Bank of Africa Limited v Time Trucks Limited & 2 others (Civil Suit 41 of 2016) [2024] KEHC 12494 (KLR) (16 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12494 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 41 OF 2016

DKN MAGARE, J

OCTOBER 16, 2024

BETWEEN

BANK OF AFRICA LIMITED ..... PLAINTIFF

AND

TIME TRUCKS LIMITED ..... 1ST DEFENDANT

TAUFUT BREK SAID ..... 2ND DEFENDANT

SALIM AHMED ABDULRAHMAN ..... 3RD DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide the Plaintiff dated 26/4/2016 seeking the following reliefs:
   a. The sum of Kshs. 25,692,187.75 being the aggregate of the 1st Defendant's current account balance, loan arrears and interest accrued thereon outstanding as at 9/2/2016.
   b. Interest on the 1st Defendant's current account balance and loan arrears at the reigning contractual interest rates as follows:
      i. On the current account balance of Kshs. 11,896,452.65 interest at the rate of 29% per annum from 10/2/2016 until payment in full.
      ii. On the loan arrears balance of Kshs. 13,634,150/- interest at the rate of 29% per annum from 10/2/2016 until payment in full.
   c. Cost of the suit.
2. It was averred that the Defendants approached the Plaintiff seeking loan facilities sometimes in 2011 and 2012.

3. The amount of Kshs. 25,692,187.75 was in respect of the aggregate of the outstanding principal sum of the banking facilities granted to the 1st Defendant. It was further averred that the Plaintiff managed to recover a total of Kshs. 2,400,000/- from the sale of 5 motor vehicles.

4. The Defendants entered appearance and filed a statement of defence dated 5/9/2016 and amended on 27/11/2017 denying the averments in the Plaint. The Defendants also raised a counterclaim for:

    a. Discharge of the guarantee

    b. Security was sufficient.

5. The 1st Defendant admitted that it was a customer of the Plaintiff. However, the 1st Defendant averred that it only had three accounts with the Plaintiff, namely:-

    a) Current Account Number 0201874002;

    b) 02018740110; and

    c) Dollar Account Number 02018740054.

    4. The Defendants refer to paragraph 6 of the Plaint and reply thereto as follows:-

        a) The 2nd and 3rd Defendants did not request for any banking facilities from the Plaintiff on behalf of the 1st Defendant.

Evidence

6. The Plaintiff called PW1, Monica Kamau. She introduced herself as the Debt Recoveries Officer. She relied on her witness statement dated 6/4/2016 and bundle of documents dated 29/4/2016 as well as further bundle of documents dated 25/1/2019 which she produced in evidence. It was her case in cross examination that the securities were log books, debentures and guarantors. She testified that motor vehicles are not valued if they are zero mileage but if ex Japan then they are valued.

7. Further, that a sum of Kshs. 1,988,149.16 was disbursed to the Defendants account. The second letter of offer was for Ksh. 2,000,000/= overdraft. It was also her testimony that the total principal amount per the last letter of offer was Ksh. 13,911,711.48 and some facilities had been paid. She also testified that there were guarantee for the advancement of the facilities and which were signed. That the guarantee was signed on 7/1/2013 and the letter of offer came before the guarantee. It was her admitted case that there was no letter written to the guarantor. That the loan became non performing on 12/3/2011.

8. The Defendants called DW1, John Wahome Maina. He relied on the list of documents dated 27/11/2017 and testified that he did valuation. Per his report dated 22/4/2014. It was his stated case that the valuation depicted the current market value of the motor vehicles.

9. Taufiq Brek Said. (Taufiq) testified as the 2nd Defence witness. He relied on his statement dated 27/11/2017. On cross examination, he stated that the 2nd and 3rd Defendants were directors of the 1st Defendant. He testified that the guaranteed loan was about Ksh. 30,000,000/- and that both directors signed the corporate guarantee. And the limitation of liability was Kshs. 14,000,000/-. It was his evidence that the loan was secured by 6 prime movers and 3 trailers. His case was that the Plaintiff subsequently seized the securities, valued at 17,000,000/=, which they have not accounted for.

