



Kalka Flowers Limited v Equity Bank Limited & another (Civil Case 37 of 2018) [2024] KEHC 10068 (KLR) (12 June 2024) (Judgment)

Neutral citation: [2024] KEHC 10068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE 37 OF 2018
SN MUTUKU, J
JUNE 12, 2024**

BETWEEN

KALKA FLOWERS LIMITED PLAINTIFF

AND

EQUITY BANK LIMITED 1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. This matter was originally filed in the Environmental and Land Court in Nairobi as HCC 1548 of 2014, Kalka Flowers Limited- vs- Equity Bank Limited and Purple Royal Auctioneers. It was transferred to Commercial and Admiralty Division of the High Court in Nairobi where it was assigned case number HCCC 601 of 2014. The file was transferred to Machakos ELC which at the time handled matters from Kajiado County under number Machakos ELC No. 12 of 2015. The case was later transferred to Kajiado ELC Court after that court was established. It was assigned case number Kajiado ELC No. 198 of 2017. Kajiado ELC transferred the matter to Kajiado High Court under the current case number Kajiado HCC 37 of 2018.
2. The Court records show that there was another related case originally filed by the same Plaintiff in Nairobi being Nairobi HCC 591 of 2014 Kalka Flowers Limited v. Equity Bank Limited. This case was also transferred to Machakos High Court and given case number Machakos HCC No. 60 of 2014. The court in Machakos directed that both cases be heard together but the 1st Defendant filed an application dated 18th April 2016 to strike out the latter case. That case was struck out through a ruling of 10th April 2017.
3. Under determination in this Judgment is the Plaintiff's suit through a Plaint dated 15th December 2014 and the Defence and Counterclaim of Equity Bank Limited dated 13th September 2019.



The Plaintiff

4. This claim is based on letter of offer dated 16th October 2012 through which the 1st Defendant (Equity Bank) advanced a loan facility totalling \$ 4,244,970 to the Plaintiff. A charge was created on Plaintiff's property title numbers Kajiado/Kisaju/1679 and 1743. (the suit property).
5. The Plaintiff claims that its directors signed the Charge in the absence of their advocates and that the requirements of the Land Registration Act and the Land Act were not explained to them. It is claimed that the funds were to be released immediately after the Charge was registered but the 1st Defendant delayed in registering the Charge leading to losses to the Plaintiff caused by the dollar losing its value to the Euro. Further, that the 1st Defendant was taking over a loan facility from NIC Bank Ltd which was granted to the Plaintiff in Euros leading to the Plaintiff paying NIC Bank Ltd more money than it would have paid had the Charge been registered without delay.
6. The Plaintiff claims that the 1st Defendant paid to its valuer and its advocate excessive fees without consulting it and without the it's consent. Further that upon registration of the Charge, the 1st Defendant failed to release the money secured by the Charge immediately as a result of which the Plaintiff incurred losses as it could not produce and export the flowers.
7. It is further alleged that the 1st Defendant determined which of the Plaintiff's creditors and suppliers to pay and insisted that they be paid only by banker's cheques issued to itself and refused to honour any cheques issued by the Plaintiff. That the 1st Defendant frustrated the release of the balance of the loan facility leading to the Plaintiff's defaulting in repayment of the loan.
8. The Plaintiff claims that the Defendant advertised the suit property for auction on 17th December 2014, which intended auction was unlawful, null and void for reasons stated under paragraph 18 of the Plaintiff, that notice given was for 9 days instead of the mandatory 14 days' notice because the advertisement was on 8th December 2014 for auction to take place on 17th December 2014.
9. Other reasons advanced are that the advertisement in the Daily Nation did not comply with the Auctioneers Rules; that the notification of sale does not state the period within which payment was to be made and that the value of the suit premises was given as Kshs 360,000,000 as at 15th January 2014 which was undervaluation.
10. The Plaintiff prays for judgement against the Defendants in the following terms:
 - i. A declaration that the effect of the Charge and various provisions of the Land Act were not explained to the Plaintiff's Directors and that the charge did not create a statutory power of sale.
 - ii. A declaration that when the 1st Defendant executed the Charge it knew that it was incapable of disbursing the sum secured by the charge on time.
 - iii. Nullification of the Charge.
 - iv. Cancellation and nullification of the registration of the Charge.
 - v. A declaration that by vetting which creditors the Plaintiff could or could not pay, by refusing to honour cheques payable to certain creditors, by insisting on payment of its preferred creditors by bankers' cheques and needlessly requiring our client's directors to visit the 1st Defendant's head offices on numerous occasions and sometimes on a daily basis, the 1st Defendant effectively took over the operations of the Plaintiff, that the 1st Defendant allotted to itself powers of a receiver manager without formally appointing a receiver manager, that the 1st Defendant,



