Okello & 2 others v Citibank N.A; Citibank N.A (Plaintiff); Fintea Limited & 3 others (Defendant) (Civil Case 86 of 2005) [2023] KEHC 3344 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3344 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 86 OF 2005

PJO OTIENO, J

APRIL 14, 2023

BETWEEN

SAMUEL ONYANGO OKELLO ..... 1ST PLAINTIFF

EXHIBITION DEVELOPMENT LIMITED ..... 2ND PLAINTIFF

UMANI TRADING COMPANY LIMITED ..... 3RD PLAINTIFF

AND

CITIBANK N.A ..... DEFENDANT

AND

CITIBANK N.A ..... PLAINTIFF

AND

FINTEA LIMITED ..... DEFENDANT

EXHIBITION DEVELPOMENT LIMITED ..... DEFENDANT

SAMUEL ONYANGO OKELLO ..... DEFENDANT

UMANI TRADING COMPANY LIMITED ..... DEFENDANT

JUDGMENT

1. As pleaded, the suit arises from a banking relationship between the Plaintiffs (henceforth the chargors), the Defendant henceforth the (bank) and Fin Tea Limited (hereinafter referred to as "the company"), which relationship commenced in or about the year 1994. The company was in the business of tea export and the bank availed and extended to the company overdraft, advances, accommodations and related facilities to assist the company in the running of its business. The arrangement was such that the tea buyer would open letters of credit with the bank so that on payment being made the bank would recover its finance and leave the surplus to the company.

2. The dispute at hand arose over two letters of offer dated 7th May 1997 and 25th August 1998 the bank sought to have the facilities secured by not only a debenture over the company assets but also legal charge over property Known as Plot No. 1191, section 1, mainland North, registered in the name of the 1st plaintiff. Before the conditions contained in the letter were to be met, the bank allowed the company to continue enjoying an overdrawn position in the accounts. The bank again offered unsecured overdraft facilities to the company by way of a third letter of offer then later requested the company to offer additional securities which the company argues was in order for the company to release the funds contained in the third letter of offer to the company.

3. The contention by the Plaintiffs and the company is that one, they were lured to provide additional securities not contained in the letter of offer and yet no facilities were disbursed to the company after availing the securities. Two, they argue that the debenture and charge and a guarantee were executed after the disbursement of the facilities and as such no facilities were released in relation to the debenture, charge and guarantee making the facilities disbursed earlier on past consideration.

4. The Defendant on the other hand contends that the facilities and the securities arose from the same transaction and it matters not what action took place first. They claim that the company is rightfully indebted to them until it clears its outstanding debts.

Pleadings

5. By a consent letter dated 14.3.2017, parties agreed to have the pleadings amended and additional witness statements and documents filed. Pursuant to that consent the plaintiff filed an amended dated 6.6.2017 with a witness statement of the 1st defendant of even date as well as bundle of documents dated 20.5.2013. Later, after the defence was amended and a counterclaim introduced, the plaintiff filed a Reply to defence and defence to counter claim. For the defendant/counterclaimant, an amended defence and counterclaim dated 18.1.2008 as well as a Reply to 1st defendants to amended defence and counterclaim dated 20.3.2008. The bank also filed four bundles of documents, statement of agreed issues and a witness statement dated 18.10.2017. For the company, as 1st Defendant to the counter claim, introduced by the counterclaim, a defence to the Amended defence and counterclaim dated 13.2.2018, witness statement dated 16.9.2016 and a bundle of documents dated 18.12.2013 were filed.

The Amended Plaint

6. By an amended plaint dated 6th June, 2017, the 1st Plaintiff in his capacity as the managing director of the company, pleads that he has been a customer of the Defendant since the year 1994. During the subsistence of their bank-customer relationship, the Defendant availed and extended to the company trading facilities, advances and accommodation which were initially unsecured.

7. By way of a letter dated 7/5/1997, the Defendant made an offer to the company to avail to the company two facilities namely USD 300,000 and Kshs. 5,000,000/-. By a further letter of offer dated 25/8/1998, the Defendant offered to avail to the company other facilities which were: - a revolving overdraft facility of USD 430,000 to reduce to USD 300,000 by 31st October 1998, Overdraft facility of USD 167,000 to expire on 31st October, 1998, a short loan of USD 700,000 repayable over 10 months and a revolving local currency overdraft of Kshs. 5,000,000/-. The said facilities were to be secured by a USD 600,000 debenture over assets of the company and a USD300,000 legal charge over property known as Plot No. 1191 section 1 Mainland North Mombasa, registered in the name of the 1st Plaintiff, which charge was executed by the 1st Plaintiff on 25/8/1998 on the representation to the 1st plaintiff that the facilities would be released to the company if he offered additional security and this prompted the 1st Plaintiff to approach the 2nd and 3rd Plaintiff who also offered their properties as security. The additional properties

offered were i) LR No.1/1148 Flat No. 60, Sumo apartments in Kilimani Nairobi; ii) LR No.330/797 Flat No. 806, Dhanjay apartments in Lavington Nairobi; iii) LR No.330/797 Flat No. 607, Dhanjay apartments in Lavington Nairobi; iv) LR No.330/797 Flat No. 306, Dhanjay apartments in Lavington Nairobi and; v) one half acre plot in Shanzu, Mombasa North coast.

8. Despite offering the above listed securities, the 1st Plaintiff avers and pleads that the Defendant failed to disburse the facilities contained in their letter of offer dated 25/8/1998 and instead used the securities to secure previously unsecured advances to the company. The Plaintiffs allege that the Defendant now purports to exercise a non-existent power of sale over Plot No. 1191 section 1 mainland north Mombasa for recovery of unsecured sums owed by the company to them.

9. The Plaintiffs thus pray for the following Orders: -

> " a) A permanent injunction restraining the Defendant from disposing of in any manner the 1st Plaintiff's property known as Plot No. 1191 section 1 Mainland North Mombasa.
>
> b) A declaration that the charge in favour of the Defendant over plot No. 1191 section 1 Mainland North Mombasa is void and unenforceable for lack of consideration by the Defendant.
>
> c) Delivery of the said legal charge for cancellation.
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> d) Rectification of the register of title in respect of plot no. 1191 section 1 Mainland North Mombasa by deletion therefrom of the entry relating to the said legal charge.
>
> e) An order to the Defendant directing it to: -
>
> -Return to the second Defendant documents of title in respect to LR No. 1/1148 Flat No. 60 Sumo apartments
>
> -Return to the Third Defendant documents of title in respect of LR No. 330/797 Flat No. 806 Dhanjay apartments in Nairobi and LR No. 330/797 Flat No. 607 Dhanjay apartments in Nairobi
>
> -Return to the 1st Plaintiff documents of title in respect of LR No. 330/797 Flat No. 306 Dhanjay apartments in Nairobi and titles in respect of one half acre plot in Shanzu Mombasa
>
> a. Costs of the suit
>
> b. Further or other relief as may be deemed just to grant. "

Amended Defence and Counter Claim

10. By an Amended Defence and Counter-claim dated 20th December, 2007, the Defendant refutes the Plaintiffs' claim and in response thereto avers that by a letter of offer dated 26/2/1996, the 1st Plaintiff acting on behalf of the company requested for a facility of USD 100,000 being a revolving overdraft facility available for one year ending 31/1/1997 from the Defendant. By a letter of offer dated 7/5/1997, the Defendant extended two facilities to the company; a US dollar working capital facility for a maximum of USD 300,000 and a Kenya shilling working capital facility for a maximum amount of Kshs. 5,000,000/-. These facilities were secured by an all asset debenture and a first charges over the property known as CR 10138 LR No. 1191/1 MN Mombasa.