10. It was his case that the 1st Defendant owed in 3 out of 7 loans, but the same should have been cleared through the sale of all the securities that had been charged. He prayed that the 2nd and 3rd Defendants be discharged.

Submissions

11. The Plaintiff filed submissions dated 20/2/2024. It was submitted that parties are bound by their contract. They relied on *Kunda Singh Construction Company International Limited v Bank of Africa Limited HCCC No. 71 of 2015* to submit that the responsibility if the court is limited only to enforcing contracts. It was also submitted that the Plaintiff's case was not barred by the in duplum rule under Section 44A of the *Banking Act*.

12. The Plaintiff placed on Section 61(1) of the *Consumer Protection Act* based on which it was submitted that the interest and default penalty interest was contractual. Reliance was further placed on Givan Okallo Ingari & Another v Housing Finance Co. Kenya Ltd (2007)2 KLR.

13. It was further submitted that the realization and sale of the 5 motor vehicles was proper and at the favourable price. Reliance was placed on Zum Zum Investment Limited v Habib Bank Limited [2014] eKLR.

14. They submitted that the 2nd and 3rd Defendants were not discharged from their responsibilities and were under obligation to pay as they 1st Defendant was in default. They cited inter alia the case of Eboy Development Co Ltd v Standard Chartered Bank (2008) eKLR to support this argument. It was submitted that the Defendant's counterclaim was not supported with evidence and as such was bound to fail within the meaning of Sections 109 and 112 of the *Evidence Act*. they relied on Vivo Energy Kenya Limited v George Karunji (2014) eKLR.

15. The Defendants filed submissions dated 22/5/2024, where they submitted that the letter of guarantee and indemnity established, the 2nd and 3rd Defendants' liabilities to the 1st Defendant which would only take effect on the date of execution. They relied on Ecobank Limited v Liberty Graphics K Limited and 3 Others (2021) eKLR.

16. It was their case that if the facilities were never guaranteed by the 2nd and 3rd Defendants then the Plaintiff was estopped from laying a claim from the 2nd and 3rd Defendants and instead should claim from the 1st Defendant. It was their case that there was no privity of contract between the Plaintiff and the 2nd and 3rd Defendants. In that connection they placed reliance on the case of Agricultural Finance Corporation v Lengatia Limited (1985) KLR 765.'

17. Their submission was that the 2nd and 3rd Defendants did not sign the forms on interest and as such were not bound as they did not signify acceptance. They relied on IP Enterprises Limited v Uneximp Ltd Civil Case No. 673 of 1985.

18. It was submitted that Section 120 of the *Evidence Act* and the case of Serah Njeri Mwobi v John Kimani Njoroge (2021) eKLR to submit that the Plaintiff was estopped by conduct from claiming when they caused the securities to be sold through illegalities to which they were part. It was their submissions that liability would only arise if the default was communicated to the 2nd and 3rd Defendants. They relied on the case of Kenya Commercial Bank Limited & Another v Mwanzau Mbalauka & Another (1998) eKLR.

19. Finally, they submitted that that the securities were not sold at the correct price as per their valuation reports in court. To buttress their case, they relied on the case of Housing Finance Co Kenya Limited v Palm Holmes Limited & others (2002)1 KLR.

Analysis

20. This case presents a unique challenge. The challenge is self-inflicted and no one can help a party to escape the ignominy of their own misconduct. This case presents the darkest of the moments that cannot in a normal commercial transaction be countenanced. Both sides could not see what was wrong with the architecture of the case.

21. The plaintiff filed suit claiming an aggregate of Ksh. 25,692,187.75. This was said to be the 1st defendant's current account balance loan arrears and interest accrued. They also seek interest at 29% on Ksh 11,896,455.65 and interest at 29% on 13,634,150. The do not lay firm basis for the second limb of the claim.

22. The Defendants field defence and raised counterclaim. The Defendants' counterclaim prayed for:

    a. Discharge of the guarantee.

    b. Security was sufficient.

