African Banking Corporation Limited v City Gas Limited & 3 others (Civil Suit 434 of 2017) [2025] KEHC 10064 (KLR) (Commercial and Tax) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10064 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 434 OF 2017

RC RUTTO, J

JULY 11, 2025

BETWEEN

AFRICAN BANKING CORPORATION LIMITED ..... PLAINTIFF

AND

CITY GAS LIMITED ..... 1ST DEFENDANT

MOHAMED ADAN BARE ..... 2ND DEFENDANT

HAMDI ABDI NUR ..... 3RD DEFENDANT

ABDIKADIR ABDI SHEIKH ..... 4TH DEFENDANT

JUDGMENT

1. By way of an Amended Plaint dated 19th July 2019, the Plaintiff instituted a suit against the Defendants for breach of a letter of offer dated 26th July 2012. As a result, the Plaintiff seeks judgment against the Defendants, jointly and severally, for the following reliefs:

    a. A sum of Kshs.45,502,715.29;

    b. Interest on the amount in (a) above at commercial rates until payment in full;

    c. Costs of the suit;

    d. Any other or further relief that this Honourable Court may deem just and appropriate to grant.

2. The Plaintiff alleges that, by a letter dated 26th July 2012, it extended a loan facility of Kshs.30,000,000/= to the 1st Defendant. The facility was secured by, among other instruments, a legal charge over LR No. 209/16448 registered in the name of the 2nd Defendant, as well as personal guarantees executed by the 2nd, 3rd, and 4th Defendants, who were directors of the 1st Defendant. The

Plaintiff further avers that the terms of the guarantees expressly provided that the guarantors were to be treated as primary obligors not merely sureties and that they would, upon demand, pay the Bank all sums due and owing from the principal debtor. The Plaintiff also states that the loan was subsequently restructured through an offer letter dated 30th December 2013, at which point the outstanding balance stood at Kshs.32,172,216.09. It is alleged that the 1st Defendant defaulted in repaying the loan, prompting the Plaintiff to sell LR No. 209/16448 by private treaty for Kshs.16,500,000/=. This sale left an outstanding balance of Kshs.29,080,237.69 as at 14th October 2016, which continued to accrue interest, eventually amounting to Kshs.45,502,714.29.

3. In their Amended Defence dated 31st January 2020, the Defendants denied the Plaintiff's claims and asserted that the Plaintiff had wrongfully applied the in duplum rule. They contended that the amount claimed was excessive, noting that they had already repaid Kshs.25,169,786/=. The Defendants also challenged the validity of the guarantees dated 4th April 2017, claiming that they were executed in 2012 and were therefore invalid and unlawful.

4. The matter proceeded to hearing on 28th November 2024. The Plaintiff called one witness in support of its case, while the Defendants presented two witnesses in their defence.

5. At trial, PW1, the Recovery Manager of the Plaintiff, adopted her witness statement dated 19th August 2023 as her evidence-in-chief. She also produced several documents in support of the Plaintiff's case: the List of Documents dated 17th October 2017, marked as Exhibits 1 to 8; the Supplementary List of Documents dated 15th January 2018, marked as Exhibits 9 to 13; the Further Supplementary List of Documents dated 2nd August 2019, marked as Exhibits 14 and 15; and the Supplementary List of Documents dated 30th January 2020, marked as Exhibits 16 and 17.

6. During cross-examination, PW1 confirmed that she was not employed by the Plaintiff at the time the loan was issued. She testified that the loan became non-performing on 25th July 2014, at which point the outstanding balance was Kshs.35,336,450.15. She further stated that the charged property was sold for Kshs.16,500,000. PW1 explained that the Plaintiff operated two accounts for the borrower: a loan account and a current account. She denied that the Plaintiff ever owed Kshs. 70 million.

7. Regarding the application of the in duplum rule, PW1 testified that it requires an accountant to compute. She understood the rule to mean that the amount outstanding at the date of default is multiplied by two, with payments and recovery costs deducted. When referred to a bank statement entry dated 27th June 2017, which reflected a balance of Kshs.36,181,942.79, she acknowledged that this figure was lower than the Kshs.45 million claimed by the Plaintiff.

