been made the entire indebtedness with the plaintiff would have been paid and some money left to the credit of the 1st defendant. DW1 further denied that the 1st defendant passed any resolution to allow it seek any financial accommodation from the plaintiff.

In cross examination, DW1 stated that he did not know whether motor vehicle registration number KAK 854 Q was registered in the joint names of the 1st defendant and the plaintiff as there was no such evidence on record. He also stated that the 1st defendant did not execute a chattel's mortgage in respect of the same motor vehicle. He confirmed that the same was not a security for the said loan facility extended to the 1st defendant by the plaintiff. He further admitted there was no evidence of the allegation that Lakestar Insurance Company had indeed agreed to pay the said sum of KShs.1,796,000.00. Referring to the statements of accounts produced by the plaintiff (P.EX 9(a)) DW1 confirmed that by 30.7.1999, the debit balance was KShs.8.4 million which was far in excess of the said sum of KShs.1,796,000.00. He admitted that the charged property was sold in 2002, 3 years after the alleged insurance claim and by that time the plaintiff was demanding KShs.20,196,284.70.

DW1 further admitted that his property (the charged property) was advertised for 3 times and delay in

realization blew up the interest. However, he had no evidence of that allegation. He also admitted receiving demands for payment of the sums owed to the plaintiff but did not remember the actual sums demanded. The said demands were copied to the 3rd defendant. DW1 further admitted that the 1st defendant on receipt of demands from the plaintiff made various proposals for settlement which proposals were signed by him. In none of the letters was there the allegation that insurance proceeds would have reduced the 1st defendant's indebtedness with the plaintiff. DW1 also admitted that he did not challenge the sale of the charged property.

In re-examination, DW1 reiterated that no letter of demand was addressed to him as a guarantor and further that the sums demanded of the 1st defendant included interest on interest.

On conclusion of the evidence, counsel made written submissions. In a nutshell, counsel for the plaintiff submitted that the evidence of the plaintiff's witness and the documents produced showed that indeed the financial facilities of KShs.10,000,000.00 were extended by the plaintiff to the 1st defendant. The same were secured by a legal charge over the charged property and the personal guarantees of the 2nd and 3rd defendants. The plaintiff had further shown that there was default by the 1st defendant which made several proposals of settlement which were executed by the 2nd defendant as the 1st defendant's director. The plaintiff had also shown that demands for payment had been made without success leading to the sale of the charged property for KShs.7 million leaving the balance now claimed plus interest.

On the defendants' defences counsel for the plaintiff contended that the same are not an answer to the plaintiff's claim which should be allowed as prayed.

On his part, counsel for the defendants contended that the only facility extended to the 1st defendant was an overdraft facility of Kshs.5,000,000.00 which was secured by the Legal charge aforesaid. In his view on the loss of the motor vehicle registration number KAK 854Q the contract between the plaintiff and the 1st defendant was frustrated and became incapable of performance. In any event, the insurance sum receivable from the insurance company should have been utilized to reduce the 1st defendant's indebtedness with the plaintiff and failure to do so allowed the plaintiff to debit the 1st defendant's account with interest which amounted to unjust enrichment. In counsel's view the sums from the sale of the charged property and the insurance company were sufficient to liquidate the entire debt due to the plaintiff. Counsel for the defendants further submitted that the guarantees could not be enforced as no demands had been made to the 2nd and 3rd defendants as guarantors. With regard to the 3rd defendant counsel contended that the alleged guarantee in any event was without consideration as the 3rd defendant was not a director of the 1st defendant.