11. By another letter of offer dated 25/8/1998, the Defendant extended another four facilities to the company namely; a revolving overdraft facility in the sum of USD 453,000 to reduce to USD 300,000 by 31/10/1998; an overdraft in the sum of USD 167,000 to expire on 31/10/1998; a short term loan repayable over 10 months in the sum of USD 700,000 and a revolving local currency overdraft in the sum of Kshs. 5,000,000/-. These facilities were to be secured by the securities already held by the Defendant that is: - a USD 600,000 all asset debenture over the assets of the company and a USD 300,000 legal charge on the 1st Plaintiff's residential property.

12. The Defendant avers that due to non-observance of the terms of repayment and the increasing indebtedness of the company, the Defendant indicated to the 1st Plaintiff that it needed additional securities to which the 1st Plaintiff obliged and offered titles to the following properties: - i) LR No.1/1148 Flat No. 60, Sumo apartments in Kilimani Nairobi; ii) LR No.330/797 Flat No. 806, Dhanjay apartments in Lavington Nairobi; iii) LR No.330/797 Flat No. 607, Dhanjay apartments in Lavington Nairobi; iv) LR No.330/797 Flat No. 306, Dhanjay apartments in Lavington Nairobi and; v) Cr No. 19934 over LR No. MN/1/6029 registered in the name of the 1st Plaintiff.

13. In the counter-claim by the Defendant, it is contended that the Plaintiffs and the company owes it jointly and severally a sum of Kshs. 43,410,785.00 and USD 1,352,973.00 together with interest of 21.25% p.a. and 3.12% p.a. respectively from 21/8/2004 being sums advanced to the 1st Defendant.

14. The Defendant further asserts that the liabilities of the company were guaranteed by the 2nd Plaintiff vide an agreement dated 26/8/1998 and by the 1st Plaintiff vide an agreement dated 26/8/1998 and thus makes prayers that judgment be entered for it against the defendants to the counter-claim, jointly and severally for: -

    a. Kshs. 43,410,785.00

    b. USD 1,352,973.00

    c. Interest on (a) and (b) at 21.25% and 3.12% p.a respectively form 31st August 2004 till payment in full.

    d. A declaration that the charge created over plot 1191 section 1 Mainland North Mombasa in favour of the Plaintiff in the counter claim is valid and duly enforceable in law.

    e. A declaration that the Plaintiff in the counter claim holds equitable charges/ mortgages over the following properties: -

        i. LR No. 330/797 Flat No. 306-Dhanjay Apartment owned by the 3rd Defendant to the counter claim.

        ii. LR No. 330/797 Flat No. 806 Dhanjay Apartment registered in the name of the 4th Defendant to the counter claim.

        iii. LR No. 330/797 Flat No. 607 Dhanjay Apartment registered in the name of the 4th Defendant to the counter claim.

        iv. LR No. 1/1148 Flat No. 60 Sumo Apartments registered in the name of the 2nd Defendant to the counter claim.

        v. CR No. 19934 over LR No. MN/1/6029 registered in the name of the 3rd Defendant to the Counter claim

f. Costs of this suit.

g. Further or other relied that the court may deem just to grant."

The Company's Defence to The Amended Defence and Counterclaim by The Defendant

15. By way of a defence dated 13th February, 2008 and in response to the Defendant's defence and counter-claim, the company admit having accepted the offer for the overdraft facility in the sum of USD 453,000 to reduce to USD 300,000 by 31/10/1998; an overdraft in the sum of USD 167,000 to expire on 31/10/1998; a short term loan repayable over 10 months in the sum of USD 700,000 and a revolving local currency overdraft in the sum of Kshs. 5,000,000/- were never availed to the company as agreed and that if the same were availed, they were not advanced against the following securities : - i) LR No.1/1148 Flat No. 60, Sumo apartments in Kilimani Nairobi; ii) LR No.330/797 Flat No. 806, Dhanjay apartments in Lavington Nairobi; iii) LR No.330/797 Flat No. 607, Dhanjay apartments in Lavington Nairobi; iv) LR No.330/797 Flat No. 306, Dhanjay apartments in Lavington Nairobi and; v) Cr No. 19934 over LR No. MN/1/6029, registered in the name of the 1st Plaintiff.

16. The company asserts that the counterclaim discloses no cause of action in failing to indicate the time the alleged breach of agreement of guarantee occurred and avers that if the same occurred, it occurred within a period of more than 6 years before institution of this suit and is thus time barred. The 1st Defendant thus prays that Amended Defence be dismissed with costs.

17. When served with the Reply to defence and defence to counter-claim, the bank filed a Reply to the 1st Defendants Defence to Counter-Claim dated20.3.2008 and joined issues with every allegation therein save for what constitutes admissions to the counterclaim and reiterated all the averments in the defence and counter-claim. It was then pleaded that the 1st and 2nd guarantees were continuing securities for the whole amount due and owing at the time and in the future together with interests and bank charges, hence the six-year limitation period had not elapsed by the time the Amended Defence and Counterclaim was filed.

18. It was then clarified that the facility offered by letter of offer dated 26.2.1996 was to last one year and terminate of 31.1.1997; that offered by letter of 7.5.1997 was for working capital yet that of 25.8.1998 was offering and availing a revolving overdraft facility which were fixed termed. The bank asserts that the company utilized each of the said facilities to the tune claimed in the counterclaim and that the sums continue to attract interests at 21.25% and 3.12% pa respectively for Kshs and USDs. The bank then contends that it not only extended the facilities as agreed but also did give valuable consideration in forbearing to sue the chargors and the company who were constantly to meet obligations under the terms of the facilities.

