REPUBLIC OF KENYA

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

Civil Case 1938 of 2000

PAUL ODHIAMBO EDWARD GONDI…….....……PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED…….....…….DEFENDANT

JUDGEMENT

In a Plaint filed on behalf of the Plaintiff on 01.11.2000 against the Defendant herein, the Plaintiff sought the following orders:-

(a) a permanent injunction restraining the Defendant whether by itself or its servants or agents or Advocates or auctioneers or any of them from doing the following acts, that is to say, from advertising for sale, selling by public auction or private treaty or otherwise howsoever the suit property,

(b) a mandatory injunction compelling the Defendant to account for the proceeds of receivership in respect of the principal debtor and to provide a true and accurate statement of account,

(c) a Declaration that the variation of charge dated 28th October 1986 and 30th November 1989 over the Plaintiff's immovable property known as L.R. No. Nakuru Municipality/Block 5/169 are invalid, null and void **ab initio** and all or any sums purported to be secured thereby are irrecoverable'

(d) a declaration that the variation of Charge and Further Charge dated 30th November 1989 is null and void and the Plaintiff is not therefore bound by them.

(e) An order that the Defendant deliver up to the Plaintiff or to such person as he appoints, the said charge and all documents in the Defendant's possession or power relating to the said charged property namely, L.R. No. Nakuru Municipality/Block 5/169 and at its cost and expense release and discharge the charged property from all encumbrances created thereon by the Defendant, or any person claiming,

(f) An order that the Defendant do deliver up to the Plaintiff the title documents and an executed instrument of discharge of charge in respect of the Plaintiff's land known as LR No. Nakuru Municipality/Block 5/169,

(g) **In the alternative and without prejudice to the foregoing and/or in addition to the foregoing** a declaration that the Defendant in making a claim of Kenya Shillings eighty million one Hundred and Ninety four Thousand Two Hundred and Sixty Five Ninety Five Cents (Kshs. 80,194,265.95) the Defendant has without consultation with and consent of the Plaintiff, converted the Plaintiff into a principal borrower to the prejudice of the Plaintiff a matter not in anticipation of the parties and in breach of the terms of the Charge thereby discharging the Plaintiff of all liability and the Defendant is estopped

from claiming and/or recovering the said sums;

(h) **In the alternative and without prejudice to the foregoing and/or in addition to the foregoing** an order that the Court does interpret the contract between the parties for its true meaning and that a true and accurate statement of final accounts is taken by the parties,

(i) A mandatory injunction restraining the Defendant from clogging or fettering the Plaintiff's right to redeem or exercising the equity of redemption in respect of the suit property,

(j) A declaration that the Defendant is not entitled to charge compound interest to the Plaintiff and that the sums claimed by the Defendant are excessive and unlawful,

(k) In the alternative and without prejudice to the foregoing a mandatory injunction to compel the Defendant to accept the redemption sum of shillings Three Hundred and Ninety Two Thousand Three Hundred and forty Twenty Cents (Kshs. 392,340.20) and within seven (7) days deliver up to the Plaintiff/Applicant the title documents and an executed instrument of discharge of charge in respect of the Plaintiff's property known as LR No. Nakuru Municipality/Block 5/169 (the suit property)Nakuru Town,

(l) An order that the Defendant forthwith concurs in doing all acts and things and executes all the necessary deeds and documents in order to effectuate the orders aforesaid,

(m) Such order or further orders as the Court may deem fit,

(n) Costs of this suit,

The Plaint itself comprises of not less than 33 paragraphs, and the facts will emerge in the course of this judgement. The following are common and admitted facts among the parties:-

(1) The Plaintiff was at all material times and is the registered owner of all that piece of land situate in Nakuru town and known as LR No. Nakuru Municipality/Block 5/169 (hereinafter referred to as "**the suit property**"),

(2) By a Charge dated 29.09.1982, (the Charge") made between the Plaintiff of the first part, the Defendant of the second part, Cholaco Tools Ltd of the third part the Plaintiff charged the suit property in favour of the Defendant as security for the repayment of advances or other financial accommodation granted by the Defendant to the Cholaco Tools Ltd to an amount of Kenya Shillings one Hundred and Forty Thousand (Kshs. 150,000), ("**the mortgage debt")**

(3) By an Instrument of Variation of Charge made on 28th October 1986 between the Plaintiff and the Defendant the Plaintiff and the Defendant agreed to vary the terms of the said charge to the intent that the charge would be a continuing security for advances and other financial accommodation to be granted to the Plaintiff and the said Cholaco Tools Limited jointly and severally provided the total monies granted shall not at any time exceed the mortgage debt of Kenya Shillings One Hundred and Fifty Thousand (Kshs.150,000/=),

(4) By a Debenture dated 13th December 1989 ("**the Debenture**") made between the Defendant, and Blowmocans Limited ("the principal borrower company") the principal borrower company charged in favour of the Defendant all its undertaking goodwill assets including its uncalled capital among others for a total security of Kshs. 150,000/= ("the principal debt"),

(5) Following the execution of the Debenture there was executed a Variation of Charge and Further Charge ("**the Variation of Charge**") dated 30th November 1989 between the Plaintiff, the Defendant and Blowmocans Limited (**the Principal Debtor Company**) by which the Plaintiff charged the suit property so as to secure the Principal Debtor Company's financial accommodation by the Defendant to an aggregate amount of Kenya Shillings Four Million (Kshs. 4,000,000/=),

(6) The Plaintiff had a personal account No. 011-043-806 with the Defendant. This personal account had a debit balance of Kshs. 393,720/20 as at 31st October 2000 according to the Plaintiff's Statement of Account Sheet No. 213 of the Plaintiff's bundle of documents filed in Court.