8. PW1 further confirmed that the 2nd, 3rd, and 4th Defendants collectively guaranteed the sum of Kshs.30,000,000, plus applicable fees, commissions, costs, and charges. However, she was unable to provide a breakdown of each guarantor's individual liability. She explained that the guarantees were executed on 27th July 2012 but were dated 4th April 2017 for purposes of stamping. Regarding the 2013 offer letter, she testified that a new account was opened, but she was uncertain whether fresh guarantees were executed, as she had not seen any such documents.

9. On the nature of the guarantee, PW1 testified that Clause 2(d) provided that it was a continuing guarantee. However, she conceded that the clause did not apply retrospectively. Concerning the sale of the charged property, she confirmed it was sold for Kshs..16,500,000. She stated that the valuation was conducted in 2015, around the time of sale, and that the earlier valuation report from July 2012 could not be traced in the Plaintiff's records. Additionally, the identity of the valuer could not be established.

10. During re-examination, PW1 clarified that the sale was conducted by private treaty at Kshs.16,500,000, which was slightly above the market value at the time. She reiterated that the guarantees were executed

on 27th July 2012 but dated 4th April 2017 solely for registration purposes. She maintained that the Plaintiff was entitled to claim the outstanding amount from the guarantors, as the guarantee constituted continuing security and was not limited to the initial loan amount of Kshs.30,000,000. Finally, she explained that the facility had been restructured into a term loan, which is why the current account reflected a nil balance as the debt had been transferred to the loan account. She affirmed that the claimed amount of approximately Kshs. 45 million was calculated in accordance with the in duplum rule.

11. DW1, the 2nd Defendant, testified that he has been the sole director and shareholder of the 1st Defendant since January 2017. He adopted his witness statement dated 3rd December 2021 as his evidence-in-chief. He stated that he became aware of the Plaintiff's claim after assuming directorship and subsequently engaged George Arum to investigate and advise on the matter. He also requested a valuation report from David Chege Kariuki.

12. DW1 indicated that he preferred the company's accountant, George Arum, to testify on behalf of the 1st Defendant, as he was more familiar with the debt in question. During cross-examination, DW1 admitted that he had no authority to testify on behalf of the other Defendants, who had ceased to be shareholders following the transfer of their shares in 2018, while the case was still ongoing. He stated that he could not comment on the conflicting dates in the guarantees and was uncertain about the implications of the "continuing security" clause. He further testified that he only became aware of the loan after assuming the role of director. When referred to the loan facility letter dated 30th December 2013, he acknowledged that both directors of the 1st Defendant had signed the agreement, but he did not know the advocate who witnessed the document.

13. DW2, George Omondi Arum, testified that he was engaged in 2018 to review the accounts related to the loan facility. He confirmed that the loan was advanced by the Plaintiff and involved two accounts: one ending in 152 and the other in 338. He adopted his witness statements dated 25th September 2018 and 27th February 2020 and produced his report and supporting documents from the Defendants' bundle.

14. During cross-examination, DW2 testified that Clause 2 on continuing security applied specifically to the facility in question, and that at the time of restructuring, the original facility had not been fully repaid. He explained that the initial overdraft was converted into a term loan, thereby creating a new facility. He stated that the borrower had breached the agreed payment terms and that the only dispute was over the amount owed. On re-examination, DW2 reiterated that the 1st Defendant operated two accounts: a term loan account (No. 338) and an overdraft account (No. 152). When questioned about his report, he clarified that it lacked context regarding the exact amount of the loan advanced and did not summarize the interest that was to accrue under the facility letter. He also noted that the restructuring letter did not specify the recoverable interest. He confirmed that the total amount repaid was Kshs. 25,120,000/=, but he was unable to distinguish how much of the Kshs.35,000,000/= constituted principal and how much was interest. Regarding the guarantees, he confirmed that the parties had signed them and that stamp duty could be paid even after execution. He explained that some key documents were not made available to him, which limited his ability to issue a conclusive report. Finally, he clarified that the in duplum rule means that interest cannot exceed the principal amount, and it does not allow for the doubling of the loan amount at the point of default. Rather, the rule applies progressively until the interest equals the principal.