19. On the demand and receipt of the additional properties by the 4th defendant, the bank asserts that as a prudent banker, it reviewed the facilities extended to the company, noted the non-observance of the terms of payment and indicated to the 1st chargor/3rd defendant to the counterclaim the need for additional securities which request the 1st chargor agreed to by willingly and voluntarily availing the four titles but the securities over the same were never perfected and registered owing to numerous obstacles placed on the banks way by the chargors. As a consequence, the bank contends that it holds equitable charges/mortgages over those title created by way of deposit of the same titles. Without prejudice to the foregoing, the bank asserts that it is usual for company sharing common directorships to guarantee each other and that the 1st plaintiff did exactly that only to come up with legless arguments proffered in this suit.

20. On the binding nature of the letters of offer, it was the position of the bank that each and every one of them was read, duly accepted and executed by the 1st plaintiff on behalf of the company and that even the borrowing was duly authorised by the Board of directors of the company hence there could not have been a misapprehension or misrepresentation whatsoever. On those pleadings, the bank contends that it is entitled to the remedies sought in the counterclaim as being well founded in both facts and the law.

Testimonies

21. The Plaintiffs called one witness, the 1st plaintiff, whose evidence was equally adopted by the company, with the Defence equally calling one witness to testify on its behalf.

22. For the plaintiffs, PW1, Samwel Onyango Okello, testified that he is a farmer but was formerly a tea trader and a director of the company as well as the 2nd and the 3rd chargors. He confirmed that the company and the bank had a banking relationship since the year 1994 adding that the company was exporting tea to Egypt at the time and thus maintained a dollar and local currency account with the Defendant since tea was brought in Kenya in dollars while local expenses were paid in Kenya Shillings. By way of a letter dated 6/2/1996 the Defendant offered an unsecured facility of USD 100,000/-to the company. The Defendant again offered the company a facility of USD 300,000 and Kshs. 5,000,000/- with the company offering property known as CR 10138, LR 1191/1/MN/MSA as security. The security was provided and perfected but the facility was never availed. The Defendant again offered the company a facility of USD 453,000 to reduce to USD 300,000 by August 1998, a facility of USD 700,000 and a facility of Kshs. 5,000,000/- though these facilities were never availed to the company. Due to intense pressure from the trade organization on account of default to pay, the 1st Plaintiff delivered titles to six properties at the request of the bank to enable it disburse the amounts but to no avail. The titles were however not charged after the bank failed to avail the facilities to the company. He states that the Defendant deceived the chargor to offer the securities with sole intention to wind up the company while underscoring the fact that a communication within the company was explicit that there was no willingness to disburse the sums.

23. On cross examination by Mr. Hayanga for the company, he reiterated that despite offering securities, no facilities were disbursed to the company thus occasioning the company loss of business and reputation. According to him the transactions were such that tea buyer would open letters of credit with the bank in favour of the company and after the tea is exported the company would get its dues net of the sums due to the tea seller. He admitted that offer letter were issued but none of the facilities was availed by way of the sums being disbursed. He added that no resolutions were passed for the facilities on account of failure to disburse and that he had no authority from the company to accept the letters of offer then concluded that the defendant insists on being paid for so sums not disbursed.

24. On cross examination by Mr. Regeru for the bank, the witness told the court that, he was, prior to founding the company in 1994, been in the tea trade industry for a period of 16 years in managerial positions and was well acquainted with bank dealings. He summarised his complaint to be that after the offers were accepted, he expected a letter to say that the facility had been availed but he did not. He said that the 2nd and 3rd chargors were also trading companies with the 2nd being involved in real estate while the third was in farming, transport and owned properties for rent. He said the company was in the exclusive business of tea trade and currently has no assets. For the letters of offer, he said that no request in writing was made by the company to the bank but oral discussions took place. He then went into details how tea trade was conducted by auction and the bank coming to settle the bid prices and that the bank statements exhibited showed the inflows and outflows thus the need for a revolving overdraft. On being shown the bank statements, he admitted that both were in debits as at the dates

the letters of offer were signed and stood at USD 938,297.55 as at 17.12.1998 while the Kshs account stood at 11,117,990.40.

25. When showed the legal charge, he agreed that he was the chargee by virtue of the fact that the property was his, he signed the document to secure sums due from the company. He added that there were company resolutions permitting the acceptance of the letters of offer but asserted that the four titles were given out of coercion and trickery conveyed through a bank staff called Radier. He however said that the titles were never charged owing to the fact they that were already charged to other banks.

26. On re-examination by Kemboy, he stated that the letters of offer were neither directed to him nor the 2nd and 3rd Plaintiffs. They only offered securities to the Defendant with the understanding that the Defendant would disburse facilities to the company. He then stressed the fact that the scheme to lure him to offer additional securities was well documented in two email exchanged by bank management. As the managing director of the company, the witness said that none of the three letters of offer was addressed to him or the other two chargors and that those letters of offer could not have been intended to secure past but future borrowings. He then relied on bank statement to show that interest was levied on both dollar and Kenya Shillings accounts and therefore denied the allegations that the plaintiff was not paying interests. He added that the chargors were kept in giving additional securities on the promise of disbursement which never materialized yet the bank's goal was to trap the company and chargors as disclosed in the email communication at pages 446 -448 of Exh D1. As a consequence of failure to disburse, the operations of the company were stalled, the company lost the chance to sell of the facility to another financier. On the accusation that he had obtained the email communication improperly, the witness told the court that the same documents had been exhibited by the bank as well as evidence of the motive of the bank to take the securities without availing the facility.

27. After the plaintiffs'/chargors 'case was closed, Mr Hayanga for the company announced that the company's case had also come to a close. This was informed by the fact that its case appeared to support that of the chargors and the PW1 had been listed as its only witness. The court takes it that the evidence of PW1 will serve for all the defendants to the counter claim.

28. For the defence, DW1, Linda Muthoni Muturi, testified that she was the senior credit officer of the Defendant having worked with them for 21 years. She adopted her witness statement dated 17.10.2017 as evidence in chief then highlighted the same by an explanation that a revolving overdraft facility is the kind that a customer used a limit of overdrawn position, pays and overdraws again subject to the agreed limit and period of the facility.

29. She went on to highlight that on 26/2/1996, the Defendant offered the company a revolving overdraft in the sum of USD 100,000 which offer was accepted by the customer and followed by an agreement. On 28/2/2016, the customer's account was debited a sum of USD 391,253.18. On the same date, a sum of Kshs. 83,572.70 was withdrawn from the customer's Kenya shilling account.

30. The first letter of offer was accepted by the customer who then withdrew a sum of USD 301,544.98 and Kshs. 1,351,841.40. The 2nd letter of offer, dated 7/5/1997 was accepted by the customer (the company) on 13/5/1997. As at 7/5/1997, the company's USD account was overdrawn to USD 160,683.13 while the Kenya shilling account was withdrawn to Kshs. 5,976,531.35. As at the date when the offer was accepted, the company's USD account was overdrawn in the sum of USD 190,948.98 and the Kenya shilling account was overdrawn to Kshs. 7,551,562.35. She added that the interest for the overdraft facilities remained payable monthly in arrears.