23. The burden of proof lies on the party who alleges. This burden does not change. It is provided for under sections 107-109 of the *Evidence Act*. the said sections 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.
>
> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

24. This also means that parties with special knowledge must proof the same otherwise the court should make adverse inference. Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'

25. It is therefore a corollary that adverse inference should be drawn upon a party who fails to call evidence in his possession as stated in the case of Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR, where the court stated as follows:

> " Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

26. In that connection, the Plaintiff had the burden of proof. This is in respect of the matters the Plaintiff pleaded that is: -

    a. The loan was issued and the amount paid and due.

    b. Sale of the 6 securities and evidence of sale.

    c. The value of the securities

    d. Crediting the proceeds of sale to the account

    e. Payments made out of the proceeds of sale of the securities.

27. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows: -

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

28. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

29. It was common ground that the 1st Defendant took a loan and offered the 6 securities referred above. However, the next question, is whether, the said securities were realized. If they were realized, how much was recovered.

30. The Defendant on the other hand, must proof the following: -

    a. The Loan was paid

    b. The value of the securities

    c. debt was paid.

31. It is also common ground that the securities were seizes. There is however a dispute whether one of them was sold. Nevertheless, the difference on which vehicles were sold and how much is a duty of shared responsibility. The Defendants stated that the seized all the securities and did not account. I have sought certificates of sale and advertisement for public auction for all the vehicles. I have not seen

any. However, I have seen several letters requesting for acceptance of certain amounts. These letters related to the securities. I have not seen any letter returning any one of the seized motor vehicle.

32. Perturbingly, I have not seen evidence of sale of all the securities. Rule 12 of the Auctioneers Rules, provide for the procedure of carrying out an action. The rule provides as follows: -

1. Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock-

(a) record the court warrant or letter of instruction in the register;

(b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;

(c) in writing, give to the owner of the goods seven days notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction;

(d) on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction;

(e) ensure safe storage of the goods pending their auction;

(f) arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter;

(g) not remove any goods under the proclamation until the expiry of the grace period.

(2) If on the expiry of the period of notice, the auctioneer finds that there are other goods belonging to the judgement debtor-

(a) which were not pointed out by the decree holder and proclaimed earlier in his proclamation; or

(b) which have been removed by the judgment debtor, or cannot be found, the auctioneer shall file an application in court seeking leave of the court to be allowed to attach any other movable properties of the judgement debtor pointed out by the decree holder.

33. There is no evidence that the auctioneer arranged advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter. In other words, the auctioneers had 21 days from the date of proclamation to carrying out of the sale.

34. There was no evidence of any sale. Purporting to negotiate between the auctioneer and the Plaintiff is in breach of the Auctioneers rules. In short there was no sale of the movable property that was seized.

35. The Plaintiff stated that there was no valuation as these were zero mileage vehicles. However, the defendant valued the vehicles before seizure. There ought to have been sold within 14 days of seizure. The Plaintiff ought to prove that they sold the said motor vehicle and at the best available prices. The only evidence available is the valuation by the defendant's witness. I take it that, the vehicles were seized

and whether, they were sold is a matter within the knowledge of the Plaintiff. There is however, no evidence that the sale amounts were credited the amount to the account.

36. It is my finding that that the vehicles, were valued at Kshs. 17,000,000/=, but there is no evidence that the same were sold, at the best value available or at all. Crediting some money and letters requesting approval for sale is not a public auction. It is therefore, that the Plaintiff converted those goods whose value was ascertained at Kshs. 17,000,000/=. The Plaintiff failed to do this as they were unable to show that there was a sale of the securities, the advertisement and certificates of sale.