Having outlined the evidence and submissions, I can now answer the issues which the parties framed for determination. On the evidence it emerged that the application for financial facilities was made by the 1st defendant and not by the 2nd and 3rd defendants. The answer to issue number 1 is therefore in the negative. The answer to the 2nd issue is in the affirmative. The plaintiff produced through PW1 exhibit 7(a) dated 17.6.1998 which is a guarantee executed by the 2nd defendant. The same witness also produced exhibit 7(b) of the same date. It is a guarantee executed by the 3rd defendant. Both guarantees are in favour of the plaintiff and are in regard to the 1st defendant's indebtedness with the plaintiff. The sum indicated in the said guarantees is KShs.10 million together with interest "at the rate being charged to the customer at the date of such demand". In any event DW1 admitted executing exhibit 7 (a). The 3rd defendant did not testify. She did not therefore contest the guarantee. Issue number 3 must also be answered in the affirmative. The 2nd defendant was a director of the 1st defendant which received the financial facilities from the plaintiff. There is therefore no question of want of consideration moving from the plaintiff to support the guarantee. As to whether or not there was consideration moving from the plaintiff to support the guarantee executed by the 3rd defendant, the only evidence we have was furnished by the plaintiff. The 3rd defendant did not challenge that evidence. I find and hold that the disbursement of the loan and/or overdraft facilities by the plaintiff to the 1st defendant was sufficient consideration

moving from the plaintiff to support the guarantee executed by the 3rd defendant.

I think it is convenient to answer issue numbers 5, 6 and 7 before issue number 4. On issue number 5 which is whether or not the 1st defendant's failure to pay the debt was occasioned by the plaintiff or whether the plaintiff breached the contract, I find that the issue is an implied admission that the 1st defendant failed to pay the debt. For avoidance of doubt however, the plaintiff adduced sufficient evidence to show on a balance of probabilities that indeed the 1st defendant failed to pay its indebtedness to the plaintiff. I did not however find any evidence of breach of contract by the plaintiff at all nor was any evidence adduced to establish that the 1st defendant's failure to pay its indebtedness with the plaintiff was occasioned by the plaintiff.

On whether or not it was an express term of the personal guarantees that the plaintiff should serve the 2nd and 3rd defendants with notice in writing specifying the default on the part of the 1st defendant I have found indeed that service of a notice specifying default by the 1st defendant was required and that such notice was duly served upon the 2nd and 3rd defendants accordingly. The plaintiff produced exhibit 10 (a) which was a letter by M/s Musyoka & Wambua Advocates addressed to the 1st defendant and copied to the 2nd and 3rd defendants. That letter demanded of the 1st defendant the sum of KSh.11,907,607.00 and by a copy of the same gave notice to the guarantors the 2nd and 3rd defendants of intention to sue. The plaintiff testified that the said letter and the copies thereof were sent by registered post. A certificate of posting was produced as exhibit 10(b). There is no doubt that the 2nd defendant received the said notice. The address used by the plaintiff was the address furnished by the 2nd defendant in the said guarantee and in deed the 2nd defendant responded to the said demand on behalf of the 1st defendant. Correspondence produced by the plaintiff disclosed that the 2nd defendant invariably communicated with the plaintiff on behalf of the 1st defendant. In my view his denials that he was not served with a notice of the 1st defendant's default as a guarantor lacks seriousness and I did not believe the denials. He did not deny signing exhibits 10 (c), 10(e), 10(g) and 10 (i) which acknowledged indebtedness of the 1st defendant with the plaintiff. With regard to the 3rd defendant, I am satisfied that she too was notified of the 1st defendant's default as already stated. She did not testify to deny the plaintiff's evidence and the documentary material placed before the court.

My above findings also answer issue number 7. Having found that the 2nd and 3rd defendants were notified of the 1st defendant's default, their liability clearly arose but they too defaulted in the repayment of the sums due to the plaintiff thereby provoking the plaintiff's exercise of its statutory power of sale over the charged property. It is common ground that the plaintiff indeed sold the charged property on 28.5.2002 for KShs.7 million. This answers issue number 4 in the affirmative.

In view of my above findings, it is obvious that the 2nd and 3rd defendants are liable under the guarantees. Issue number 8 is accordingly answered in the affirmative.