(7) Blowcans Limited was a company in which the Plaintiff had some interest (otherwise he would not have been so ready to grant the security of his own property). At least he was a director of it at the material time. This company maintained an account No. 011-043-105 at the Defendant's Moi Avenue Branch, I shall hereinafter refer to this account at the "**Blowcans Account**". As at 26.05.1989 the Blowcans Account had a debit balance of Kshs. 158,341.70. For reasons which will be shown later in the course of this judgement these opening balances will assume their own importance,

(8) Before the hearing of this suit, the parties agreed on the issues for determination of the Court,

(9) The parties produced bundles of documents both of which were bulky,

(10) The Plaintiff filed a notice to admit to the Defendant in accordance with the provisions of Order XII of the Civil Procedure Rules. The two bundles had more or less identical documents, mainly the statement of account of the Plaintiff's account No. 011-043-806 and the Blowcans Account No. 011-043-105.

In support of his case, the Plaintiff's sole witness, the Plaintiff himself, Paul Edward Odhiambo Gondi told the Court in his evidence in-chief that he initially maintained an overdraft facility of Kshs. 150,000/= in his current account – 011-043-806, but that this sum was increased to Kshs. 500,000/=. For this loan he charged his property situate in Nakuru, known as Title No. Nakuru Municipality/block 5/169 ("the suit property") for the purpose of improving the working capital of his company called Cholaco Tools Ltd. The Plaintiff however denied that this was the purpose of the increase in the overdraft facility because he said, Cholaco Tools Ltd had no account with the Defendant, and this anomaly was never rectified. It was not, I think, necessary but Cholaco Tools Ltd should have had an account with the Defendant for the facility remained available to the Plaintiff who drew and applied it for any other purpose, including for use as working capital of Cholaco Tools Ltd. This would however not invalidate the charge. The Plaintiff in any event admitted the due execution and registration of the Charge. The terms of the Charge included keeping the Plaintiff informed of the statement of the account at any given time, and that the Plaintiff's liability would be limited to a maximum of Kshs. 150,000/= (as principal) and interest and other charges from time to time.

By an instrument of variation of charge made on 28th October 1986, made between the Plaintiff and the Defendant the parties agreed to vary the terms of the Charge that the Charge would be a continuing guarantee for advances and other financial accommodation to be granted to the Plaintiff and the said Cholaco Tools Ltd jointly and severally. Again the total principal would be limited to a maximum of Kshs. 150,000/=. The Plaintiff did not contest the due execution of this Variation of Charge.

The Plaintiff also gave evidence that he executed a Guarantee on 22nd June 1989 guaranteeing financial accommodation by the Defendant to Blowcans Ltd (the Blowcans). The Guarantee was part of the bundles of documents produced by the Plaintiff. The Plaintiff again provided the suit property as security. The Plaintiff alleged that the terms of the guarantee included keeping the Plaintiff informed of the status of Blowmocan's account, …….. the financial accommodation would not exceed Kshs. 4,000,000/= that the Defendant and Blowmocans would not enter into any other arrangements affecting the Plaintiff's guarantee without notice to him and his consent first had and obtained. Blowmocans would maintain one account with the Defendant, that the Plaintiff would be called upon to make good the guarantee in the event of failure or default of Browcans to pay, the Defendant would give notice to the Plaintiff of his liability and liability would crystalize only upon such notice, and that Blowcans and the Defendant would maintain and operate the account prudently and diligently.

As indicated at the beginning of this judgement by a Debenture dated 13th November 1989 made between the Defendant and Blowcans, Blowcans charged in favour of the Defendant all its undertaking goodwill assets and uncalled capital among others. I also indicated following the issue of the Debenture, the

parties executed a Variation of Charge and Further Charge dated 30th November 1989, again over the Plaintiff's suit property to secure financial accommodations to Blowcans to an aggregate the amount of Kshs. 4,000,000/=.

The Plaintiff told the Court that the said Variation of Charge was drawn by M/s Hamilton, Harrison & Mathews who by a letter dated 30.06.1986 sent to the Defendant's Manager at its Kenyatta Avenue Branch for execution by the Plaintiff or to procure signature of the Plaintiff. The said letter is signed by one C.O. Rachuonyo and yet the said C. O. Rachuonyo is the same person who purportedly witnessed the signature of the Plaintiff and purported to give the Advocate's Certificate that he had explained to the Plaintiff the effect of the Variation of Charge before the Plaintiff signed it and before the Advocate signed the Certificate to that effect. The Plaintiff informed the Court that he could not remember whether he appeared before any Rachuonyo because there are two of them by the same name.

The Plaintiff has charged that by virtue of this discrepancy in the correspondence and his execution, the variation of Charge dated 30th November 1989 was executed without compliance with the mandatory provisions of Section 71 of the Registered Land, (Chapter 300 of the Laws of Kenya) and is by reason thereof null and void, and the Plaintiff should not be charged with any liability thereunder. I shall revert to the provisions of Section 71 of the Registered Land Act, (R.L.A) later.

It was also the Plaintiff's evidence that the financial accommodation of Kshs. 4,000,000/= was made available to Blowcans well before the securities were perfected or registered. He observed that from the Statement/Sheet No. 01 of 26th May 1981 the debit balance on Blowmocan's Account No. 011-043-105 was Kshs 158,341.70. Between Account Sheets Nons 2-7 the debit balance on the account was Kshs, 2,643,132,.40 as at 31.08.1989. Statement of Account Sheets No. 8 – 17 are missing both from the Plaintiff's and Defendant's Bundles and is not possible to state when the sum of Kshs,. 4,000,000/= was disbursed. However it is observed that from the statement of Blowcan's Accounts (Sheets Nos 18 – 21) that the debit balance was Kshs. 6,588,620/= as at 01.12.1989 that is to say one day after signature of the Variation of Charge and before its registration the debit balance was over Kshs. 6,000,000/=. The Plaintiff inferred that the amount of Kshs. 4,000,000/= was advanced before registration of the further charge and as a result thereof there was no consideration as defined in the Charge.