37. This court noted that the said motor vehicles were repossessed barely one year after valuation. The valuations given to the said motor vehicles as at 22/4/2014 were as follows:

    a. KBH 889J -prime mover- Market value 2,000,000/= Forced sale value 1,900,000/=

    b. KBS 774Y (DAF) –prime mover-Market value 2,000,000/= Forced sale value 1,900,000/=

    c. KBH 455M (DAF)- prime mover-Market value 1,600,000/= Forced sale value 1,500,000/=

    d. KBP 799(MAN)-prime mover- Market value 3,250,000/= Forced sale value 3,150,000/=

    e. KBQ 611Z (ERF)-prime mover- Market value 3.170,000/= Forced sale value 3,050,000/=

    f. ZC 9648- Trail King, Trailer- Market value 1,800,000/= Forced sale value 1,750,000/=

    g. ZD 0275- Trail king, Trailer- market value 1,800,000/= Forced sale value 1,750,000/=

    h. ZD 8720- Ocean Trailers, semi trailer- Market value 2,080,000 Forced sale value 2,000,000/=

38. On 7/7/2011 the following vehicles were valued insured as follows:

    a. KBH 455M - 1,200,000/=

    b. KBH 889J – 2,000,000/=

    c. KBP 799- 3,250,000/=

39. Therefore, the Plaintiff was expected to plead that they repossessed the motor vehicles and sold them, to whom they were sold and at how much and prove that they sold the repossessed motor vehicles at the best available prices. This would be by way of a public auction. The parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

    “

    > “ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

40. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

41. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

42. The Plaintiff pleaded for an amount of Kshs. 25,692,187.75. The total facilities were stated to be Ksh. 13,911,711.48. It was therefore the case of the Plaintiff that the claim of Ksh. 25,692,187.75 included the aggregate of the outstanding principal sum and all interests, commissions, fees, commissions, charges and expenses thereon as at 9/2/2016.

43. The court cannot act on evidence, even where it is established, in the absence of pleadings. In the recent presidential Election Petition, the Court of Appeal of Nigeria sitting as the election court, in Peter Gregory Obi & another versus Senator Bola Ahmed Tinubu &INEC & 3 others consolidated with petitions no. 4 and 5 both of 2023, stated as doth: -

> " In Belgore Versus Ahmed (2013) 8 NWLR (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable(sic), omnibus and general in terms. The Apex court specifically held as follows: -
>
> "Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent.

44. The Plaintiff set out the particulars of the loan advanced and the supported the eventual current balance on loan by way of the bank statements. However, for the purpose of determining the amount that was yielded from the sale of the repossessed motor vehicles, it was paramount for the Plaintiff to conduct a public auction and demonstrate that the motor vehicles were not sold at an undervalue as contended by the Defendant.

45. The amounts in arrears, that were due as at Ksh. 8,694,537/=, if the Amount had been credited within the period for conducting the sale, the balance could have exceeded the amount due. It is therefore clear that find that the Plaintiff failed to prove its case on a balance of probability as to the owing loan amount of Kshs. 25,692,187.75. that was claimed with interest.

46. I say so also because there was not material placed before the court from which it was inferred that all the vehicles that were undoubtedly repossessed could have yielded only Ksh. 2,400,000/= through a competitive public auction. There was no basis for crediting only Ksh. 2,400,000/= instead of the entire value of the vehicles.

47. The Plaintiff had the duty to carry out the best market research and obtain prices that were reasonable. This was so because the motor vehicles as security remained property of the Defendant even upon repossession and would only be lawfully sold with the aim of yielding the maximum that would be obtained towards settling or reducing the loan amount. there was thus a duty to the Plaintiff to carry out due diligence to obtain the best price of the said motor vehicle.

48. The Plaintiff failed to that money was due and owing after crediting, on time, the true value of the 6 vehicles forced sale value of Ksh. 17,000,000/= in terms of. The market value was indicated to be 17,700,000/=. By failing to credit the amount the court shall presume that they receive value. This court cannot A Court of law cannot re-write a contract between the parties in the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR as follows: -

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
>
> As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):

> "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

49. The sale could have been valid had rule 12 of the Auctioneers Rules complied with. It could have been plausible that some money was due and owing, if the Plaintiff proved that the due loan was over and above the total sale of the repossessed motor vehicles. The sale was not proved. It means they retained the vehicles and must been the consequences. If they handed then away for a song, it is irrelevant herein. There is no counterclaim for the amount over and above the loan due.