31. On the security in respect of property known as CR 10138 LR No. 1191/1 MN MSA offered by the 1st Plaintiff in favour of the company, she stated that the Security respected the overdraft facility of

USD 300,000 and by way of a letter to the bank the 1st Plaintiff agreed to secure the borrowings of the company.

32. As at 24/11/1998, the Kenya Shillings account was overdrawn to a tune of Kshs. 11,104,405.85 while the USD account was overdrawn a sum of USD 668,668.24.

33. The 3rd letter of offer dated 25/8/1998 was for a revolving overdraft facility of 453,000/- reduced to 300,000 by 31/10/1998 and a second facility of USD 167,000 to finance duplicated recoverable for Egypt.

34. As at 31/10/1998, the USD account balance was USD 688,383.03 while the Kenya shilling account balance was Kshs. 10,726,009.10.

35. The securities offered by the company were a charge, a guarantee and a debenture and these were not sufficient to cover the bank. The bank therefore requested for additional security from the company and the 1st Plaintiff offered five documents of title.

36. On cross-examination by Mr. Kemboy, she stated that she did not deal with the matter at hand and that the basis of her knowledge was her experience in credit administration and the evidence before her. She stated that on 28/2/1996 when the Defendant availed to the company a facility of USD 100,000 the company owed the Defendant more than USD 390,000 and if were up to her, she would approve the facility if the company demonstrated the ability to pay. She detailed that there was no communication from the bank complaining to the company of non-compliance and though on the surface of the company's bank statements it did not qualify for additional facilities, the Defendant offered the company additional facilities nonetheless. She was however unequivocal that the last payment into the accounts was 1998 and that the last time advances were extended was 1998 adding that the counterclaim was lodged in January, 2008. She also confirmed that the documents given but not charged were encumbered in favour of other banks but added a disclaimer that her work involves not securitization of documents and would not comments on the mechanics involved.

37. When cross-examined by Mr. Hayanga, the witness told the court that different banks employ different practices for disbursements but generally disbursement do occur after conditions are fulfilled and that a bank would be concerned if proceeds are not employed for intended purposes adding that here there was no such diversion recorded by the bank. She added that a debit balance is evidence of money owed, but denied that there was an intent to persuade Okelo, 1st plaintiff, to give all he had as well as the allegations that there was never disbursement of the facilities. Any negligence on the part of the bank was equally refuted as much as the allegations that the chargors and the company were pressurized into doing what they got into, offering additional securities.

38. On re-examination by Mr. Regeru, she affirmed that negative balances would not necessarily disqualify a customer from getting credit and that the Defendant had other ways to convey complaints other than letters including the monthly statements. She added that following non-compliance, there were letters to the bank relating to some recoverable forming part of the assets secured by the debenture expected and that the resolutions regarded past as well as future advances. Further the witness said that the three letters of offer were essentially towards restructure the same purpose of the debenture and the charge. In conclusion, the witness said that a bank could decide to avail a facility to the client before the securities are perfected.

39. There was a Statement of Issues dated 14/10/2011,filed by the bank setting out thirteen issues for determination by the court. Those issues were approved and adopted by the chargors and the company when parties appeared in court on the 15.11.2016 save that the company filed a list of two

supplementary issues dated 22.2.2017. The plaintiff equally filed additional four issues in a statement of issues thus making the aggregate issues to be: -

a. What was the nature of the transactions entered into between the Plaintiffs and the Defendant and what were the terms in respect thereof?

b. Was there an offer and acceptance of the facilities extended by the 1st Defendant to the Plaintiffs?

c. Is consideration essential to establish the relationship between the Plaintiffs and the Defendant?

d. If the answer to (c) above be in the affirmative, whether there was due consideration?

e. Was there any misrepresentation on the part of the Defendant that affected the plaintiff decision making?

f. Did the Plaintiffs freely handover the following titles to the Defendant to secure the facilities in issue?

   i. LR No. 330/797 Flat No. 306-Dhanjay Apartments

   ii. LR No. 330/797 Flat No. 806-Dhanjay Apartments

   iii. LR No. 330/797 Flat No. 607-Dhanjay Apartments

   iv. LR No. 1/1148 Flat No. 60-Sumo Apartments

   v. CR No. 19934 over MN/1/6029

g. Did Fin Tea Limited default in servicing of the overdraft or such other facilities granted to it by the Defendant?

h. Did the statutory power of sale with regard to the charge in respect of Plot 1191 section 1 mainland north Mombasa accrue to the Defendant?

i. Is the sum of Kshs 43,410,785.00 and USD 1,352,973.00 plus 21.25% and 3.12 interest respectively from 31/8/2004 due and owing to the Defendant from the Plaintiffs?

j. Is the Plaintiff entitled to the prayers sought?

k. Is the Defendant entitled to the prayers sought in the counter claim?

l. Which party should bear the costs of the suit?

m. Which party should bear the costs of the counterclaim?

n. Whether Fin Tea was a debtor to the Bank in any way?

o. Whether guarantee between Fin Tea and Citi Bank was enforceable?

p. Whether the counterclaim was statute barred when filed?

40. The parties have filed their respective submissions largely compressing that plethora of issues into; four issues for the chargors, six issues for the bank while the company did not fashion the submissions filed with any specific address to any identifiable set of issues.

Plaintiffs Written Submissions

41. The Plaintiffs' submissions identify four issues for determination namely:

    a. What was the nature of the transactions entered between the Plaintiffs, the company and the Defendant?

    b. Whether there was misrepresentation on the part of the Defendant bank in obtaining the Plaintiffs' securities?

    c. Whether the counter-claim is statutorily barred?

    d. Who is entitled to costs

42. On the nature of the transactions between the Plaintiffs, the company and the Defendant, it is the submission of the Plaintiffs that the company and the Defendant enjoyed a banking relationship where the Defendant offered the company overdraft facilities that were to be repaid by the income received by the company from their business which was tea export. Under that arrangement and by a letter dated 26th February, 1996, the Defendant offered the company an overdraft facility of USD 100,000 available for one year up to 31st January, 1997. Barely one month into the life of the facility, as at 28/2/1996, the overdrawn position by the company stood at USD 391,489.40 for the USD account and Kshs. 83,572/- for the Kshs account. At the expiry of the facility on 31/1/2007, the overdrawn balances stood at USD 459,967.83 for the USD account and Kshs. 200,790.30 for the KSH account. It is noted by the court that the facility did not provide for an overdraft facility in Kenyan shillings.

43. By way of another letter of offer dated 7/5/1997, the Defendant offered the company two facilities namely; USD 300,000 and Kshs. 5,000,000. The letter of offer demanded that the company offers security in the form of an all asset debenture and a charge on property known as CR 10138 LR No. 1191/1 MB MSA.