Finally the Plaintiff referred to correspondence and in particular the letter dated 9th March 1992 (marked MFI "I") addressed by the Defendant to the Directors of Blowcans Ltd regarding its account No. 011-043-105 showing a debit balance of Kshs. 19,901,987/70 and paragraph 1 of which read as follows:-

"**The position of your account is causing us a lot of concern and calls for proposals from Blowcans for payment. In the meantime the machinery imported be incorporated among the securities for the Bank."**

The letter is signed by one Mwingote.

The Plaintiff told the Court that he never authorized the Defendant to open a Letter of Credit (L/C) for Blowcans. The Defendant never consulted him. The L/C amount of Kshs. 19 – 25 million arose from importation of machinery, documented to having been sold to Blowcans Ltd shipped to the Defendant but for the account of Blowcans. The total value of the machinery imported was £stg. 850,000= or equivalent to Kshs. 17,000,000/= at the time of importation. The Plaintiff was unable to say whether Blowcans paid the said sum.

The Plaintiff also told the Court that on or about 14th April 1993, the Defendant appointed Receivers for Blowcans with a view to managing and ascertaining the assets of Blowmocans and account to the Defendant as appointor and no doubt to shareholders of Blowmocans. Despite an order by Hewett J. for the Receivers to furnish an account of their receivership of Blowmocans, the Plaintiff was not aware of any account by the Receivers. The Plaintiff told the Court that he cannot be made liable for accounts of Blowmocans for importation of machinery of which he was unaware, and did not authorize or consent to. The liabilities for which he guaranteed under the guarantee dated 22nd June 1989, were limited to Kshs.

2.0 million. The debit balance to his personal account No. 011 043 806 was Kshs. 393,720/70 as at 31.10.2000 per sheet No.213 contained in the Defendant's Bundle of Documents referred to above. The Plaintiff admitted that he is liable for this sum, and he had always been, and now remains ready and willing to pay the said sum.

When the Plaintiff sought to produce the L/C documents as secondary evidence, Mr. Kariuki Counsel for the Defendant strongly objected to their production, firstly because the notice given to him to produce he said was extremely short. The notice was served on him on 19.01.2004 whereas the hearing was to commence on 20.01.2004. Secondly the documents had not been enumerated in the Plaintiff's bundle of documents as is required under Section 69 of the Evidence Act, (Cap. 80 Laws of Kenya). Thirdly the Plaintiff had ceased being a director of Blowcans in 1990 and had by implication little interest in the importation and/or documentation sought to be produced.. Fourthly production of the said documents would be contrary to the requirements of Section 35 of the Evidence Act. Section 35 (1) which is the relevant provision for our purposes is in these terms:-

"**35 – (1) In any court proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied that is to say –**

(a) if the maker of the statement either –

(i) had personal knowledge of the matters dealt with by the statement or

(ii) **where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have personal knowledge of these matters, and**

(b) **if the maker of the statement is called as a witness in the proceedings.**

<u>PROVIDED</u> that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which is in the circumstances of the case appears to the Court unreasonable.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible in evidence, or may without any such order having been made, admit such a statement in evidence -

(a) notwithstanding that the maker of the statement is available but is not called as a witness,

(b) notwithstanding that the original document is not produced if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the Court may approve , as the case may be.

(3) ……

(4) ……

(5)

I overruled Mr. Kariuki's objection and admitted the documents in evidence under the proviso to Section 35(1) that no one seemed to be able to trace the compiler of the list of the imported equipment, and procuring his attendance would be done only at great expense to the Plaintiff and would cause

unnecessary delay in determination of the suit and S. 68 (1) (a) (i) that the receivers took over the assets of Blowmocans as a going concern and the original documentation of the machinery whose value was shown as being Kshs. 17 million or thereabouts depending upon the commercial rate at the time of sterling pounds and the Kenya shilling was either under the possession, control or custody of the Defendant.

In the conclusion of his evidence, the Plaintiff told the Court that at the time he signed that Charge he did not wish to assume liability for Kshs. 80 million. He had assumed liability for Kshs. 4.0 million. The Plaintiff therefore sough the orders set out in the prayers at the end of his plaint, including a declaration in terms of paragraph 12 of the Plaint that at the time he was served with a notification of sale by Garam Investment Ltd, he had not been served with a Statutory Notice in terms of S. 74 of the R.L.A. He sought a mandatory injunction for the Defendant to accept the sum of Kshs. 393,720/20 in full and final settlement of his liability under the Charge and the Guarantee.

Under cross-examination by Mr. Kariuki, learned Counsel for the Defendant the Plaintiff admitted that he signed the Charge, the Variation of Charge and Further Charge, and that by signing the Charge he agreed with the terms thereof. He confirmed that Cholaco Tools Ltd had no account with the Defendant, although advances were made in respect of Chalaco Tools Ltd and confirmed that paragraph 4 of the Plaint is a true statement of affairs. The Plaintiff maintained that under the Variation and Further Variation of Charge, his liability was limited to Kshs. 4 million with interest thereon.