50. The only available and reasonable valuation produced in court was the valuation by the Defendants. It contained all the repossessed motor vehicles and the fact that the motor vehicles and trailers were repossessed as per the Defendant's valuation report was not controverted by the Plaintiff. The total amount that would be yielded from the sale of the trucks and trailers as per the Defendants' valuation was thus Kshs. 17,000,000/-. The Plaintiff on the other hand valued the trucks and trailers at Kshs. 2,400,000/-To this court, the valuation by the Defendants was reasonable and more credible. The Plaintiff's valuation was indeed devoid of due diligence and amounted to an undervalue. Therefore, the valuation by the Defendants for Kshs. 17,000.000/= is the proper valuation.

51. The Plaintiff instructed Westminster commercial traders to repossess the vehicles. This is the same day they were coincidentally valued by the Pw1. The bank had set the sale on 14/4/2014 giving 7 days to repossess. At the time repossession took place, valuing the assets for opportunity costs. A second demand had been made for arrears of Kshs. 8,691,076.45 and the first demand on 12/3/14 was for Kshs 8,694,537 in arrears. The parties, must not throw to the court allegations for the court to sweep through and award them. In the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

52. There was no consideration for the repossessed motor vehicles which ought to have reduced the amount substantially. The amount per the Defendants' valuation report being Ksh. 17,000,000/- would my view reduce the loan owed to the Plaintiff which arrears of Ksh 8,691,076.45 per the second demand letter. The court notes that the first demand dated 12/3/14 demanded for Ksh 8,694,537 in arrears. The Plaintiff filed a Bundle of Documents dated 29/4/2016 with 385 pages. The last one showed arrears of 11,892,913.76 as at 31/1/2016 and printed by pw1 on 29/2/2016 at 13:56:17 hours.

53. To the extent that the Plaintiff failed to file full details of the motor vehicles and trailers repossessed and the amount that each was sold based on a public auction, the court is bound to infer that the sale was haphazardly carried out to the detriment of the Defendant. The Plaintiff had the knowledge of the loan arrears and the particulars of the motor vehicles repossessed but failed to carry out an accountable sale for each of the repossessed motor vehicles. In this regard, Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party

54. Therefore, in the absence of the Plaintiff's claim for the actual arrears after the proper valuation and sale of the repossessed motor vehicles which was not clearly done, it is difficult for this court to find basis for the Plaintiff's claim.

55. The Defendants submitted extensively that the Plaintiff was an accomplice in the illegalities causing the securities to be unlawfully sold that therefore the Plaintiff was estopped by its own conduct from denying the fact of causing the securities to be unlawfully sold. In Nurdin Bandali v. Lombank Tanganyika Ltd [1963] EA 304, the former Court of Appeal for Eastern Africa set out the conditions under which equitable estoppel arises as follows:

> " The precise limits of an equitable estoppel are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another party a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in belief of the truth of the representation, acted upon it."

56. Estoppel is a shield and not a sword and as held in Serah Njeri Mwobi vs. John Kimani Njoroge [2013] eKLR:

> 'The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person

57. The Defendant failed to demonstrate the manner in which the Plaintiff was an accomplice in illegalities. I find basis in the application of the doctrine of estoppel in the circumstances. The Doctrine of Estoppel is well captured under Section 120 of the *Evidence Act* which provides:-

> When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

58. bank statements were tendered in evidence that the interest on the liability indeed stopped accruing on 31/10/2014, that is when the facility became performing. The claim that by the Defendants that the interest claimed by the Plaintiff was barred by the in duplum rule within the meaning of Section 44A of the *Banking Act* is untenable. However, it is moot given that the repossession had already occurred in April 2014. The in duplum rule was elucidated by the Court of Appeal in the case of Kenya Hotels

Limited Vs Oriental Commercial Bank Ltd (Formerly known as Delphis Bank Limited) (2019) eKLR thus:-

> " In duplum" is a Latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May 2007 it has been applied by the courts with reasonable degree of consistency. See Lee G. Muthoga V. Habib Zurich Finance (K) Limited & another (2016) eKLR, Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation (2019) eKLR, along a host of many others where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage.
>
> "The In duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides.