15. Upon conclusion of the hearing, the Court directed the parties to file written submissions. The Plaintiff filed its submissions on 19th December 2024, while the Defendants filed theirs on 26th February 2025.

Plaintiff's Submissions

16. The Plaintiff began its submissions with a summary of both its case and that of the Defendants. It stated that, through a letter dated 26th July 2012, it advanced a loan facility of Kshs.30,000,000 to the 1st Defendant. The facility was secured by, among other instruments, a legal charge over property LR No. 209/16448, registered in the name of the 2nd Defendant, and Deeds of Guarantee executed by the 2nd, 3rd, and 4th Defendants. The Plaintiff further submitted that the loan was later restructured under an offer letter dated 30th December 2013, at which point the outstanding balance stood at Kshs.32,172,216.09. Thereafter, recovery proceedings were initiated, during which the 2nd Defendant offered to sell the charged property by private treaty. Despite these efforts, the loan remained in arrears.

17. The Plaintiff identified four key issues for determination:

    a. Whether the sale of LR No. 209/16448 was proper;

    b. Whether the claim under the Deeds of Guarantee is proper;

    c. Whether the Plaintiff correctly applied the in duplum rule;

    d. Whether the Plaintiff is entitled to the reliefs sought.

18. On the first issue, the Plaintiff submitted that the property was sold for Kshs.16,500,000, but the proceeds were insufficient to fully settle the outstanding loan. It argued that the Defendants' claim of undervaluation was unfounded, as the sale was a private transaction initiated, approved, and executed by the 2nd Defendant.

19. In support of this position, the Plaintiff cited a letter dated 17th May 2016, in which the 2nd Defendant informed the Plaintiff that he had secured a buyer for the property at Kshs.16,500,000. A follow-up letter dated 19th May 2016 acknowledged receipt of statutory notices and requested permission to proceed with the sale. The Plaintiff noted that the sale agreement was duly executed by the 2nd Defendant, who also issued a letter of authority authorizing the transfer of the sale proceeds to the 1st Defendant's account.

20. The Plaintiff stated that the sale proceeds were credited to the 1st Defendant's account in two instalments: Kshs.13,498,000 on 29th August 2016, and Kshs.3,005,998 on 12th October 2016. It argued that the 2nd Defendant, having facilitated and benefited from the sale, could not now challenge its validity. The Plaintiff also pointed out that the property was sold above market value, as the valuation report had placed its worth at approximately Kshs.15,000,000.

21. Regarding the valuation report dated November 2019, filed by the Defendants, the Plaintiff submitted that it lacked evidentiary value since the valuer was not called to testify. It also noted that the report incorrectly listed the 2nd Defendant as the property owner, despite the fact that the property had been sold in 2016 and the transfer registered in favor of the new owner.

22. The Plaintiff further referred to a letter dated 5th December 2017, in which the 2nd Defendant acknowledged the outstanding debt and offered to pay Kshs.10,000,000. It also relied on a bank statement showing an outstanding balance of Kshs. 29,080,237.69 as of 14th October 2016, after crediting the sale proceeds.

23. On the second issue, whether the claim under the Deeds of Guarantee was proper, the Plaintiff submitted that DW2 admitted during cross-examination that the 2nd, 3rd, and 4th Defendants had signed the guarantees. PW1 testified that the guarantees were executed in 2012 but dated and stamped in 2017 solely for the purpose of assessing and paying stamp duty before filing the suit. The Plaintiff

argued that late stamping is permitted under Section 20 of the *Stamp Duty Act*, which also protects such documents from legal challenge once properly stamped. It relied on the case of *Paul N. Njoroge v Abdul Sabuni Sabonyo* [2015] eKLR to support the position that the delay in stamping did not affect the validity or enforceability of the guarantees.

24. On whether the guarantees covered the restructured facility under the offer letter dated 30th December 2013, the Plaintiff submitted that the letter did not create a new facility but merely restructured the existing one. It argued that the offer letter was signed by the 2nd and 3rd Defendants, who could not now feign ignorance of its terms yet they had accepted and was witnessed by Oganda Tom Oigara, who also appeared in these proceedings on behalf of the Defendants. The Plaintiff emphasized that the guarantees constituted continuing security, covering all amounts advanced to the 1st Defendant until full repayment, and were not limited to a specific facility or amount. Since the loan remained unpaid and demand had been made, the Plaintiff submitted that the guarantors' obligations had properly crystallized.