The Defendant too called only witness, Mr. George Kipkoech Ruto who is the Defendant's Account Manager, Recoveries, Harambee Avenue Branch, and one of his assignments related to the account of Blowcans Ltd (who was the Principal Borrower) in the matters at issue in this case. He confirmed the issues in this matter, advances of various sums to the Plaintiff's business Cholaco Tolls Ltd, and Blowcans Ltd, firstly, in the sum of Ksh. 150,000/= and for which the suit property was granted as security. DW1 also confirmed that the Plaintiff was granted further facilities as working capital for Blowmocans Ltd a company of which the Plaintiff was an active director until sometime in 1995. To secure these various facilities, the Plaintiff granted to the Defendant –

(1) 28.09.1982 Charge to secure a facility of Ksh. 150,000/= for the use of the Plaintiff's business Cholaco Tools Ltd, over the Plaintiff's property i.e the suit property,

(2) 28.10.1986 – Variation of Charge – constituting the Charge to b e a continuing security for the facility of Kshs. 150,000/= (the charge debt) and for advances and other financial accommodation granted or to be granted to the chargor and to the borrower (Chalaco Tools Ltd) jointly and severally,

(3) 30.11.1989, Variation of Charge and Further Charge – which was supplemental to –

(a) the Charge

(b) the Further Charge

(c) a Debenture dated 30.11.1989 made between the Plaintiff, the Defendant, and Blowcans Ltd (Blowcan) securing a facility of Ksh. 4.0 million,

and in turn comprising -

(i) the sum of Kshs. 150,000/= to Chalaco Tools Ltd.

(ii) The sum of Ksh. 4.0 million for the Plaintiff's trading business Blowcans.

(iii) 22.06.1989 Guarantee by the Plaintiff to Defendant for the sum of Kshs. 2.0 million in respect of the said facility to Blowcans,

These are the basic documents in issue and giving rise to the Plaintiff's claim herein, and I shall be

reverting to them in due course. In essence DW1 said the documents secured different sums comprising the Plaintiff's personal guarantee of Kshs. 2.0 million and the Cholaco Tools Ltd, (Kshs. 150,000/=) and the Blowcans facility of Kshs. 4.0 million, making an aggregate sum of Kshs. 4.150 million liability on the part of the Plaintiff.

DW1 told the Court that the Defendant upon realising that the account was not being serviced demanded the regularisation of the account per its Advocate's letter of 22.10.1997 when the sum then due was stated to be Kshs. 45,377,569.85 and that unless the said sum was paid immediately, the Defendant would proceed to realise the Charge on the suit property. The witness told the Court that an analysis of Blowcans account showed an outstanding balance of Kshs. 80,194,265/45 as at 30.11.1999, and that no payment had been received by the Defendant on the said sum or any part thereof.

DW1 also testified that the Defendant never recovered the machinery the subject of a Letter of Credit for sums between Kshs. 17 – 25 million, and that they also never recovered the moneys from the sale of recovery of machinery, despite a judgement and decree for shs. 8.5 million, in H.C.C.C. No. 2513 of 1993 between the **Receivers** of **Blowcans** (**Evan Alexander Davidson & Another**) vs. (**Scan Forwarders Kenya Ltd & Another**). He also told the Court that there were never prepared any accounts by the Receiver, and no assets or machinery was recovered by the Receivers. In the circumstances he prayed that the interim injunctive order be vacated and the suit by the Plaintiff be dismissed with costs.

In cross-examination DW1 admitted that,

- there was no application or document to show a request for an L/C facility by the Plaintiff,

- there was no statement of account for Chalaco Tools Ltd.

the guarantee for the Kshs. 2.0 million is not part of the Charge and is consequently not secured by the Charge,

- he was unable to explain either the reason, or the contents of the Statements for Blowcans which were issued between the sum of Kshs. 2,643,132/40, (sheet No. 7) and Kshs. 6,888,620.25 (Sheet No. 18) with sheets Nos. 8 – 17 missing.

- there was no record of a request from the Plaintiff to grant an L/C facility to Blowcans or the opening thereof

- he was unable to distinguish the L/C sum from the overdraft facility, the guarantee, and interest element, or what the penultimate sum of Kshs. 80,194,265.95 comprises,

and could not say whether the machinery for which Minolta Industries Ltd offered to buy at shs. 17,535,533.50 were ever sold to them and which sum should have been payable to the Debenture-holder or the Defendant in accordance with the Court's judgment in **Evan Alexander Davidson vs. Scan Forwarders Kenya Ltd and Another** (supra).

I have reviewed in full, the rival parties positions in this suit. If I may recapitulate, the Plaintiff's case is that it is a stranger to the letter of credit which led to substantial increase of the facility to **Blowcans. He** relies entirely upon the Defendant's own statements of Account to show that the Plaintiff's personal liability as at 31.10.2000, the time of the cessation of assistance to Blowcans was Kshs. 383,720/20. The Plaintiff sought to be excused from all and every liability in respect of any sum under either the Guarantee, the Charge, the Further Charge and the Variation of Charge and Further Charge.

To determine the parties respective liabilities, their Advocates framed and filed not less than fourteen (14) issues for determination by the Court. I shall now consider each of these issues in turn.

Firstly were the variations of Charge and Further Charge over the suit properly executed by the Plaintiff over the suit property and are they valid?

The Plaintiff in his evidence-in-chief testified in effect that he signed the Charge Variations of Charge, and Further Charge, but that he did not have any Advocate have explained to him the effect of these instruments as is required by the provisions of Section 110 of the (Registered Land Act, Chapter 300, Laws of Kenya), (R.L.A) , and Rule 7(2) of the Registered Land Rules.