without any expertise in running a flower farm relied upon its own discretion and caused the business to collapse and thereby curtailed the Plaintiff's equity of redemption by bringing the Plaintiff's operation to a halt.

- vi. A declaration that without the immediate disbursements of the sum secured in full the consideration for the charge failed and that therefore the 1st Defendant has no right to enforce the Charge.
- vii. A declaration that the 1st Defendant knew from the word go that it had no ability to disburse the sum secured in full and on time and that the delay in disbursement of the funds and eventual failure to disburse the full funds was caused by the 1st Defendant's lack of funds.
- viii. A declaration that the overdraft could not be applied to its intended purpose as it was used to cover exchange losses in conversation of the Dollar to the Euro as a direct result of the delay in releasing funds in settlement of the NIC facility.
- ix. A declaration that the charge did not contain the rate of interest, that the 1st Defendant cannot charge any interest and that the interest claimed by the 1st Defendant on monies advanced in US Dollars is unreasonable, unconscionable, exorbitant, usurious and way above the industry norm.
- x. An order for injunction restraining the threatened sale.
- xi. A declaration that the execution of the charge was procured by fraudulent misrepresentations.
- xii. Damages for breach of contract.
- xiii. Punitive and aggravated damages.
- xiv. A declaration that the 1st Defendant curtailed the equity of redemption and that therefore the 1st Defendant has no right to enforce any aspect of the charge.
- xv. The refund of monies fraudulently paid out of the Plaintiff's account.
- xvi. A declaration that it is illegal for the 2nd Defendant to give only 9 days' notice of the intended auction of the suit premises instead of the mandatory 14 days' notice and that therefore the intended auction is illegal and unlawful.
- xvii. A declaration that the 2nd Defendant was required to give an accurate description of the suit premises but has failed or refused to do so with the result that the intended auction is illegal, unlawful and a nullity.
- xviii. Cost of this suit.

The Defence

11. The 1st defendant filed a Statement of Defence and a Counterclaim, dated 13th September, 2019 denying the allegations levelled against it.
12. The 1st Defendant has stated that the Plaintiff was previously the registered proprietor of the suit property, but it is now registered in the name of Lelo Investments Ltd, who acquired the said property from 1st Defendant on 28th August 2017 for USD 3,000,000 through a sale in exercise of its statutory power of sale.
13. The 1st Defendant stated that the directors of the Plaintiff signed the Charge instrument in the presence of an advocate and that the effect of the [Land Registration Act](#) and the [Land Act](#) was explained to them.



14. The 1st Defendant denied any delay in the registration of the charge and stated that if the same happened it was not in their control. They further claimed that no loss was occasioned to the Plaintiff and that they paid out USD 2,560,000/- to NIC Bank Ltd on 24th December 2012 to clear the outstanding loan balance held by the Plaintiff. They claimed that the letter of offer indicated that the facilities were to be disbursed in US Dollars.
15. The 1st Defendant stipulated how the funds were released to the Plaintiff as shown under paragraph 10(a-c) of the Defence. It is the case for the 1st Defendant that it did not interfere with the Plaintiff's management by dictating which creditors to pay and stated that its part was to facilitate payment of USD 453,000/- but that the amount was not enough to pay all creditors, as a result of which the Plaintiffs were requested to prepare a list of creditors to be paid in order of priority; that all payments were made either by RTGS or bankers cheques issued by the Plaintiff; that payments were all initiated by the Plaintiff and that the allegations that the 1st Defendant undervalued the Plaintiff's suit property is untrue.