25. In support of this position, the Plaintiff cited the case of *Robert Njoka Muthara & Another v Barclays Bank of Kenya Limited & Another* [2017] eKLR, where the court held that a continuing guarantee remains valid even when an overdraft is converted into a term loan, as the original indebtedness remains outstanding. The Plaintiff argued that no new facility was issued that would require fresh guarantees.

26. On the third issue, whether the Plaintiff correctly applied the in duplum rule, the Plaintiff submitted that DW2 acknowledged some amount was owed, though he disputed the figure of Kshs. 45,502,715.30 and questioned the Plaintiff's application of the in duplum rule. The Plaintiff stated that the loan became non-performing on 25th July 2014, at which point the outstanding amount stood at Kshs.35,336,250.65 and that under the in duplum rule, the maximum recoverable amount would be Kshs.70,672,501.30. After accounting for payments made, the Plaintiff calculated the recoverable balance as Kshs.45,502,715.30.

27. The Plaintiff also referred to the offer letter dated 30th December 2013, which restructured the facility into a term loan of Kshs. 32,172,216.09 at a flat commission rate of 10% per annum. The repayment terms required instalments of Kshs.200,000 for three months, followed by lump sum payments of Kshs.10,000,000 by 30th April 2014 and another Kshs.10,000,000 by 30th June 2014. Thus, the 1st Defendant was expected to pay a total of Kshs.20,600,000 by 30th June 2014.

28. The Plaintiff submitted that the principal sum advanced under the facility letter was Kshs.32,172,216.09 and that interest was charged at a rate of 10% per annum, which translated to approximately Kshs.3,217,221.60 per month. According to the Plaintiff, by July 2014, the 1st Defendant had only repaid Kshs.737,400. As such, the Plaintiff maintained that its computation was accurate in showing that the loan became non-performing on 25th July 2014, with an outstanding balance of Kshs.35,336,250.65. This amount remained unpaid as of 28th February 2015 and continued to be classified as non-performing thereafter.

29. In reference to Section 44A of the *Banking Act*, the Plaintiff argued that the in duplum rule is clear and unambiguous and should be interpreted in its literal sense. The Plaintiff submitted that the correct approach to applying the rule involves three steps: first, identifying the date the loan became non-performing; second, determining the outstanding amount as of that date; and third, ensuring that any interest charged thereafter does not exceed the principal amount at default, inclusive of recovery related expenses. The Plaintiff relied on the case of *Housing Finance Company of Kenya Limited v Scholastica Nyaguthii Muturi & Evanson Kamau Waitiki* [2020] KECA 833 (KLR), to support its position that the relevant reference point for applying the in duplum rule is the outstanding balance at the date of default not the original loan amount, as argued by the Defendants. Accordingly, the Plaintiff

maintained that its demand for Kshs. 45,502,715.30 was lawful and consistent with the contractual terms. The Plaintiff also cited the case of *Bank of Africa Limited v Morganite Limited & 3 Others* [2021] KEHC 378 (KLR), emphasizing that Clause 14 of the offer letter obligated the Defendants to reimburse the Plaintiff for all expenses incurred in recovering the debt, including legal fees. On this basis, the Plaintiff urged the Court to award it the full costs of the suit.

30. In conclusion, the Plaintiff prayed that the suit be allowed as prayed, with costs awarded in its favor.

Defendant's Submissions

31. The Defendants submitted that the Plaintiff failed to prove the amount claimed, arguing that the figure of Kshs.45,502,715.30 was merely stated verbally by the Plaintiff's witness during oral testimony and was not supported by documentary evidence. They contended that the only relevant documents produced were bank statements for the overdraft account (No. 152) and the loan account (No. 338).