However upon cross-examination the Plaintiff confirmed that he did indeed execute the Charge, the Variation of Charge and Further Charge. As to whether he did not execute those instruments before an Advocate who gave the Verification Certificate, the Plaintiff failed, in my view, to discharge that burden or onus. His statement that he did not know which of the two Rachuonyos before whom he may have executed those instruments suggested to me, that the effect of those instruments was explained to him by an Advocate called "**Rachuonyo**" but that his only problem was merely that he could not remember which one of them gave the Verification Certificate.

I reject this contention. Firstly, the Charge (of 28.09.1982) was executed before one Njage N. Nganga Advocate. Secondly, the Instrument of Variation of Charge (of 28.10.1986) was executed before C. O. Rachuonyo who also witnessed the signatures of the Defendant's Attorney who executed the Variation of Charge. Thirdly, the Variation of Charge and Further Charge (of 30.11.1989) was executed by the Plaintiff before one S.K. Chepkonga, Advocate who also verified the execution and rendered his Certificate. There was no evidence by the Plaintiff that he did not appear before the said Advocate. The first ground for challenging the validity of the Further Charge fails.

The second ground for challenging the validity of the Further Charge is however more substantial. **The Plaintiff alleges that there was no consideration, and if there was such consideration, it was past consideration, and such consideration is not valid in law, for the Variation of Charge and Further Charge.**

The Plaintiff testified that the Variation of Charge and Further Charge was executed on 30.11.1989 but was not registered until 1.02.1990. Under the provisions of Section 71 of the R.L.A, the Charge or the Variation of Charge and Further Charge takes effect only after registration. Yet from the Defendant's Statements of Account for Blowcans Sheet No. 7 it is shown that Blowcan's Account was overdrawn only by KSh. 2,643,132.40, as at but on 1.12.1989, a day after the execution of the Variation of Charge and Further Charge, the account was swollen to Kshs. 6,888,620.25.

For this argument to be credible, the Plaintiff will need to show that Blowcan's Account was overdrawn by at least Kshs. 2,688,620.25 on or before 30.11.1989 so that the sum of Kshs. 4.0 million, added to the said figure (and thus constituting the offending figure of Kshs. 6,688,620.25) was disbursed to Blowcan's account on that date, that is to say, on 1.12.1989. In the absence of Sheets Nos. 7 – 17, the Plaintiff cannot clearly make that conclusion. Similarly, in the absence of sheets for the months of February 1990, the Plaintiff cannot conclude that the sum of Kshs. 6,688,620.25 shown in the account of Blowcans at sheet No. 18 certainly includes the sum of Kshs. 4,000,000/= provided for under the Variation of Charge and Further Charge. The Plaintiff cannot further say that the said instrument having been registered on 1.02.1990 and taking effect thereafter, that the consideration was past, or that there was no consideration. For if it was a matter of plucking figures from the Statements of Account for Blowcans nothing could stop the Defendant taking a figure at Sheet No. 31 (of 1.03.1990) at shs. 6,584,922.50 and say it includes the sum of sh. 4.0 million, the consideration for the Charge.

In the result again, I must reject the Plaintiff's pure speculation that the sum of Kshs. 6,688,620.25, at Sheet No. 18 of Blomowcans Account as including Shs. 4.0 million provided for under Variation of Charge and Further Charge.

DW1 (Ruto's) suggestion upon cross-examination that the sum of Kshs. 4.0 million was debited on 1.12.1989 is also not borne out by any entry by way of credit on that date, and cannot for that reason be correct. But even assuming that Ruto's testimony was correct that the Charge debt of Kshs. 4.0 million was credited on 1.12.1989 (although there is no basis for that statement), my view of the matter is that the crediting of an account of Blowcans was one only thing. It was not a drawn down on 1.12.1989. There was no evidence of a drawn-down of that sum on 1.12.1989 or indeed any time before 1.02.1990.

In fact the debits or drawn-downs set out in Sheets Nos. 18 – 21 inclusive, that it is, the period 1.12.1989 to 31.12.1989 show a drawn-down of Kshs. 1.4 million which does not reflect a drawn-down of the assumed credit of shs. 4.0 million of the total debit of Kshs. 6,688,620.25 as at 1.12.1989. There are no sheets for the period 31.12.1989 to 31.01.1990. The probable and reasonable inference is that as at 1.02.1990, the date of registration of the Variation of Charge and Further Charge, the Charge debt of Kshs. 4.0 million was yet to be drawn. The fact also that there are actual credit deposits of Kshs. 1.3 million (approximately), between the same period strengthens this view. This being so, I am unable to accept the view that there was no or past consideration for the Variation of Charge and Further Charge.

There was certainly adequate consideration for the Variation of Charge and Further Charge. It is stated in the Recital to that Instrument. The Defendant had at the request of the Plaintiff (the Chargor) agreed not to call for immediate repayment of the principal moneys and interest secured under the Charge. An undertaking not to call the immediate repayment of the principal moneys and interest is an act of the future, not the past. The Defendant had also agreed to extend further advances to the primary or Principal Borrower (Blowcans), not to exceed the sum of Kshs. 4,000,000/= as security and not together to exceed the sum of Ksh. 4,150,000/= that is, together with the first sum of Ksh. 150,000/=.