44. As at 7/5/1997, when the letter of offer was issued, it would appear, the facility was already in use because the debit balances of the company's accounts stood at USD 160,683 for the USD account and Kshs. 5,976,531.35 for the Kshs account. The securities in line with the letter of offer dated 7/5/1997 were perfected by execution many months later as follows; the charge over CR 10138 LR No. 1191/1 ML MSA was executed on 20/11/1998, 18 months after the letter of offer, while the debenture was executed on 8/12/1998, 19 months after the said letter of offer. A board resolution authorizing the utilization of the said facilities was issued on 26/8/1998, 15 months after the letter of offer.

45. As at 20/11/1998 when the charge was executed, the accounts had overdrawn balances of USD 668,888.24 for the USD account and Kshs. 11,104,405,85.35 for the KSH account.

46. The Plaintiffs further submit that in relation to the guarantee agreements, no such security was required in the letter of offer. It is the Plaintiffs submission that money cannot be paid before a charge is executed and registered. Reliance was placed on the case of *Watson Mogere & 2 others v East African Building Society* (1992) eKLR. They contend that for a contract to have ensued from the said letters of offer, the letters of offer had to be accepted and there be consideration yet it was the evidence of DW1 that there was no consideration furnished by the bank. They referred the court to the case of *William Muthee Muthami v Bank of Baroda* (2014) eKLR and *RTS Flexible Systems Ltd v Molkerei Allois Muller GmbH* (2010) UKSC 14 for the proposition that for a letter of offer to constitute a contract, the same must be accepted and the expected consideration furnished. It was added that what constitutes an agreement is not the subjective individual minds, but what was communicated between them by words or conduct and if such leads to an objective conclusion that the parties intended to be bound into a

contract. For the chargors, therefore. The failure to appropriate the facilities automatically voided the securities, being the legal charge and the debenture executed between them.

47. On the question whether there was misrepresentation on the part of the Defendant, the chargors refer the court to an email conversation dated 30/11/1998 in which the Defendant's employees and managers discuss ways in which they could entice the 1st Plaintiff to provide further securities purely to enhance the banks position without any disbursements being made and urges the court to find that there was evident scheme to lure the plaintiff into releasing securities with no intention to release any money to the company.

48. It was then argued that the conduct of the bank was thus clearly unconscionable in the manner it obtained additional securities, not alluded to in the letters of offer, from the chargors and decisions in *Kenya Commercial Finance Company Ltd Vs Ngeny* (2002)eKLR and *Margaret Njeri Vs Bank Of Baroda* (20140eLKR cited for the proposition that courts never hesitate to decline invitation to enforce contracts that are unconscionable, unfair and oppressive due to procedural abuse during the formation of the contract or due to terms that are unreasonably skewed and favourable to one party while precluding meaningful choice to the other.

49. On limitation and statute time bar of the Defendant's counter claim, the Plaintiffs submit that the cause of action contained in the counter-claim is based on a contract and that section 4 of the *Limitation of Actions Act* prohibits suits filed after the end of 6 years from the date on which the cause of action accrued, hence by 2008 when the counterclaim was lodges, it was lodged out of time and was time barred. To compute time pegged on when the default occurred, the chargors relied on the evidence in the witness statement by DW 1 that there was never meeting of obligations by the company beginning 1998. In maintaining that position the chargors relied on the provisions of section 4 of the Act to command that causes founded on contract be lodged not later than six years.

50. After being served with the banks submissions and that by the company and in the course of highlighting his submissions, the chargors' advocated cited a decision of the court of appeal in *Basil Criticos vs National Bank of Kenya Ltd & Another* (2022) 541 (KLR), (then unreported), to bolster is arguments on unconscionable and unenforceable contracts.

51. Lastly, on costs, the Plaintiffs submit that costs must be left to follow the event.

Submissions by the bank (defendant in the main suit)

52. The Defendant has filed three sets of submissions he calls main submissions, rejoinder to the plaintiff submissions and further rejoinder to submissions. It has, with admirable industry and alacrity, set out in details the order of pleadings and the evidence led while paying great attention to the documents produced and their purport. The script to the bank is that there was a customer-bank relationship between the company and the bank by which the company operated three named accounts; two accounts were denominated in USD while one was in Kenya shillings. Through the said accounts the bank availed to the company an accommodation named revolving overdraft facility by which the company was permitted to overdraw its accounts with the bank expecting that that the same would be made good by deposits or transfers from proceeds of sale of tea. In that scheme of things, any credit balance would be money owed to the company while any debit balance would signify sums owed to the bank by the company. It is thus the sums owed as at 31.8.2004 which has been claimed in the counter claim.

53. To the bank, the relation between the chargors and the bank was never governed by the letters of credit which the bank clarifies were issuable by the various banks for the various overseas tea purchasers of the company's tea and as such the Defendant could not have possibly opened letters of credit in favour of

the company. In any event, it was argued, he who alleges must prove and in this case the Plaintiffs failed to produce the letters of credit. That the facilities offered by the bank to the company were revolving overdraft facilities was reiterated.

54. The bank has compressed its over thirteen issues earlier filed into five issues for determination by the court. In the bank's view the suit is determinable by the court answering the following questions: -

    a. Whether there was consideration arising from the three letters of offer issued by the Defendant to the company.

    b. Whether there was misrepresentation on the part of the Defendant in procuring the securities emanating from the three letters of offer.

    c. Whether the Defendant's counterclaim is time barred.

    d. Whether the Plaintiffs are entitled to the reliefs sought in the amended plaint.

    e. Whether the Defendant is entitled to the reliefs sought in the counterclaim.

55. On whether the bank gave consideration for acceptance of the three letters of offer issued by the company, the bank addresses the three letters of offer separately and asserts in the main that the letters of offer were essentially restructuring the overdrawn positions, ratifying the facilities already in use and that there was indeed due consideration.

56. On the letter of offer dated 26/2/1996, the bank submits that the increasing debit balances in the company's USD and KSHS account is evidence that the company received consideration by quoting the *Casebook On Contract*, 9th Edition at Page 129, and contends that consideration includes benefits accruing to one party.

57. For the other two letters of offer, it is submitted that the securities, namely an all asset debenture inclusive of charges on the property described as CR 10138 LR No. 1191/1 MN MSA to secure the facilities contained in the letter. There was equally a request for a board resolution by the company with the closing part of the second letter of offer stipulating that the terms and conditions of the facilities were never to be limited to the ones contained in the letter of offer.

58. The bank asserts that the company through its Managing Director consented to the charge and acknowledged receipt of the facilities. The charged property, belonging to the 1st Plaintiff, was perfected at his request to the Defendant not to call for the immediate repayment of the then existing indebtedness of the company. The bank then argues that by dint of the explicit admissions of the company of its existing indebtedness, consideration had been advanced to the company. The increasing debit balances of the company's accounts was a further proof of consideration by a benefit flowing from the bank to the company.