32. The Defendants pointed out that Account No. 152 showed an outstanding balance of Kshs.32,172,216 as of 30th November 2013. When the overdraft was converted into a term loan, Account No. 338 was opened with an opening balance of Kshs.34,260,186.69, which corresponded to the amount outstanding in the overdraft account at the time of conversion. They argued that at no point did the bank statements for Account No. 338 reflect an outstanding balance of Kshs.70,672,501.30 or Kshs.45,502,715.30, as claimed by the Plaintiff.

33. The Defendants noted that the closest figure to the Plaintiff's claim appeared in an entry dated 25th August 2015, which showed an outstanding balance of Kshs.44,955,571.69. However, this was more than a year after the Plaintiff claimed the loan became non-performing on 25th July 2014, and therefore could not support the Plaintiff's position. They further submitted that this amount was reduced to Kshs.31,457,571 on 29th August 2015, following the deposit of Kshs.13,498,000 from the sale of the charged property.

34. Relying on the report prepared by DW2, the Defendants argued that even two years after the suit was filed, the interest accrued on the loan had not reached the amount claimed in the Plaint. They urged that DW2 found no evidence of a one-time or bullet application of interest, contrary to the Plaintiff's assertion that it had levied a lump sum interest charge of Kshs.35,336,250.65. The Defendants invoked Section 107 of the *Evidence Act*, asserting that the Plaintiff had failed to discharge its burden of proof regarding the amount allegedly owed.

35. On the application of the in duplum rule, the Defendants submitted that the Plaintiff had misapplied the principle by doubling the outstanding amount at the date of default in a single bullet application of interest, which is not permitted under the rule. Even on the Plaintiff's own misguided interpretation, the Defendants argued that the bank statements produced by the plaintiff did not reflect either the alleged interest charge of Kshs.35,336,250.65 or the total outstanding amount of Kshs.70,672,501.30.

36. The Defendants further contended that the Plaintiff's deduction of Kshs.25,169,786 in payments from the alleged Kshs.70,672,501.30 was baseless, and that the final claim of Kshs.45,502,715 was equally unjustified. They relied on DW2's report, which was supported by documentation and remained unchallenged during cross-examination. The report showed that the total interest and penalties charged between 28th February 2014 and December 2019 amounted to Kshs.29,170,891.40 —not the amount claimed by the Plaintiff. The Defendants emphasized that this finding was uncontroverted, and that the Plaintiff's assertion that it levied a one-time interest charge of Kshs.35,336,250.65/= was therefore demonstrably false.

37. Citing Section 44A of the *Banking Act*, the Defendants submitted that the provision should be applied literally. They argued that the correct approach involves:

    (i) determining the date the loan became non-performing;

    (ii) establishing the principal and interest due on tha

    (iii) continuing to apply interest as per the contract; and

    (iv) ceasing to charge interest once it equals the principal outstanding at default. They emphasized that Section 44A does not authorize doubling the outstanding amount at default in a single charge, as the Plaintiff had done. Therefore, they argued, the Plaintiff's claim was based on a misapplication of the law and was invalid.

38. On the issue of guarantees, the Defendants denied liability for the amount claimed under the Deeds of Guarantee. They argued that the guarantees were expressly limited to Kshs.30,000,000 plus fees, commissions, costs, charges, and expenses. The Plaintiff had not provided evidence to justify the additional Kshs.15,502,715.30 claimed. The Defendants also submitted that the guarantees, being deeds, were not effective until delivered. While the Plaintiff claimed the guarantees were signed on 27th July 2012, the Defendants noted that they were sealed and delivered only on 4th April 2017.

39. The Defendants argued that by the time the guarantees were delivered in 2017, the 1st Defendant had already defaulted on the loan. They further submitted that the guarantees were tainted with illegality because the Plaintiff attempted to avoid paying penalties for late stamping by misrepresenting the date of execution as 4th April 2017, even though the documents had been signed five years earlier. Relying on the case of *Housing Finance Company of Kenya Limited v Palm Homes Limited & 2 Others* [2002] 1 KLR 411, the Defendants argued that parole evidence could not be used to alter the written dates of the guarantees.

40. The Defendants contended that the Plaintiff should have honestly dated the guarantees as 27th July 2012 and paid the applicable penalty for late stamping in April 2017, which would have rendered the guarantees enforceable. Instead, the Plaintiff misrepresented the date of sealing and delivery as 4th April 2017, purportedly "for purposes of stamping." The Defendants submitted that this admitted dishonesty rendered the guarantees illegal, invalid, and unenforceable.