The Counterclaim

16. The 1st Defendant filed a Counterclaim. For clarity's sake, I will call the Plaintiff in the Counterclaim as Equity Bank, the first Defendant as Kalka Flowers, 2nd Defendant as Prismaa Flowers, 3rd Defendant as Arumugam Pillai and 4th Defendant as Patricia Srithar.
17. It is the case for Equity Bank that by letter of offer dated 16th October 2012, which offer was accepted by Kalka Flowers, Equity Bank advanced Kalka Flowers loan facilities for its account numbers xxxxxxxx, xxxxxxxx, xxxxxxxx and xxxxxxxx. It was a term of the letter of offer that Kalka Flowers would pay the loan amount with interest as and/or when they fall due.
18. By a Charge dated 25th November 2012 Kalka Flowers charged its property namely Title Numbers Kajiado/Kisaju/1743 and 1679 to the Equity Bank to secure the principal sum of USD 4,244,970. Kalka Flowers undertook to pay the principal sum together with interest.
19. However, Kalka Flowers failed, neglected and or refused to pay the principal amount plus interest. Equity Bank claims payment from Kalka Flowers for the outstanding amount of USD 2,136,969.4; Kshs 7,622,251.99 and Euro 120.20 as particularized below:
 - a. Account number xxxxxxx - USD 1,142,778.05
 - b. Account number xxxxxxx - USD 994,191.35
 - c. Account number xxxxxxx - Kshs. 7,622,251.99
 - d. Account number xxxxxxx - Euro 120.20
20. Equity Bank has stated that by a corporate deed of guarantee and indemnity dated 15th November 2012, Prismaa Flowers guaranteed to pay Equity Bank on demand all money due or owing to it by Kalka Flowers; that despite demand being made on 28th August 2019 on Prismaa Flowers under the terms of the guarantee for the amounts shown above, Prismaa Flowers has failed to make payment of the sum demanded or any sum.
21. Equity Bank has stated that it is entitled to and claims payments of the amounts stated above from Prismaa Flowers under the terms of the guarantee plus interest on the sum demanded.



22. Further, Equity Bank has stated that by directors' personal guarantee and indemnity dated 15th November 2015, Arumugam Pillai and Patricia Srithar guaranteed to pay Equity Bank on demand all money due or owing to Equity Bank on account of the loan agreement dated 16th October 2012.
23. Equity Bank prays that the suit against it by Kalka Flowers be dismissed with costs and judgement be entered against Kalka Flowers, Prismaa Flowers, Arumugam Pillai and Patricia Srithar, jointly and severally for:
 - i. USD 2,136,969.4, Kshs. 7,622,251.99 and Euro 120
 - ii. Interest
 - iii. Cost of the suit
 - iv. Any other further relief which this honourable court may deem fit to grant.
24. The record of the court file show that Kalka Flowers did not participate in this matter save for filing the Plaint and accompanying documents. The court records show that service was effected personally on them. The proceedings show that on 17th November 2021, Mr. Gaithaiga attended court holding brief for Mr. Waiganjo for Kalka Flowers. He informed the court that Kalka Flowers had been served with the Defence and Counterclaim and that Mr. Waiganjo would require 21 days to respond to the Defence and Counterclaim.
25. On 25th April 2022, Mr. Waiganjo told the court that there was an issue with representation of Kalka Flowers; that there was another firm representing Kalka Flowers and that they alerted the directors of Kalka Flowers about it. However, this issue was never clarified.
26. The Court directed that since representation was not clear, service be effected through the known physical address of Kalka Flowers. Further, that service would be effected on the advocate indicated on the pleadings as appearing for the Kalka Flowers. An affidavit of service was filed on 20th May 2022 indicating that service had been effected as directed by the Court.
27. The court record shows, further, that Prismaa Flowers, Arumugam Pillai and Patricia Srithar were served by way of substituted service as per the directions of the Court (Justice E.C Mwita) on 5th May 2021.