59. On the proposition and contention by the Plaintiffs that the letters of offer looked to the future and not the past, the bank cited to court, *The Law of Contract*, 2nd Edition page 51, and contends that where the giving and making of the promises form one transaction, then it matters not the chronology in which the events take place.

60. The bank then cites the case of *Security Products Limited v Gabriel Teo Kian Chong & another* (2020) eKLR where it was held that where a contract makes reference to other documents and transactions which contains all the terms in writing not contained in the first document, the two documents can be read together to constitute a sufficient memorandum. In that regard, it submits that the second letter of offer, the director's resolution, the charge and the debenture constitute one document. It thus views the position by the Plaintiffs that money could not be paid before the charge was executed and registered as

untenable in law. It then distinguishes Watson Mogere's case (supra), cited by the Plaintiffs, for having been about the question of charging interest before disbursement of the principal sum and does not apply in the instant suit.

61. On the third letter of offer, it was submitted that the increasing debit balances confirms that the facility was availed consideration to the company but that owing to the extent of exposure, it was necessary for the bank to procure additional securities and this prompted the execution of Guarantees on 26/8/1998. On the averment by the Plaintiffs that the letters of offer did not provide for the execution of guarantee as security, the Defendant submits that the contract of guarantee is separate and distinct from the letter of offer and cited the case of *Rajnikantkhetshi Shah v Habib Bank A.G. Zurich* (2016) eKLR as an authority in that regard.

62. The bank then contends that its financial exposure persisted and necessitated the need for additional securities as the Plaintiffs cash flows were inadequate and that upon request, the 1st Plaintiff freely availed additional title documents.

63. On the third issue whether there was misrepresentation by the Defendant in procuring securities emanating from the three letters of offer, it is the submission of the Defendant that there was no misrepresentation on its part since it was looking for ways to secure its interest and mitigate potential loss and damage on account of the company's increasing indebtedness. It argues that prudence and sound financial management demanded that it explore every possible avenue to negotiate with the Plaintiffs. The offer to negotiate was a demonstration of lack of coercion, undue influence, scheme or deception on its part. If anything, the Defendant added, it was the company that misrepresented to it that it would have a capital injection and that the securities they offered were unencumbered which turned out not to be the case.

64. On the counterclaim being time barred, the submissions were offered that the cause of action persists until the Defendant's equity of redemption is extinguished in accordance with the law as settled by both High Court and the Court of Appeal in *Rajnikantkhetshi Shah v Habib Bank A.G. Zurich* [2016] eKLR and (2018) eKLR.

65. The bank therefore cites section 35 of the *Limitation of Actions Act* to deem time for the counterclaim to have commenced on 16/5/2005, the date when the plaint was filed then cites the case of *Beatrice Mumbi Wamahiu v Mobil Oil Kenya Ltd* (2011) eKLR in support.

66. On whether the Plaintiffs are entitled to the reliefs sought in the amended plaint, it is the submission of the bank that the Plaintiffs have failed to prove that they are entitled to any of the reliefs they seek adding that the prayer that the charge herein be discharged before the payment of debt has no legal basis and cannot be granted.

67. On its own remedies and reliefs sought in the counter claim, the bank asserts that it has proved the amounts it claims and that the company has admitted to being indebted to it hence the charge created over CR 10138 LR No. 1191/1 MN MSA is valid and duly enforceable in law as the consideration was adequately availed. It is therefore the plea by the bank that costs be ordered to follow the event as the law dictate.

68. In the rejoinder to the plaintiff's submissions, the bank cites five decisions in rebuttal of both submissions by the chargors and the company, the object comes out clearly to be the debunking of the company's position that the claim in the counterclaim was unclear and what constitutes a revolving overdraft facility. On whether any consideration was passed pursuant to the acceptance of the letters of offer, the bank underscores the continued growth of the overdrawn position as the evidence of disbursement and that even the forbearance by the bank is itself sufficient consideration.

69. Regarding the submissions by the chargors, the same were viewed as untenable on the face of the evidence on record with stress that the decision in Habib Bank's and that of Beatrice Mumbi's cases (supra) remain the law having not been disturbed by higher courts. In conclusion, party autonomy and freedom to contract was stressed by the citation of the decision in *Vijay Morjaria vs Nansingh M Dardar* (2000) eKLR where the holding was that it is inimical for the courts to limit freedom of contract on the grounds of unconscionability.

70. The third set of submissions was targeted at distinguishing the decision in Criticos's case (supra) as not aligned to the fact and on the law that each case is peculiar on its own facts and that the ratio decidendi in that decision was on limit of indebtedness in the guarantee and application of usurious interest rates besides the fact that oppression and bad faith were exhibited by the bank declining an offer by the debtor to sell the property only for the bank to sell it a lower price. Additional submissions were that a case is only an authority for what it actually decides and not logically flows from it concluding that precedent should only be followed so far as it marks the path of justice. The decisions in *Republic vs Advocates Disciplinay Tribunal, ex parte Apolo Mboya* (2019) eKLR and *Ronyand Enterprises vs Kenya commercial Bank Ltd* (2019) eKLR were cited on the use and applicability of stare decisis.

Submissions by The Company

71. The company's submissions, I agree with the bank submissions, are not structured along any issues, in fact they don't even accord to the issued filed by the company, lack elegance and largely difficult to follow easily. In them, it is submitted that the letter of offer for USD 300,000 and Kshs. 5,000,000/- did not create any debt contract because it never stated terms whether securities would come first before payment of the facility or whether facilities came before and this in law is past consideration. They question why the bank continued to offer facilities to the 1st Defendant if at all the Defendant was defaulting and unable to pay the facilities.

72. The company further submits that the bank waived its rights by acting too late by a counterclaim that is nothing but an afterthought and emphasised that through various letters dated 1/12/1998 and another dated 17/5/2000, the company raised complaints to the Defendant for non-payment of promised funds whereas securities had been given.

73. On the propriety of the security, it is contended that the charge was unenforceable for having been made pursuant to Registration of titles Act and Indian Transfer of Property Act which were repealed by the *Registered Land Act* and could not ground a charge. The company relies heavily on decision by foreign jurisdictions to premise its position that on account of lack of consideration or past consideration the securities given are not binding hence the obligations are not payable.

74. It, the company, also filed further written submissions whose thrust was that the bank had acted coercively and therefore the agreements with the company had been voided. For that position, the Criticos' case was cited.