41. The Defendants submitted that the 2nd, 3rd, and 4th Defendants were joined in the suit solely in their capacity as guarantors of the 1st Defendant. They argued that Clause 1(b) of the Deed of Guarantee expressly limits the total recoverable amount under the guarantee to the principal sum of Kshs.30,000,000. As such, they contended that the Plaintiff's claim for Kshs.45,502,715.80 is unsubstantiated, and the additional amount of Kshs.15,502,715.29 should be disallowed.

42. In response to the Plaintiff's submissions, the Defendants argued that the mere stamping of a mortgage or charge does not shield it from legal challenge, as such documents are routinely contested in court. They submitted that the Plaintiff's reliance on the case of *Paul Njoroge v Abdul Sabuni Sabonyo* [2015] eKLR was misplaced, as that case dealt only with the admissibility of unstamped documents and was irrelevant to the present dispute. The Defendants further argued that the Plaintiff's request for interest at contractual rates until full payment was an attempt to circumvent the in duplum rule, which limits recoverable interest to an amount equal to the principal outstanding at the time the loan becomes non-performing. They maintained that the Plaintiff had not demonstrated any exceptional or egregious conduct by the Defendants that would justify departing from the standard practice of awarding interest at court rates.

43. In conclusion, the Defendants urged the Court to dismiss the suit in its entirety, with costs awarded to them.

Analysis and Determination

44. I have carefully considered the pleadings filed by both the Plaintiff and the Defendants, the oral and documentary evidence presented by their respective witnesses, as well as the written submissions submitted by both parties. From the record, the following key issues arise for determination:

    a. Whether the sale of the charged property, LR No. 209/16448, was proper

    b. Whether the claim under the Deeds of Guarantee executed by the 2nd, 3rd, and 4th Defendants is valid and enforceable

    c. Whether the Plaintiff correctly applied the in duplum rule in its claim

    d. Whether the Plaintiff is entitled to the sum of Kshs.45,502,715.29, interest, and costs as prayed

45. Before addressing the contested issues, I note that several facts are not in dispute. It is undisputed that the Plaintiff advanced a loan facility of Kshs.30,000,000 to the 1st Defendant, which was secured by a legal charge over LR No. 209/16448. It is also not contested that the 2nd, 3rd, and 4th Defendants executed Deeds of Guarantee on 27th July 2012, which were later stamped in April 2017 for purposes of filing this suit. Additionally, it is agreed that the 1st Defendant defaulted on the loan, and that the charged property was sold by private treaty in 2016 for Kshs.16,500,000, with the consent and at the request of the 2nd Defendant. The proceeds were applied to the loan account. The Defendants also acknowledge having made partial repayments totalling approximately Kshs.25,169,786.

46. With the undisputed facts outlined, I now turn to the contested issues for

    Whether the sale of the charged property, LR No. 209/16448, was proper

47. As previously noted, it is not in dispute that the charged property was sold by private treaty for Kshs.16,500,000. This was confirmed by DW2 during cross-examination, who acknowledged that the sale proceeds were credited to the loan account. The evidence further shows that the 2nd Defendant personally initiated and approved the sale, confirmed receipt of the statutory notices, and authorized the transfer of the sale proceeds to the loan account, as evidenced by his letter of authority dated 29th August 2016.

48. The valuation report prepared by Sedco Valuers in April 2015 placed the market value of the property at Kshs.15,000,000. The property was ultimately sold for Kshs.16,500,000 above the assessed market value. Although the Defendants challenged the sale on grounds of alleged undervaluation, they failed to produce credible evidence to support this claim. The valuation report they relied on, dated 24th October 2019, was prepared more than three years after the sale and is therefore irrelevant. The only applicable valuation is the one conducted in April 2015. Given the 2nd Defendant's active involvement and express consent to the sale, the Court finds that the transaction was proper, lawful, and validly executed.