The Plaintiff also attacked the Defendant's case in that the Defendant had under the Variation of Charge and Further Charge consolidated the Plaintiff's liability under his personal account, (No. 011 043 806), and the Blowcan's Account No. 011043 (05), and that by doing so, the Defendant violated the provisions of Section 84 of RLA which states that:-

"84. **A chargee has no right to consolidate his charge with any other charge unless the right is expressly reserved in the Charges or in one of them, and is noted in the register against all the charges so consolidated."**

From the ordinary meaning of this section, it presupposes the existence of two or more charges. There is only one Charge in this case. It is the Charge of 28.09.1982, which Variation thereof per the Instruments of Variation dated 28.10.1986, and the Variation of Charge and Further Charge of 30.11.1989. What the latter instrument did, was not to consolidate the Charges, but merely to vary the Plaintiff's liability from the original sum of Kshs. 150,000/= to Kshs. 4,150,000/= inclusive of the security to Blowcans Ltd. Provided the Variation is in conformity with the provisions of Section 71 of the R.L.A to which I have already referred, and confirmed that it does comply therewith, there was no violation of either that Section 71 or Section 84 of the R.L.A.

The Variation of Charge and Further Charge is therefore valid and enforceable.

The third issue was whether the Plaintiff was served with a statutory notice as required under Section 74 of the R.L.A.

Section 74(1) of the R.L.A. provides that if there is default made in the payment of the principal sum or of any interest or of any other periodical payment or any part thereof, ….. and continues for one month, the Chargee may serve on the Chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.

If the Chargor does not comply, within three months of the date of service with the said notice, the Chargee may either appoint a receiver of the income of the charged property or sell the property. A Chargee who appoints a receiver may not also exercise its power of sale.

In the case at hand, by a letter dated 22.10.1997, the Defendant's Advocates demanded payment of the sum of Kshs. 45,377,567.85 and purported to give notice that:-

"**unless we receive the said amount together with <u>interest immediately</u> we shall proceed as provided by Section 74 of the Registered Land Act to realise the Charge on Title No. Nakuru Municipality/block 5/169 given to our client by way of security."**

We have observed above that said Section 74(1) & (2) of the R.L.A requires that there be a default of one month, and that default continues thereafter, the Chargee may only exercise any of his rights to either appoint a receiver, or sell the charged property within **three months of the date of service**. The said Defendants Advocate's letter demanded payment of the amount stated and interest thereon **immediately.** This is not in my opinion a proper or statutory notice as provided by the said Section 74(2) of the R.L.A that the statutory power of sale may only be exercised **within three months of the date of service**, and not **immediately**. Mr. Njogu, Counsel for the Defendant admitted as much.

In the result therefore the Plaintiff was not served with a Statutory notice as required under Section 74 of the R.L.A and consequently no statutory power of sale arose.

Fourthly, has the Defendant clogged or fettered the Plaintiff's right to redeem the charged property?

Section 72 of the R.L.A confers upon the Chargor the right of redemption upon the following conditions:-

(1) that the Chargor pays all moneys due and owing under the Charge at the time of payment,

(2) that the Chargor pays all moneys due and owing under the Charge,

(3) that the Chargor pays all costs and expenses properly incurred by the Chargee in exercising any of the powers conferred upon the Chargee by Section 74 of the R.L.A.

(4) that the Chargor pays the said principal sum and interest and any other moneys specified under the Charge.

(5) that if the Chargee is not available to receive all such payment, the Chargor may deposit the same with the Registrar who will then discharge the charged property.

If the chargor fulfils all the above conditions before the charged land is sold under section 77 of the Act (R.L.A), he is entitled to redeem the land, and his right to do so is only fettered in so far as the above conditions are not fulfilled.

In the matters at hand, the Plaintiff acknowledges that he is indebted to the Defendant in at least the sum of Ksh. 393,537.20 together with interest thereon. There is no dispute that the charged property was to secure –

(a) Facilities to Chalaco Tools Lt.

(b) Facilities granted to the Plaintiff personally;

(c) Facilities to Blowcans Ltd.

There was no evidence by the Defendant for a claim against Cholaco Tools Ltd. The sum admitted by the Plaintiff is secured by the Charge. It was the Plaintiff's testimony in Court that his liability under the Charge in respect of facilities extended to Blowcans by the Defendant was limited to a principal sum of Kshs. 4 million plus interest. The Plaintiff has made no offer to pay off this sum, unlike the offer for payment of his personal account, for Kshs. 393,537.20. The Defendant has in my opinion, rightly refused to permit the Plaintiff to redeem the Charge by payment of the liability under his personal account while omitting to pay out the sum of Kshs. 4.0 million secured under the Charged property. By his testimony, he acknowledges liability also for the said sum, being secured facilities to Blowcans Ltd.

In the circumstances therefore I cannot say that the Defendant has clogged or fettered the Plaintiff's right or equity of redemption to redeem the charged property.

The Parties 5th and 6th issues were whether the Plaintiff was entitled to a Discharge of the Charge over the suit property upon payment of the sum of the sum of Kshs. 383,537.20, and whether the Plaintiff's liability under the Charge is limited to Khs. 150,000/=.

I have already dealt with these issues in the discussion on the fourth issue, and indeed the previous discussion on the validity of the Further Charge, and the variation of the Charge, and the Further Charge. Having found as I did, that the Further Charge and the Variation of Charge were valid and enforceable, the Plaintiff's liability cannot be limited to either Kshs. 383,537.20, or Kshs. 150,000/=. The Plaintiff is also liable for the secured sum of Kshs. 4.0 million in respect of facilities to **Blowcans**.

Loss and Damage to the Plaintiff was the 7th Issue.

The evidence advanced to the Court showed that the Plaintiff owed the Defendant Shs. 393,537/20 and disputed owing Shs. 4.0 million on account of **Blowcans**. No evidence of loss and damage suffered or likely to be suffered by the Plaintiff was tendered to the Court. The Plaintiff's own acknowledgement shows that the Plaintiff is indebted to the Defendant and also shows that the Plaintiff has been in breach of his own covenants under the Charge, the Further Charge and the Variation of Charge and Further Charge. The Plaintiff cannot be said to suffer loss or damage in the circumstances.