Issues, Analysis and Determination

75. Even though the pleadings here are hefty and the documents files are voluminous, the dispute looks narrow when regard is given to the undisputed facts that a relationship existed between the company and the bank pursuant to which certain arrangements were put in place as consequence of which the company's accounts with the bank were in overdrawn positions for the period leading to the institution of the case. it is also common ground that three letters of offer were issued and accepted by the company; that a legal charge over the first plaintiff's property together with an all assets debenture of the company's assets were executed and duly registered in favour of the bank and that at the request

of the bank the 1st plaintiff availed to the bank titles belonging to the 2nd and 3rd chargors, which were then encumbered, as securities to other lenders, but the same were never charged in favour of the bank.

76. Based on that extent of concurrence, and despite the long list of issues initially proffered by the bank, the issues that stand out as seeking determination are: -

a. What was the nature of the transactions entered between the chargors, the company and the bank?

b. Whether there was consideration arising from the three letters of offer issued by the bank to the company?

c. Whether there was misrepresentation on the part of the bank in procuring the securities emanating from the three letters of offer?

d. Whether an equitable/English mortgage was created over those properties known as LR No 330/797 Flat Nos. 306,607 and 806, Dhanjay Apartment, LR NO 1/1148, Flat NO 60, Sumo Apartments and CR No. 19934 over LR No.MN/1/6029?

e. Whether the Defendant's counterclaim is time barred?

f. Whether the chargors, or any of them, are entitled to any of the reliefs sought in the amended plaint?

g. Whether the bank is entitled to the sums claimed or any of the reliefs sought in the counterclaim?

h. What orders are appropriate on costs?

77. While the eight issues may appear distinct, there are the inevitable prospects of some converging and intertwining hence a determination of one may dispose of another or others. For that reason, it may not follow that the same be dealt with seriatim.

i. Is the counter-claim statute barred?

78. Whether or not the counter-claim is statute barred is a threshold issued that goes to jurisdiction and must be the starting point[1]. Even though the relationship between the parties is essentially contractual, the court views same as a special specie of contracts that are not strictly governed by section 4 but section 19 of the *Limitation of Actions Act*. It is thus to this court a claim that even if it were initiated otherwise than as a counterclaim, and in so far as it seeks the recovery of both principal sum and interest would be available to be brought within twelve years. Computation would start from the date of default, which both parties agree was in the year 1998.

What was the he Nature of the Dealings/ Transactions Entered Between the Chargors, The Company and The Bank?

80. As between the bank and the company, there is an admitted relationship of a bank and a customer. That relationship is governed not by a single document but by various requests by the company and at least the three letters of offer duly executed by the company. I have however not seen any copy of

[1] Thuranira Karauri v. Agnes Ndeche[1997] eKLR

79. However, here, the claim is brought as a cross-action and the dictates of section 35 are binding that it is deemed to have been lodged the same day the plaint was lodged. The court thus finds that the counter-claim is not statute barred.

the letter of credit alleged by the 1st chargor and the company hence it is impossible to say what the terms therein could be.

81. What has not been established by evidence recorded is whether there existed any privity between the bank and the 2nd and 3rd chargors prior to the titles registered in the names of the two being given to the bank.

82. The evidence by DW1 and concerning the relationship between the bank and those two defendants was scanty and not so much. In both the witness statement and oral evidence in court, the witness only alluded to the fact that those two entities were sister companies to the company with common directorship and shareholding in that the 1st chargor was a director or shareholder in the three companies. Short of such assertions, it is merely added that when the bank demanded more securities to commensurate its exposure, the 1st chargor, out of free will, availed the five title; two in his name, one in the name of the name of the 2nd chargor and two in the name of the 3rd chargor and that in his capacity as the principal officer of the other two chargors obstructed the perfection of securities over the said titles which remain unperfected.

83. Based on such deposit, which is not disputed, the court finds that there could only have been a relationship of a chargee and chargor by way of an equitable mortgage, as asserted by the bank, but only if the prerequisite of such a mortgage be established.

84. The deposit is said to have been made prior to 2012 and thus before the enactment of the new land law legislations following the *constitution* 2010. The governing law thus remains the *Equitable Mortgages Act*, Cap 291, now repealed. Section 2(2) of the *Act* envisages that other that deposit, there be a clear intention to charge. It is thus important that there be memorandum in writing to show the intention of the parties to create a charge or mortgage.

85. It was therefore the finding of the court of appeal in *Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited)* [2019] eKLR, that the statute demanded that deposit be accompanied by a written memorandum. The court said: -

> " I may add here that, as the name implies an equitable mortgage arises where the formalities to create a legal mortgage may not have been completed but the transaction is nonetheless recognized as a mortgage by equity. Equitable mortgages may, for the reason that they are equitable, lack some legal formalities that must be present in a legal mortgage...
>
> In Kenya the *Equitable Mortgages Act* demands that the deposit of title documents be accompanied by a written memorandum. This is important for the memorandum states the purpose for which the deposit is made."

86. From the record of evidence led including the documents filed, I find that even thought there was deposit of the five documents of title with the bank, there was no accompanying memoranda and there has not been established the meeting of minds to create an equitable mortgage over those properties. The inevitable conclusion from this finding is that no equitable mortgages were ever created by the chargors over the properties.

87. Secondly, the parties agree that the titles when deposited were indeed encumbered to secure other interests of other/another creditors. In such situation no valid equitable mortgage would be created without the concurrence of such prior encumbrancer and before the encumbrance is discharged. The law that recognizes equitable mortgages serves the purpose of protecting the rights thereby created. The Act therefore specifically outlawed the creation of a subsequent equitable mortgage prior to the discharge of an existing one. See sections 3 and 4 of the Act.

88. Flowing from the foregoing findings, the court holds that no equitable mortgages were created over those properties known as LR No 330/797 Flat Nos. 306,607 and 806, Dhanjay Apartments, LR NO 1/1148, Flat NO 60, Sumo Apartments and CR No. 19934 over LR No.MN/1/6029.

89. Without a legal right created and vested in the bank, the bank has no iota of a right to keep same but must forthwith release same to the owners thereof.

90. This determination disposes issues number a, d and partially, f.

Whether there was consideration in relation to the three letters of offer and the legal charge dated 20th November, 1998

91. The three letters of offer are fashioned alike the only difference being the purpose each facility was to serve. There seems to be no much contestation over the first letter of offer and the court agrees that indeed there are evident disbursement made subsequent to the letter being issued and its terms being accepted by the company and the 1st chargor. That disbursements were made to the account of the company, even if by permission to overdraw same, is to court sufficient furnishing of valuable consideration.