Whether the Deeds of Guarantee are Valid and Enforceable

49. During re-examination, DW2 confirmed that the 2nd, 3rd, and 4th Defendants executed the Deeds of Guarantee on 27th July 2012. This fact is also evident from the face of the guarantee documents. The guarantees also bear a stamp showing they were registered on 18th April 2017. The Plaintiff explained that this was done to enable stamping and filing for admissibility, which is permitted under Section

20 of the *Stamp Duty Act*. The Defendants challenged the legitimacy of backdating, arguing it was dishonest and rendered the guarantees unenforceable. Further that the stamping late rendered the guarantees invalid and without merit.

50. The Court finds that DW2's admission that he executed the said Deed of Guarantee produced by the Plaintiff Bank in its List of documents dated 17th October 2017 dislodges the submission by the Defendants that the said Deeds are invalid and unenforceable. Regarding the late registration of the guarantee, the Plaintiff justified the delay in stamping, stating it was preparing to file the suit and needed to ensure admissibility. The Court of Appeal, in *Paul N. Njoroge v Abdul Sabuni Sabonyo* [2015] KECA 928 (KLR), clarified that non-compliance with the *Stamp Duty Act* does not automatically render a document inadmissible or invalid, so long as parties are afforded an opportunity to pay the required duty and penalty.

51. Guided by this authority, the Court affirms that even if the Deeds of Guarantee had not been stamped at the material time, they could still be admitted into evidence upon payment of the necessary duty and penalty. In this case, the Plaintiff did stamp and file the guarantees, albeit belatedly, thereby complying with the relevant provisions of the *Stamp Duty Act*, thereby rendering the Deed of Guarantee both valid and admissible in evidence.

52. The Defendants also argued that the guarantees did not provide continuing security and were limited to the original loan of Kshs. 30,000,000. In contrast, the Plaintiff maintained that the guarantees expressly constituted continuing security, covering both the original facility and its restructuring in 2013. Clause 2(a) of the Deed of Guarantee states:

> " This Guarantee is a continuing security and shall secure the ultimate balance from time to time owing to the Bank by the principal in any manner whatsoever notwithstanding the death, bankruptcy, liquidation, administration or other incapacity or any change in the Constitution of the principal or the guarantor..."

53. The language of Clause 2(a) is clear and unequivocal. The clause is express that the guarantee is a continuing security. It confirms that the guarantors remained liable for the principal debtor's obligations from time to time until full settlement of the debt or proper termination of the guarantees.

54. Clause 2(d) of the deed of guarantee further provides:

> " Notwithstanding any notice of termination or that this guarantee ceases to be continuing for any reason whatsoever, the Bank may continue any account of the principal or open one or more new accounts and the liability of the guarantor hereunder shall not in any manner be reduced or affected by any subsequent transactions or receipts or payments into or out of any such account."

55. This clause protects the Bank's right and ability to enforce the guarantee for past and existing obligations despite account movements, restructuring, or notice of termination. It prevents guarantors from escaping liability for already incurred obligations just because of administrative changes in the debtor's accounts or because they gave notice of termination.

56. Clauses 2(a) and 2(d) read together, affirms that the guarantees remained effective even after the loan was restructured in 2013. A deed of guarantee are contracts of guarantee and are therefore to be treated just like any other contract where terms are to be given effect in their full and literal sense.

57. Notably, although the Defendants challenged the the validity of the guarantees they merely denied their enforceability without affirmatively pleading specific grounds of invalidity or raising any

substantive defence. They failed to plead specific grounds of invalidity or present substantive evidence beyond the issue of late stamping and whether they were of a continuing nature upon restructure of the initial loan. This court therefore finds that the guarantees were duly executed and produced in evidence and are valid and enforceable.

58. Accordingly, based on the pleadings, evidence, and submissions, the Court finds that the Deeds of Guarantee executed by the 2nd, 3rd, and 4th Defendants constitute valid and enforceable continuing security for the outstanding liabilities of the 1st Defendant.

Whether the Plaintiff Properly Applied the In Duplum Rule in its Claim

59. This was the most contested issue in the suit. The Plaintiff argued that the loan became non-performing on 25th July 2014, at which point the outstanding balance was Kshs.35,336,250.65. Under the in duplum rule, the total recoverable amount—comprising both principal and interest would therefore be capped at Kshs.70,672,501.30. The Plaintiff claimed Kshs.45,502,715.29, which it maintained was well within this limit.