59. This rule was recently reiterated by the Court of Appeal in the case of Housing Finance Company of Kenya Limited Vs Scholarstica Nyaguthii Muturi & Another (2020) eKLR in the following terms:-

> " As we have shown section 44A of the *Banking Act* came into force on 1st May 2007. That provision of law sets up the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. The banking institution is limited in what it may recover from a debtor with respect to a non performing loan and the maximum recoverable amount is defined as follows in section 44A(2):
>
> "The maximum amount referred in subsection (1) is the sum of the following-
>
> a) The principal owing when the loan becomes non-performing;
>
> b) Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and
>
> c) Expenses incurred in the recovery of any amounts owed by the debtor".
>
> By that provision if a loan becomes non-performing and the debtor resumes payment on the loan and the loan becomes non-performing again the limitation under the said paragraphs shall be determined with respect to the time the loan last became non-performing. In addition, by section 44A (6) it is provided:
>
> "This section shall apply with request to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation."
>
> Section 44A has retrospective effect and this as explained by this Court in the case of *James Muniu Mucheru V. National Bank of Kenya Civil Appeal No. 365 of 2017*.

60. The Plaintiff also prayed for interest at commercial rates. I find no basis for this. Interest at commercial rates has to be proved. I have thus to establish whether the interest at 29% was due to the Plaintiff on the basis of the balance on current account and load arrears.

61. On this, the Plaintiff posited that 29% was the commercial interest rate applicable. I have scrupulously perused the pleadings and evidence relied on by the Plaintiff. The import of the rate was not specifically pleaded. It was only advanced as a relief in the Plaint. I find the interest of 29% was not pleaded and supported and I decline it. Instead, interest was to accrue at accrue on the proved liability at court rates from the date of filing the suit had the claim been proved. Further the same should arise from the Pleadings. This was addressed in the case of Intraspeed Logistics Ltd & 15 others v Commissioner of Police & another [2018] eKLR, the court stated as follows:

...The plaintiffs are entitled to interest but in the absence of proof of commercial rates they are only entitled to interest at court rates.

62. It is also settled that simple interest on liquidated damages should commence from the date of filing the suit. In the celebrated Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469 the court stated as follows:

> The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment.

63. The issue of interest on liquidated claims was recently addressed in the case of Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others [2018] eKLR, where the court posited as follows:

> 32. I have come to the conclusion that the Learned Trial erred by not adverting her mind to whether interest was payable on the liquidated sum she ordered the Respondent to pay to the Appellant. Had the Learned Trial Magistrate done so, she would have likely reached the conclusion that the Appellant was entitled to an award of interest at Court Rates from the time of filing the suit since she had already concluded that the Appellant was entitled to a liquidated amount which she had been deprived of by the actions of the Respondents. This is the predictable rule on award of interest on liquidated sums that has emerged from our Courts' repeated application of Section 26 of the *Civil Procedure Act*. The cases cited above reached the conclusion that where a claim is for liquidate damages, unless there is good cause, the interest should be calculated from the date of filing the suit.

64. Whereas the Plaintiff maintained that the Defendants were in breach of the loan facility contract as well as the guarantee. The Defendant's case is that the guarantees were obtained my misrepresentation and were as such null and void.

65. However, DW2 admitted in his testimony that they signed the guarantees. The allegation of misrepresentation was not proved to the required standard. There were guarantees were addressed by Court of Appeal in Robert Njoka Muthara & another v Barclays Bank of Kenya Limited & another [2017] eKLR as follows:

> 23. A guarantee by definition 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. Geraldine Andrews & Richard Millet

succinctly described the nature of a guarantee in "The Law of Guarantees" (supra) at page 156 as herein under:-

> "A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point." Emphasis added.

24. By its very nature, a guarantee is distinct from the agreement which gives rise to the obligation guaranteed. The principal debtor is neither a party to the guarantee nor considered as one with the guarantor. See Moschi vs. Lep Air Services Ltd. [1972] ALL ER 393. Consequently, the rights and/or obligations of a guarantor as against the creditor accrue to him/her from the relationship created by the guarantee. See Halsbury?s Law of England, 4th Edition (reissue) Vol. 20(1) at paragraph 217.