Evidence

28. This matter proceeded to hearing on 1st November 2022. Equity Bank called Mary Katoni Mbithi, Credit Manager, as its witness. Mary testified that had worked with Equity Bank for 16 years. That she was familiar with the matter before the court. She relied on her Witness Statement dated 13th September 2019 and produced the bundle of documents contained in the Counterclaim as her evidence.
29. Mary's evidence as contained in her Witness Statement is that Kalka Flowers approached Equity Bank for a loan facility in 2012 to enable them to establish additional flower farms and to have the Bank take over a loan facility that they had with NIC Bank Ltd. That Equity Bank offered 3 credit facilities, the 1st facility was for USD 1,231,970, the 2nd for USD 2,560,000 and the 3rd for USD 453,000. That the terms were set out in the offer dated 16th October 2012.
30. She stated that Kalka Flowers accepted the terms and acknowledged receipt of the 2nd and 3rd facility through the letter dated 4th November 2013 (found on page 43 of Kalka Flower's bundle of documents). She testified that the terms of the 1st credit facility were varied upon Kalka's request vide a letter dated 14th January 2013 for short term loan of USD 1,000,000 to be utilised to pay its creditors,



secure salaries and pay electricity bills (copy of the letter is found on page 1 of Equity Bank's bundle of documents). This was acknowledged through a letter to Equity Bank dated 17th January 2013 (found on page 2 of Bank's bundle of documents).

31. She testified that the letter of offer dated 16th October 2012, under its clause 3, showed that the facilities would be secured by a Charge over the suit properties, fixed and floating debenture charge of USD 4,244,970, corporate deed guarantee and indemnity and Directors' personal guarantee and indemnity of the said amount. That the Charge was registered at Land Registry on 16th November 2012 and at Company's Registry on 21st November 2012.
32. She testified that when valuation of the suit properties was carried out it was found that there was duplication during subdivision of the parent parcel; that therefore the Ministry of Lands was required to amend this. That the same was amended and the Bank valuers carried out fresh valuation on 24th December 2012, slightly a month after the registration of the Charge at Company's Registry. That this delay was occasioned by factors outside the control of Equity Bank.
33. She testified that the Charge was executed before an advocate S.B Kinuthia on 25th October 2012 (see page 29 of Kalka's bundle of documents). That the Bank had clear provisions on interest at clause 2 (see page 4 of Kalka's bundle of documents). That Kalka did not make payment instalments as per letter of offer, letter of variation, Charge and Debenture and as at 17th July 2013, Kalka was in arrears of 84 days. That the Equity Bank issued a demand notice and thereafter a statutory notice dated 9th May 2013 and 23rd September 2013 respectively (see pages 82 to 87 of Bank's bundle of documents).
34. She testified that the Bank did not get a suitable offer upon sale by auction (see page 88 of Bank's bundle of documents). That the Bank proceeded with exercise of its statutory power of sale on the suit properties. That the properties were sold to Lelo Investments on 28th August 2017 for USD 3,000,000. That this constituted a part payment of amounts owed by Kalka. That despite this sale there are arrears for USD 2,136,969.4, Kshs. 7,622,251.99 and Euro 120.20 being the principal sum plus interest. That by letter dated 28th August 2019 the Bank made demand on Prismaa Flowers Ltd, Arumugam Pillai and Patricia Strithar under terms of guarantee for the arrears mentioned herein and interest on the sum demanded.
35. The Defendants in the Counterclaim did not advance any evidence in the Counterclaim or in the original Plaint.

Submissions

36. The only party who filed submissions in this matter is Equity Bank. They are dated 19th April 2023. Three issues have been raised for determination:
 - a. Whether Kalka Flowers has proved its claim against the Bank?
 - b. Whether the Bank has proved its counterclaim against the defendants to the counterclaim?
 - c. Whether the court should grant the prayers sought in the counterclaim?

Whether Kalka Flowers has proved its claim against Equity Bank

37. It was submitted that Kalka Flowers did not participate in the hearing and did not call any witnesses or produce documents in support of their case despite being served with the hearing notice. That the



consequences for this was demonstrated in the Court of Appeal case of Prafulla Enterprises Limited - vs- Norlake Investments [2014] eKLR, where it was stated that:

“In our view, the fact that documents are produced by consent of the parties to a suit is not in itself proof of the contents of these documents. It only means that parties agree that those are the documents the contents of which are to be canvassed or are in controversy but as to the proof of the same contents, witnesses are required to be produced and to be examined and cross-examined on the same contents unless the parties categorically admit the contents.”