92. The contestation is on the letters of offer dated 7.5.1997, hereinafter called the second letter of offer, and that of 25.8.1998, hereinafter called the 3rd letter of offer. For the 2nd letter of offer, the company and the 1st Chargor assert that no consideration ensued while the bank insists that valuable consideration did pass as negotiated and covenanted. In determining this issue the court appreciates that in law, parties are bound by own bargain and that consideration never measured on adequacy but sufficiency. The court has taken its time to peruse the statements of accounts with a view to ascertaining if any financial benefits moved from the bank to the company and is satisfied and convinced that there was indeed such movement by way of cheques being demonstrated to have been cleared through the account commencing on the date of letter of offer, when four cheques were paid and then on the next days when cheques kept coming in and getting paid. To this court availing funds must include being given the liberty and right to overdraw an account held by the bank offering such facilities. That no lump sum was transferred into the account is no justification to assert that the facility was never availed and thus ignore the access given to the company by the bank.

10. Even after the 3rd letter of offer was issued and accepted, the bank continued to clear cheques through the account. There was never an allegation nor evidence that the cheques cleared between the date of the 2nd letter of offer and well after the 3rd letter, were not issued by the company. The court thus finds and holds that the bank did provide valuable consideration to the company on the basis and foot of the three letters of offer. Issue b, is thus resolved in the affirmative.

93. How about the charge? Was its execution and perfection met with valuable consideration? As said before, the relation between the bank and the company is contained in a series of documents and not a single one. The legal charge is such documents and must be read together with the letters of offer envisaging the creation of that charge. It was an express term of the charge, under the recital clause, that it would secured the facilities already advanced to the company by the bank as well as future facilities to be advanced. On the date the charge was executed on the 20.11.1998, the balance outstanding on the Kenya shillings account was 10, 784,405.85 while the USD account stood at a debit balance of 710,968.55. The bank statements show that between the date of issue of the letter of offer and the date the charge was executed there continued active movement of money in and out of the account by transfers, withdrawals and payment of cheques. The court considers every cent leaving the account by way of transfer or settlement of a cheque as money used by the company and thus enjoyment of the facility. That, to the court, is a valuable and sufficient consideration. It is therefore the finding of the

court that there was furnished by the bank due, valuable and sufficient consideration for the letters of offers and the securities founded upon such letters of offer.

Whether there was misrepresentation on the part of the bank in procuring the securities intended by the three letters of offer?

94. A lot was fought over the email dated Monday the 30th November 1998 in which the bank employees discussed the efforts to be employed to enhance the banks security against continuing exposure. While the bank took the view that the document was unprocedurally obtained and hence thus inadmissible, the court rejects that objection on three grounds. The first ground is that the document was filed as part of the banks bundle and produced by consent. It would thus be a pretentious and defeatist to let a party show a document to court then entertains the same party on the objection that the same document was obtained from it illegally or unprocedurally. Secondly, the onus was upon the bank to show that the document was illegally obtained and not just unprocedurally obtained. That however would swim if it was the adversary showing up with the document to the surprise of the bank, not when the document has been voluntarily file by the bank.

95. The more forceful ground is that by law, every relevant evidence is admissible, even if illegally obtained, like when stolen, or obtained in violation of the right or fundamental freedom, and would only be excluded if its admission would render the trial unfair or detrimental to the administration of justice.[2] It is the finding of the court that the email having been introduced by the bank and produced without any objection is not only admissible for being relevant but also on account of duty of every litigant and counsel to help court reach a fair and just decision by full disclosure. In addition, no prejudice has been demonstrated to be capable of visiting the bank by the production and reliance by the court on that document.

96. Having held so and with the additional finding that there was indeed valuable and sufficient consideration flowing from the bank to the company, what is the effect of the document upon the rights and obligations of the parties under the charge?

97. A reading of that document leaves no doubt that that the bank, through its employed were desperate to have the 1st chargor and the company provide additional securities with no commitment to avail additional accommodation. It clearly comes out as a scheme to entrap. However, by the date of the document, the 3rd letter of offer had been signed and benefits derived by the company. It is to this court indeed an impropriety but not of the magnitude to vitiate the validity and terms of the charge. The court thus determines that there was indeed a misrepresentation by the bank which did mislead the 1st chargor in providing the additional titles but which did not affect the decision to accept the letter of offer and the legal charge between the parties. In coming to this conclusion, I have taken the valuable learning from the submissions filed and the various decisions on when to strike down unconscionable, tyrannous, shabby and unacceptable treatment by a party standing on a stronger position against the weaker one.

98. The foregoing findings then establish the basis upon which to consider what remedies are available for grant to and against the parties. With the holding that the contacts between the bank and the company are valid and enforceable, it follows that the sums availed to the company under the various letters of offer, the legal charge and the guarantees are due and payable. However, the law under section 44B,

[2] Article 50(4)

"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice

the *Banking act*, limits the sum recoverable to the principal sum as at the date of default plus a sum on account of interest not exceeding the said sum as well as costs necessitated by recovery proceedings.

99. The court's review of the evidence, especially bank statements, (Banks EXH 4,) show that the last remittance into the USD account was on the 24.11.1998 while on the Kenya shillings account was about the same date. The court thus determines that the default occurred then and sets 30.11.1998 as the date of default for purposes of section 44B. As of that date the sums due on both accounts read USD 710,969.55 and Kshs 11,042,274.80. The counterclaimant is thus entitled to such sums together with interests not exceeding the respective sums.

100. Accordingly, and flowing from the foregoing findings, judgment is entered as follows: -

1. For the main suit judgment is entered for the plaintiffs/chargors against the defendant / counter-claimant for: -

    a. An order that the defendant returns, forthwith and unconditionally, to the 1st plaintiff the documents of title respecting LR No. 330/797, Flat No 306, Dhanjay Apartments, Lavington Nairobi and CR No. 19934 over LR No.MN/1/6029

    b. An order that the defendant returns, forthwith and unconditionally, to the 2nd plaintiff the documents of title respecting LR No. 1/1148, Flat No 60, Sumo Apartments, in Kilimani Nairobi.

    c. An order that the defendant returns, forthwith and unconditionally, to the 3rd plaintiff, the documents of title respecting LR No. 330/797, Flat Nos 607 and 806, Dhanjay Apartments, Lavington Nairobi.

    d. Costs of the suit.

2. For the counter-claim, judgment is entered for the bank against the company, Fin tea Limited, for;

    a. USD 1, 421,939.10

    b. Kshs 22,084,274.80

    c. A declaration that the legal charge created over Plot No.1191, section1, Mainland North Mombasa, in favour of the defendant/counterclaimant is valid and duly enforceable in law.

    d. Costs of the counterclaim.

DATED, SIGNED AND DELIVERED, VIRTUALLY, BY MS TEAMS, THIS 14TH DAY OF APRIL, 2023.

PATRICK J. O.

JUDGE

In the presence of:

Mr. Kere for Kemboy for the Plaintiff

Mr. Njoroge Regeru for the Defendant/Counterclaimant

Mr. Hayanga for the 1st Defendant to Counterclaim

C/A: Mukabwa