66. Black's Law Dictionary (Eighth edition) defines the term fraudulent misrepresentation as stated to mean:-

> " A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to induce a party to detrimentally rely on it".

67. Therefore, the legal position is that fraud is proven when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false (Derry -vs- Peek (1889) 14 App Cas 337). Nondisclosure was addressed in the case of Sidhu & another –Vs- Memory Corporation PLC No. CHANI 1999/0636/A3, where the Court of Appeal in England had the following to say about material non-disclosure and misrepresentation of facts at the ex parte stage:

> " In the context of what should be disclosed to the Court on a without notice application, the distinction between facts and law is not clear-cut. Many of the authorities already cited refer almost interchangeably to non-disclosure of 'material facts' or 'relevant matters.' Little weight can be attached to these slight variations in language. But some statements of principle of full disclosure extend to what the Court was told about matters of law."

68. Material non-disclosure, was discussed more candidly at page 90 in the case of D. Bank Mellat –V- Nikpour [1985] FSR 87, 92, where Donalson J stated as follows: -

> " The principle that no injunction obtained ex parte shall stand if it has been obtained in circumstances which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed it is so well enshrined in the law that it is difficult to find authority for the proposition; we all know, it is trite law."

69. Back home in Uhuru Highway development Limited –V- Central Bank of Kenya & others [1995] eKLR the Court of Appeal of Kenya held that the foregoing principles of full disclosure apply in Kenya in the same way as in England.

70. It is on this basis that I find and hold that the Defendants did not place material to justify the allegation that the guarantee dated 7th January 2013 were obtained by material nondisclosure and were invalid and void.

71. On my perusal of the pleadings and evidence also, I do not find basis in the position fronted by the Defendants that the 2nd and 3rd Defendants were not notified of the default by the company. Various letters and notices were issued by the Plaintiff and the Defendants have not denied them. The letters and notices were clearly addressed to the 1st Defendant to which the 2nd and 3rd Defendants were the directors. I say so because under clause 7 of the Guarantee, a notice would be deemed duly served upon a known address of the guarantor or the principal place of business.

72. The demand notices herein were addressed to the known address of the 1st Defendant as also depicted in the letters of offer. I therefore find no basis to the allegation that the guarantors herein as the 2nd and 3rd Defendants had no knowledge of the default by their own company, the 1st Defendant. In any event, the 1st Defendant is a legal entity, distinct and separate from the 2nd and 3rd Defendants.

73. I equally do not accede to the submission by the Defendants that the guarantee took effect upon its execution and therefore the liability could not be traced to the date of the facilities. The guarantee was issued as a consequence of the loan facilities and secured the loan amount as from the date of the loan facility.

74. Having found that the Plaintiff did not factor in that the vehicles with a forced sale value of Kshs. 17,000,000/-, which were seized in realization of their security. On the materials placed before this court, the Defendant demonstrated that the motor vehicle's market value was a total of forced sale value of Kshs. 17,000,000/=.

75. I am unable to deal with the issue of any amounts below or over the value of the vehicles. Having proved that the amount was sufficient to clear the loan 21 days after proclamation, it is my considered view that the Defendant's counter claim is merit. This is because the guarantee is now spent.

76. The end result is that the plaintiff's suit fails. Since the guarantees are spent, the defendant, are discharged. Regarding, the issue of costs, the same follow the event. Section 27 of the *Civil Procedure Act* provides as follows: -

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

77. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the

> preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

78. Consequently, the plaintiff's case, is dismissed with costs. The counter claim is allowed with costs. The Defendants shall have the costs of the suit and counterclaim assessed at Kshs. 955,000/=.

Determination

79. In the upshot, I make the following Orders:

    a. The Plaintiff suit is dismissed with costs.

    b. The Defendants are hereby discharged from the guarantees.

    c. The Defendants shall have the costs of the suit and counterclaim assessed at Kshs. 955,000/-

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 16TH DAY OF OCTOBER, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ngaine for the Plaintiff

No appearance for the Defendant

Court Assistant- Ms. Jedidah