38. They further relied on *Shaneebal Limited- vs- County Government of Machakos* [2018] eKLR, where the court relied on *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997*, where it was held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.

39. It is their case that by failing to call witnesses to testify on its case and to produce documents, Kalka Flowers has failed to satisfy the burden of proof and all documents filed by them remain mere allegations it has made are unsubstantiated and unproven. It was submitted that their witness, Mary Katoni, through her Witness Statement, addressed all the allegations made by Kalka Flowers on paragraphs 3 to 25 of that Statement. It is submitted that failure by Kalka Flowers to call a witness to testify on its claim and the fact that the Bank has addressed all the claims made by Kalka Flowers in its defence and by the Witness Statement of Mary Katoni means that Kalka Flowers has failed to prove its case on a balance of probabilities.

Whether the Bank has proved its Counterclaim against Kalka Flowers and the other Defendants to the Counterclaim

40. It was submitted that all the Defendants to the Counterclaim failed to file a defence. They relied on the Court of Appeal case of *Samaki Industries (Nairobi) Limited -vs- Samaki Industries (Kenya) Limited (2) (1995 -98) EA 366* to the effect that a Counterclaim is substantially a cross suit and should be treated for all purposes as an independent action and that failure by a defendant to file a defence to the counterclaim means that the defendant was deemed to have admitted the allegations of fact made by plaintiff to the counterclaim.
41. It was submitted that all the allegations of fact made in the counterclaim are uncontroverted and therefore admitted. That on the basis of admission alone, the court should allow the counterclaim. They reiterated the facts as shown in the counterclaim. It was submitted that Kalka Flowers accounts are still in arrears in the sum of USD 2,136,969,4, Kshs 7,622,251.99 and Euro 120.20 being the principal sum plus interest as follows:
- i. Account No. xxxxxxxx USD 1,142,778.05 (Facility 1)
 - ii. Account No. xxxxxxxxxx USD 994,191.35 (Facility 3)
 - iii. Account No. xxxxxxxx Kshs 7,622,251.99 (Operating account).
 - iv. Account No. xxxxxxxx Euro 120.20



42. It was submitted that the evidence of Mary Katoni during the hearing has explained how these balances arose, and she produced documents setting out the balances.

Whether the Court should grant the prayers sought in the Counterclaim

43. It was submitted that Kalka Flowers has not disputed the balances or led any evidence to disprove the balances and therefore the claim by the Bank is unchallenged and ought to be allowed and that the Bank has proved its case against all the defendants in the Counterclaim.
44. It was submitted that the Bank is also seeking interest on the outstanding loan amount at the rate agreed in the letter of offer at 10% per annum plus default interest of 6% per annum giving a total rate of 16% per annum as per the loan agreement. The Bank urged this court to award interest on the sums outstanding at the agreed rate of 16% per annum till payment in full.

Analysis and Determination

45. I have taken time to study this file. It is a voluminous file, and the case has done its rounds, from Nairobi to Machakos to Kajiado. The matter has been handled by several judges. Justice Mwita took the evidence of the only witness who testified in this matter. I will adopt the issues identified by the Bank as the issues for determination given that there are no other issues identified by the Plaintiff or Defendants in the Counterclaim.
46. On whether Kalka Flowers has proved its case against Equity Bank, I have noted that it is not in dispute that there exists a relationship between the parties in this case as stated in the original claim and in the counterclaim. There are allegations that have been made by the Plaintiff in the original claim. These allegations are as follows:
- i. That Equity Bank delayed registering the Charge. This allegation has been responded to by Mary Katoni in her Witness Statement at paragraphs 10 to 14.
 - ii. That Equity Bank delayed in releasing the funds. This allegation was responded to in paragraph 14 of Mary's Witness Statement.
 - iii. Allegation of loss of foreign exchange occasioned by the delay in disbursing funds. This allegation is explained in paragraph 6 of the defence and counterclaim and paragraphs 19 to 21 of Mary's Witness Statement.
 - iv. Allegations of payment of excessive fees to the valuer and the advocates without Kalka's consent. This allegation has been answered in paragraph 18 of Mary's Witness Statement.
 - v. Failure to honour cheques issued by Kalka to pay its creditors and instead the Bank paying its own creditors and failure to pay other creditors has been responded to in paragraphs 11 and 22 of the defence and counterclaim and Mary's evidence.
 - vi. Allegations of variation of facility 1 of USD 1,231,970 to USD 1,000,000. This was responded to in paragraph 6 of Mary's Witness Statement.
 - vii. Allegations that the Bank misrepresented its ability to advance the facility and failure to release the entire facility. The Bank has explained that the loan was disbursed to Kalka on various dates as set out in paragraph 7 of the Witness Statement of Mary and that Kalka acknowledged receipt of the facilities II and III in paragraph 3 of their letter dated 4th January 2013 (see page 43 of Kalka's bundle of documents). The record also shows that Kalka acknowledged receipt