The 8th Issue was Fundamental Departure from the terms of the Charge, etc

I am unable to say that the Defendant altered unilaterally any of the terms of the Charge, Further Charge, and Variation of Charge and Further Charge. In this regard Mr. Ochieng Oduol, learned Counsel for the Plaintiff submitted at length on the **Defendant's breach of the guarantee agreement**. The real short answer to this submission lies in the response thereto by the learned Counsel for the Defendant. The issue of guarantee is not pleaded nor is there any relief sought in relation to any guarantee, and the submissions on this (subject of guarantee) amount to a serious breach of the fundamental rule of pleadings, and the Court as such has no jurisdiction to decide on the issue not raised before it in pleadings. This rule is embodied in Order VI rule 6(1) that unless a party amends his pleadings (rule 6(2)), no party may in any pleading make an allegation of fact, or raise any new ground of claim inconsistent with a previous pleading of his in the same suit.

Considering a similar point the Court of Appeal in the cases of CHARLES C. SANDE vs. KENYA CO-OPERATIVE CREAMERIES LTD (Civil Appeal No. 154 of 1992 (unreported) which was followed also in NAIROBI CITY COUNCIL vs. THABITI ENTERPRISES LIMITED (Civil Appeal No. 264 of 1996) also unreported) held that:-

"…… **In our view the only way to raise issues before a Judge is through pleadings and as far as we are aware, that has always been the legal position"**

The instant case from the Plaint, is about restraining the Defendant from enforcing its rights as chargee, and discharge of charge executed over the Plaintiff's property. The Defendant in turn has been seeking to enforce its rights under the Charge, not the guarantee. I have poured several times over the Plaint herein, and also the Defence, and I am satisfied that the issue in this matter concerns the relationship of the parties as Chargor and Chargee, and not that of Chargee and guarantor. There is no basis for the Plaintiff's Counsel's submission that the Plaintiff be discharged from the terms of the guarantee which is not in issue here. I must therefore disregard all discussion on the guarantee in this matter.

I have already dealt with the issue of the Discharge of the Plaintiff from all liability under the Charge, the Further Charge and the Variation of Charge and Further Charge. I have already found that the Plaintiff acknowledges owing to the Defendant a sum of Ksh.393,537/20. I have also founded that the Plaintiff is bound by the terms of the said Variation of Charge and Further Charge. The Plaintiff's land will be discharged only once he complies with the requirements of Section 72 of the R.L.A regarding the payments of moneys secured under the Charge instrument. The 9th issue whether the Plaintiff may be discharged for liability and the charge discharged does not therefore arise.

The 11th Issue whether the Defendant has failed to account to the Plaintiff for any sums deposited in the Principal Debtor's Account in repayment of the sums due.

Apart from what appears in the Various Sheets of the Statement of Account (Account No. 011043105) as credit deposits, the Plaintiff did not adduce any evidence to show what other sums were paid into or were received by the Defendant towards the payment of the facility of Kshs. 4.0 million to **Blowcans Ltd.** This 11th issue does not therefore lie at all.

The 12th Issue was whether the Defendant had acted fraudulently, recklessly and/or in breach of its duty of care on the Plaintiff.

Mr. Njogu, learned Counsel for the Defendant submitted that the Plaintiff had to establish that the Defendant owed the Plaintiff a duty of care and the extent of that duty of care. For my part, I am satisfied that the Defendant Bank owed a duty of care to its customer, the Plaintiff. There is no explanation as to the opening of the Letter of Credit far in excess of the secured debt of Shs. 4.0 million. In my view, the Plaintiff will not be held liable for that recklessness in lending, and absolute lack of follow up of the decree obtained in H.C.C.C. No. 25137 of 1993 (supra) for Kshs. 8.5 million and thereafter running Blowmocans account to Ksh. 80,194,265.25, well beyond the assets of Blowmocans. The Defendant will bear the loss and damage for its recklessness.

Is the Plaintiff entitled to the reliefs and who is to be condemned in costs of this suit. These were the ultimate, 13th and 14th issues as framed by the parties Advocates.

Before I decide on these over all issues, the Defendant's Counsel raised the issue of admissibility of the Plaintiff's evidence on Exhibits, MFI – 1 to MFI – 2. The Defendant's Counsel objected to the admission of those documents on Section 62 of the Evidence Act (Cap. 80, Laws of Kenya), which provides that all facts save for contents of documents may be proved by oral evidence, and such evidence must in all cases be direct evidence (per Section 63 of the Evidence Act), that is to say, evidence by a witness who has actual firsthand knowledge of the fact sought to be proved. Counsel had contended that the Plaintiff having had little to do with the day to day management of the company **Blowcans** after 1990, and the issue of the receivership of the same is not direct evidence within the meaning of Section 62 of the Evidence Act and that as such the same is inadmissible and of no evidence value.

With regard to the contents of the documents produced as exhibits MFI – 1 and MFI – 2, the contents of which could not be produced by oral evidence because the Plaintiff was neither the maker of the Statements nor did he have personal knowledge of the matters dealt with the said documents, and that the makers of these statements were not called to corroborate the Plaintiff's testimony.

I overruled this objection at the hearing and do so still. Upon Blowcan's being placed under receivership by the Defendant, the Receiver did address a letter dated 9.03.2001 and marked MFI – 1 to the Plaintiff as director of Blowcans, and which said letter made reference to a letter of credit number 011043 where the Defendant was claiming a sum of between Kshs. 18 – 25 million from **Blowcans** for the importation of various machines and the importation documents were marked MFI – 2. The Plaintiff's evidence arising from that letter and not on those documents alone, was that the Letter of Credit account was opened without reference to him and he did not authorise the opening of the Letter of Credit, and consequently liability thereon could not be attached to him or the security over the suit property, and the Defendant could not recover those moneys represented by the L/C from the Defendant. The said documents were therefore properly admitted in the testimony of the Plaintiff.