60. The Defendants, however, contended that the Plaintiff misapplied the in duplum rule by simply doubling the outstanding balance at default without providing a proper breakdown or calculation. They argued that the bank statements did not reflect the claimed amount. DW2, the Defendants' accountant, testified that the total interest and penalties accrued between February 2014 and December 2019 amounted to only Kshs. 29,170,891.40.

61. It is important to note that the amount due to the Bank is supported by the Bank statements of account. The Plaintiff's bank statements were produced in evidence without objection. Under Section 176 of the *Evidence Act* (Cap. 80, Laws of Kenya), entries in a banker's books are presumed to be prima facie evidence of the transactions recorded therein. The section provides;

> " 176. A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded."

62. Given this statutory presumption in favor of the Plaintiff, it was incumbent upon the Defendants to identify and demonstrate specific errors or omissions in the bank statements. However, the Defendants' Amended Defence dated 31st January 2020 did not plead or establish any such specific inaccuracies. Although DW2 produced a report analyzing the 1st Defendant's accounts, his testimony focused on the general principle that interest should cease accruing once it equals the principal, rather than identifying concrete errors in the statements.

63. Section 44A of the *Banking Act* provides that once a loan becomes non-performing, the maximum interest recoverable thereafter is equal to the principal outstanding at the time of default. This rule is intended to prevent excessive interest accumulation against the borrower.

64. DW2 testified that the total interest and penalties charged between February 2014 and December 2019 amounted to Kshs.29,170,891.40 and not the Kshs. 45 million claimed by the Plaintiff. He also stated that the Plaintiff appeared to have applied a one-time interest charge equal to the principal, which is inconsistent with the proper application of the in duplum rule. However, the Defendants did not point to any specific entries in the bank statements which were erroneous or improper to support this claim. Their contention appeared to be a general challenge to the manner in which the interest was calculated, rather than a demonstration of specific inaccuracies

65. Upon reviewing the Plaintiff's bank statements, the Court finds that the actual outstanding balance as of the date of filing the suit was Kshs.36,181,942.79. This figure was confirmed by PW1 during cross-examination, who admitted that there was no statement showing an outstanding balance of Kshs.45,000,000 as claimed in the Plaint. Accordingly, the Court finds that the 1st Defendant is indebted to the Plaintiff in the sum of Kshs.36,181,942.79—not the Kshs.45,502,715.29 claimed.

66. In conclusion, the Court finds that the Plaintiff has partially succeeded in its claim. While the Plaintiff did not substantiate the full amount of Kshs.45,502,715.29 as pleaded, it has proved, through admissible bank statements and uncontroverted evidence, that the 1st Defendant is indebted in the sum of Kshs.36,181,942.79. The Deeds of Guarantee executed by the 2nd, 3rd, and 4th Defendants are valid, enforceable, and constitute continuing security for the outstanding debt. The sale of the charged property was proper and conducted with the full knowledge and consent of the 2nd Defendant. The Plaintiff's application of the in duplum rule, while generally compliant, overstated the recoverable amount, and the Court has accordingly adjusted the award to reflect the actual indebtedness.

67. In doing so, the court is mindful that while the in duplum rule sets the maximum amount recoverable, it does not replace the existing contracted terms. Thus, the amount outstanding continues to accrue as contracted. From the record, the interest had not accrued beyond double the outstanding amount as to invoke the in duplum rule. Accordingly, it was not open for the Plaintiff to automatically double the outstanding amount as at the date of default until it demonstrated that the interest and penalty accrued were beyond the double. The introduction of the in duplum rule, in my view was to act as a shield to the borrower in default and not a sword for the lender.

68. The upshot is that judgment is entered for the Plaintiff as follows:

    a. Judgment is entered for the Plaintiff against the Defendants jointly and severally for Kshs.36, 181, 942. 79/= together with interest at contractual rates until payment in full.

    b. The Plaintiff is awarded the costs of the suit, to be paid by the Defendants jointly and severally.

69. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 11TH DAY OF JULY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Plaintiff

.....Defendants