of facility I at paragraph 1 of its letter dated 17th January 2013 (see page 2 of the Banks bundle of documents).

- viii. Failure to state the rate of interest in the Charge. The Bank has stated that it responded to this allegation in paragraph 24 of Mary Katoni's statement and Clause 2 of the Charge dated 15th November 2012 and Clause 1.2 of the letter of offer at pages 4 and 32 of the Kalka's list of documents respectively.
- ix. Allegations that Kalka's directors did not sign the Charge in the presence of an Advocate, and neither were the effects of the [Land Registration Act](#) explained to them. the Bank has stated that it responded to this allegation in paragraph 15 of Mary's statement and that the Charge contains stamps of M/s S.B. Kinuthia Advocates found at page 29 of Kalka's bundle of documents.
47. The evidence of the Bank was not controverted. Kalka did not tender evidence to counter the evidence of the Bank. As stated in the authorities cited here, the Defence and Counterclaim stand unchallenged and the case by Kalka remains unsubstantiated (see [Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi \(Milimani\) HCCC No. 834 of 2002](#) where the Court cited with approval [Autar Singh Bahra & Another vs. Raju Govindji HCC No. 548 of 1998](#)).
48. I agree with the reason of the Court in [Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Othes Nairobi \(Milimani\) HCCs No. 1243 of 2001](#), relied on by the Bank, that "it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings"
49. Not only did Kalka and the other Defendants in the Counterclaim, not participate in the hearing of the matter, they did not call any witnesses to substantiate their case and disapprove the counterclaim, but they also failed to produce the documents that they attached on their pleadings.
50. In [CMC Aviation Ltd. vs. Cruisair Ltd. \(No. 1\) \[1978\] KLR 103; \[1976-80\] 1 KLR 835](#), it was stated as follows:
- "Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence, and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth."
51. The law is clear that he who alleges must prove. This is captured under Sections 107 and 108 of the [Evidence Act](#) provide as follows:
- 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.