So therefore, reverting to the ultimate issues herein, **is the Plaintiff entitled to the reliefs sought herein, and who is to be condemned in costs.**

There were altogether fourteen (14) issues which the parties framed, and asked the Court to determine in this suit. The Plaintiff had also in his Plaint sought not less than fourteen (14) prayers. The final orders will however depend upon the Court's findings on the testimony, the law, the submissions of Counsel of the rival parties and the Court's analysis of those matters.

It was common ground among both the Plaintiff and DW1 (Mr. Ruto that the Plaintiff offered to pay the sum of Kshs. 393,537/20 due on his personal account. The Defendant objected to this proposal and required the Plaintiff also to pay the moneys due from Blowmocans secured under the Variation of Charge and Further Charge. Despite strong prostrations from both the Plaintiff and the Plaintiff's Counsel, I have found and held that the Variation of Charge and Further Charges were validly executed, and are therefore enforceable. It is necessary to state that the original sum of Kshs. 150,000/= which was a facility to Cholaco Tools Ltd was by the Variation of Charge and Further Charge incorporated into the said instruments and secured under the said Instrument "**as the existing debt**" which together with the "**new debt of Kshs. 4,000,000**" made the aggregate debt of Kshs. 4,150,000/=, secured under that instrument.

So the only moneys due from **Blowcans** and for which the Plaintiff would legally be liable for under the Variation of Charge and Further Charge would therefore be the said sum of Kshs. 4,150,000/= plus interest thereon.

The Plaintiff having failed to plead the issue of the guarantee in his Plaint, the relationship of the Plaintiff and the Defendant in this suit was that of Chargor and Chargee. The submissions by Counsel for the Plaintiff concerning the Plaintiffs Personal Guarantee were therefore not relevant and no claim can be founded upon those submissions.

The Defendant, by opening the Letter of Credit, and purporting to lay liability upon the Plaintiff, without first reference to the Plaintiff, acted recklessly and must consequently bear the consequences thereof. There was no evidence or even suggestion that the Defendant in opening the L/C acted fraudulently.

There was no evidence from the Plaintiff apart from the credit deposits scattered in the various statements of **Blowmocans** in the almost identical bundles of documents filed by the parties, that the Plaintiff made any separate deposits to either his personal account or to the **Blowmocans** account. He cannot therefore say, he was not given credit for any such payments.

There was no departure or fundamental departure from the Charge. The Charge had been regularly varied, and executed, and registered in accordance with the provisions of the law, the R.L.A.

I also found that the Defendant had not in any way clogged or fettered the Plaintiff's right to redeem the suit property. I also found that the Defendant had not served the Plaintiff with the requisite statutory notice of sale, and consequently the Defendant's statutory power of sale had not arisen, and the Auctioneer's purported notice of sale was consequently null and void.

I also found that the Variation of Charge and Further Charge were regular, valid, and therefore enforceable and the issue of consolidation does not arise where there is only one Charge which is varied and executed by all the parties concerned. A variation may take many forms including transferring for a consideration one debt from one entity to another as happened here where the debt by Cholaco Tools Ltd was assumed by the Plaintiff by adding the same to the Plaintiff's liability under **Blowmocans**. Such transfer is not a consolidation as there is but one charge which is being varied for a consideration that was valid.

In his prayers, the Plaintiff had sought the Court's interpretation of the parties relationship, under the Variation of Charge and Further Charge. I have indicated already that the relationship between the Plaintiff and Defendant was that of Chargor and Chargee and not Lender and Guarantor. The Plaintiff also prayed that the Court do determine the parties ultimate liabilities or otherwise.

Considering the foregoing summary, of the findings herein, the Plaintiff fails substantially in its suit, and there shall therefore be judgement for the Defendant in the terms following:-

(1) The Plaintiff shall pay to the Defendant the sum of Kshs.393.537/20 (not Kshs. 383,532/20 as repeatedly stated) on account of the Plaintiff's Personal Account No. 011-043-806 together with interest thereon @ 15.5%

(a) from 1.11.2000 till the date of filing of suit, and

(b) interest on the said principal sum together with interest thereon aforesaid (first aggregate sum) from the date of filing suit till the date of judgement, (the second aggregate sum), and

(c) interest on the second aggregate sum from the date of judgement till payment in full,

(2) There shall also be judgement for the Defendant in the sum of Kshs. 4,150,000/= together with interest thereon @ 15.5% p.a.

(a) from 1.02.1990 (the registration of the Charge) to the date of filing suit on the said principal sum and interest,

(b) on the said principal sum as aforesaid (the first aggregate sum), from the date of filing suit till the date of judgement,

(c) Interest on the said first aggregate sum from the date of judgement at the said rate till payment in full.

(3) Upon payment of the moneys set out in paragraphs 1 and 2 aforesaid, the Defendant shall discharge the suit property forthwith.

(4) It is declared that no valid statutory notice was served upon the Plaintiff by the Defendant, and consequently no statutory power of sale had arisen, and no valid Auctioneers Notice of sale could be served upon the Defendant,

(6) It is also declared that the Plaintiff is not liable for the **Blowmon's** debt in excess of the sum secured under the Variation of Charge and Further Charge.

In the event, the Defendant shall also have the costs of this action.

Dated and Delivered at Nairobi this 13th day of April 2005.

ANYARA EMUKULE

JUDGE