On whether or not the property was worth at least KShs.15 million as on 28.5.2002, the defendants did not produce evidence in support of the allegation. Indeed the only valuation of the property availed to the court was carried out by M/s Centenary Valuers and Property Consultants. The same was produced by the plaintiff as exhibit 14. It showed that as on 13.2.2002, the open market value of the charged property was KShs.9.5 million and the forced sale value was KShs.7 million. There was no challenge to that valuation and I accepted the same as a true representation of the worth of the charged property. I do not therefore find that the plaintiff was negligent in disposing of the same for 7 million. That finding answers issue numbers 9 and 10.

On whether or not the 2nd and 3rd defendants were served with statutory notice of sale, there is on record exhibit 12 (a) which was produced by the plaintiff. It is a statutory notice of sale which was served upon the 2nd defendant as the chargor by registered mail. The certificate of posting was produced as exhibit 12(b). These documents were not challenged by the defendants at all when the plaintiff produced

them. The statutory notice was in my view a valid one. In the premises, I find and hold that the 2nd defendant was duly served with a valid statutory notice of sale. The 3rd defendant was not a joint owner of the charged property nor did she have any registrable interest in the property. The plaintiff had therefore no obligation to serve her with a statutory notice of sale. That answers issue number 11.

On whether or not the 2nd defendant was served with a notification of sale, the plaintiff produced exhibit 13 (a) which is a 45 days redemption notice addressed to the 2nd defendant. Also produced as exhibit 13(b) was a notification of sale by M/s Palomino Auctioneers. That too was addressed to the 2nd defendant. There was no real challenge against these documents by the 2nd defendant. I am satisfied on a balance of probabilities that indeed the 2nd defendant was duly served with the requisite notification of sale. Issue number 12 is therefore answered in the affirmative.

On whether or not it was incumbent upon the plaintiff to give the 2nd defendant opportunity to redeem the property and whether or not the charged property belonged to the 2nd defendant, I have no hesitation in giving an affirmative answer. However, my above findings show that the 2nd defendant was duly given an opportunity to redeem the property but failed to do so. That takes care of issue number 13.

On whether or not the 2nd and 3rd defendants are discharged from liability under the guarantees, I have already found that there were no circumstances that could lead to any such discharge. Issue number 14 is therefore answered in the negative.

Arising from those answers it is clear that the plaintiff advanced to the 1st defendant a total sum of KSh.10,000,000.00 in the form of a loan of 5 million and an overdraft facility of another 5 million. The statements of accounts produced as exhibits 9 (a) and (b) buttressed the plaintiff's oral evidence given by PW1. The 2nd defendant who was a director of the 1st defendant executed a legal charge over the charged property and further furnished his own personal guarantee for the said sum. The 3rd defendant too executed another guarantee in favour of the plaintiff. There is no doubt that the 1st defendant defaulted in the repayment of the said facilities and the plaintiff exercised its statutory power of sale over the charged property and realized only Kshs.7 million leaving the balance claimed together with interest. The 2nd defendant did not challenge the plaintiff's exercise of its statutory power of sale and the defence of frustration alleged by the defendants is really no answer at all to the plaintiff's claim. The allegation that the contract was frustrated by failure of the plaintiff to release the log book of motor vehicle registration umber KAK 854Q was far fetched and was not supported by any credible evidence at all. I reject it as an issue introduced to cloud matters. The 1st defendant in its correspondence with the plaintiff acknowledged its indebtedness with the plaintiff and never alluded to the issue of the alleged insurance proceeds long after the accident of the said motor vehicle.

In those premises, I am satisfied on a balance of probabilities that the plaintiff has proved its case against all the defendants and is entitled to judgment. I accordingly order that judgment be and is hereby entered in favour of the plaintiff against all the defendants jointly and severally as prayed in the plaint. The plaintiff will also have the costs of the suit.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MAY, 2007.

F. AZANGALALA

JUDGE

3/5/07

Read in the presence of:- Bundotich for the plaintiff.

F. AZANGALALA

JUDGE

3/5/07