52. With no evidence to substantiate what the Plaintiff in the original claim is alleging, this court has no option but to find that the Kalka Flowers Limited has failed to prove its case on a balance of probabilities. On the other hand, Equity Bank Limited has tendered evidence countering the allegations and offering explanations that are plausible.
53. It is my finding therefore that Kalka Flowers Limited case against Equity Bank Limited and Purple Royal Auctioneers must fail for reasons that there is no evidence tendered to substantiate the allegations made against Equity Bank Limited by it.
54. On whether Equity Bank has proved its counterclaim against the defendants to the counterclaim, I have considered the Counterclaim and the evidence by the Bank substantiating the Counterclaim. It is clear that the Bank facilitated the loan to Kalka Flowers through a letter of offer dated 16th October 2012. That Kalka Flowers failed to pay the monthly instalments as agreed and fell into arrears. After sending out demand notices they exercised their statutory power of sale and sold the suit properties to Lelo Investment Ltd for USD 3,000,000.
55. The Bank has explained through evidence how the amount now owing came about as the proceeds of sale did not cover the whole amount. The arrears are shown as USD 2,136,969.4, Kshs.7,622,251.99 and Euro 120.2. It is the Bank's case that the defendants to the counterclaim are liable to pay the said amount and the interest accruing therein.
56. I have considered the Bank's case that the cause of action arose against the 2nd, 3rd and 4th Defendants in the counterclaim by virtue of being guarantors. That there are 2 guarantees one was a corporate guarantee by the 2nd Defendant and the other one was a director's guarantee by the 3rd and 4th Defendants. That Kalka Flowers is the principal in the corporate guarantee and the principal debtor in the director's guarantee. I have seen the corporate deed of guarantee dated 15th November 2012 between Prismaa Flowers and Equity Bank Limited found contained on page 46 of the Bank's bundle of documents. Clause 1 sub clause (1.1) states in part as follows:
- “The guarantors will pay to the bank all money that is now or shall at any time or times hereafter be due or owing to the Bank from or payable to the Bank by the principal in whatever currency denominated under or in respect of any dealing, transaction or engagement whatsoever, either solely or jointly with any other person.....”
57. Sub-clause 1.2 shows that the guarantors will also pay to the Bank, “all interest (as well as before any demand or judgement) costs commissions and other banking charges including default charges and expenses”
58. I have also considered the Directors personal guarantee by the 3rd and 4th Defendants dated 15th November 2012. It states under Clause 1 in part as follows:
- “The guarantor will pay to the bank on demand all money and discharge all obligations and liabilities, whether actual or contingent, now or hereafter due, owing or incurred to the bank by the principal debtor in whatever currency denominated whether on any current or other account.....”
59. On the issue of both guarantees it is clear to me that from the written guaranteed documents as outlined above the guarantors are liable to pay all money owed and interest by the principal (Kalka Flowers).
60. In *Hosea Mundui Kiplagat v Kenya Commercial Bank* [2012] eKLR, the court held that a guarantee is a continuing security and shall remain in force until the subject debt is satisfied.



61. The Bank has cited “The Law of Guarantees” 2nd Edition by Geraldine Andrew and Richard Millet where at page 156 it is stated that:

“A guarantee is a pledge by a person (guarantor), other than a party upon whom the contractual or other legal obligation is imposed, to the effect that if the party so bound (principal) fails to perform the act in question, the guarantor, will either perform or make good any loss or claim arising from the non-performance. The pledge is ordinarily made to a creditor. The essence is that the guarantor agrees not to discharge the liability in any event, but to do so only if the principal debtor fails to honour his duty.”

62. I have considered the evidence Mary Katoni who gave evidence in support of the Bank’s case. She disapproved Kalka’s case and gave explanation on the claims by Kalka. The Defendants in the counterclaim did not participate as they did not file any defence to the claims alleged by the Bank. The Bank’s claims therefore remain unchallenged.

63. In North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi [2019] eKLR, the Court held that:

“It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party’s pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff’s case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant’s evidence. In the instant case the plaintiff gave evidence which was not challenged, proved documents in support of her claim. I find the plaintiff’s evidence to be credible....”

64. It is my finding that the Bank’s Counterclaim remains unchallenged having proved its case on a balance of probabilities and in the absence of the defendants’ evidence in defence to the counterclaim.

65. Having found that Kalka Flowers Limited did not prove its claim against Equity Bank Limited in the original claim and that Equity Bank Limited has proved its counterclaim against the defendants to the counterclaim, it is clear to my mind that issue number three whether the court should grant the prayers sought in the counterclaim must be answered in the affirmative.

66. Consequently, I grant the following orders:

- i. The Plaint filed by Kalka Flowers Limited against Equity Bank Limited and Purple Royal Auctioneers on 15th December 2014 is hereby dismissed with costs to the Equity Bank Limited.
- ii. Judgment is hereby entered jointly and severally for Equity Bank Limited in the Counterclaim as against the Kalka Flowers Limited, Prismaa Flowers Limited, Arumugam Pillai and Patricia Srithar for
 - a. USD 2,136,969.4, Kshs 7,622,241.99 and Euro 120.
 - b. Interest at 16% per annum until payment in full.



c. Costs of the Counterclaim.

67. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JUNE 2024.

S. N. MUTUKU

JUDGE

