REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 172 OF 2015

GULF AFRICA BANK LIMITED .....PLAINTIFF

VERSUS

WALID KHALID ABDUL KARIM.....DEFENDANT

JUDGMENT

1. At the time material to this suit, Gulf African Bank Limited (Gulf Bank or Bank) offered Musharakah facilities to its customers. Perhaps still does as I write this judgment. Walid Khalid Abdulkarim (Walid) was granted three such facilities when in the employment of Gulf Bank. One of the facilities was to finance purchase of land. That proved problematic and has been cited by Walid as the root of the controversy that embroils him with the Bank.

2. The other two were separate facilities to finance purchase of a vehicle and the further studies of Walid. The three facilities were for Ksh 15,000,000.00,1,100,000.00 and 3,300,000.00 respectively. As part security for the facilities, a charge was taken in favour of the Bank over property described as Mombasa /Block XVII/1517 (the suit property).The Bank grieves default on the part of the Walid and sues for Ksh 27,466,333.83 together with profit at the rate of 15.6% per annum and default damages as computed by it from 11th March 2015 until payment in full. Costs of the suit on an advocate-client basis is also sought.

3. Being the holder of a charge, it would be expected that the Bank would realise the security instead of bringing an action such as this. But in paragraph 8 of the Plaint dated 2nd April 2015, the Bank lists what it calls frustrations in selling the charged property by public auction. I see no need to paraphrase the catalogue and reproduce it below;

> FRUSTRATION IN SELLING THE CHARGED PROPERTY BY PUBLIC AUCTION:
>
> a) Following the issuance of the 45 days notification of sale, the public auction fixed for 19th May 2014 was cancelled following a Court order in Mombasa HCCC NO. 227 of 2002 Said Sweilem Saanun v Commissioner of Lands & 5 Others. The Bank was not a party to this suit at the time it was filed. On 26th May 2014 the Court dismissed the application seeking to review the suit.
>
> b) In response to a letter dated 19th May 2014 from the Ethics & Anti-Corruption Commission the Plaintiff's advocates set the record straight by a letter dated 5th June 2014 giving a historical background leading to the charging of the property and confirming that the auction would proceed.
>
> c) The public auction fixed for 23rd June 2014 was cancelled after the Defendant's repayment proposals were accepted.
>
> d) Following default, the auctioneer re-advertised the charged property for sale on 25th July 2014 but the auction only attracted a bid of Kshs.10,500,000 which was below the reserve price of Kshs.27,000,000.
>
> e) The County Government of Mombasa did not take any action following the bank's letter dated 5th November 2014 to demolish the illegal structures on the charged property.
>
> f) Another auction fixed for 9th February 2015 was frustrated after an ex-parte order was issued on 6th February 2015 in Mombasa ELC No. 15 of 2015 Nur Sweilem Gheithan (Suing as the legal representative of the estate of the Said Sweilem Saanun-Deceased) v Walid Khalid Abdulkrim & Another. The Bank was not a party to this suit and the order lapsed after 14 days.

4. Walid does not dispute the grant of the facilities but states that by dint of the Master Musharakah Agreement dated 21st December 2009 a ''Shirkat ul Milk'' or beneficial ownership was created in respect to the property and he and the Bank were proprietors in common in unspecified shares over the property. A relationship, it is alleged, is governed by Islamic jurisprudence and Shariah law.

5. It is the case of Walid that under the terms of the agreement the Bank had three major express or implied obligations. That it was an express or implied condition that the Bank would use its approved legal and professional advisers and experts to generate such reports on title to the assets, its valuation, searches and surveys as it found necessary and appropriate to ensure that the property to be jointly purchased had a valid, uncontested and proper title for passage to him.

6. Another obligation, he asserts, was for the Bank to effect payment only upon satisfaction that the suit premises was available for occupation and/or possession by him. Lastly, that it was not just a responsibility of the Bank, but also his legitimate expectation, that the Bank's actions would be based on sound professional, exhaustive advise and opinions in a form and substance satisfactory and acceptable to it of experts pre-qualified by it and independent of him so as to ensure that the transaction was beyond reproach.

7. Walid complains that the suit property is the subject of contested ownership and is occupied by third parties and this was well known to the Bank at the time of effecting the purchase. Walid sees fraud and bad faith on the part of the Bank. Particulars of the allegations are reproduced below;

> PARTICULARS OF FRAUD AND BAD FAITH
>
> The plaintiff fraudulently and in bad faith by knowingly and deliberately misleading the Defendant into the Musharakah Agreement and committing him to paying for the amounts in purchase of its shares by:-
>
> i. Failing to establish the claim or capacity under which the premises were occupied and the relationship between the sitting tenants and the vendor.
>
> ii. Failing to obtain assurances and warranties from the vendor with regard to any existing legal claims or contestations of title before paying out the purchase price.
>
> iii. Proceeding to effect payments for purchase of the asset directly to the vendor without an agreement between him and the Defendant or its equivalent safeguarding the common proprietor's interests when there was a pending claim in High Court Case No. 227 of 2002.
>
> iv. Failing to disclose to the Defendants the fact that the Plaintiff had not carried out due diligence on ownership or established in writing warranties of title by the vendor.
>
> v. Failing to ensure that it unilaterally appointed advocates and experts discharged the obligation of ascertaining proper title in safeguarding the interests of the Defendant as required by the terms of the Agreement.
>
> vi. Proceeding to receive payments for purchase of its share of the property from the Defendant when they knew or were constructively aware that they could not pass title to the Defendant due to the contest of the same.
>
> vii. Exposing the Defendants to a loss in terms of the amount paid as purchase of the share.
>
> viii. Misleading the Defendant by proceeding on the advice of its experts and thereby implying that they were satisfied with the opinions given.
>
> ix. Proceeding with purchase of the Musharakah Asset when it is listed under the Report of the Commission of Inquiry into illegal/irregular allocation of public land of 2004 as an irregular title recommended for revocation.
>
> x. Referring the Defendant to the Credit Reference Bureau maliciously as a way of compelling him to pay off their share.
>
> xi. Putting up the property for public auction without exhausting the joint resolution mechanism under the Musharakah.

8. Walid does not only resist the claim by the Bank but also mounts a Counterclaim as follows;

> [16] That the Defendant based on the Plaintiff's misrepresentation on the bonafide of the purchase of the Musharakah Asset and breach of the duty of care owed to him by the Plaintiff proceeded to dutifully pay for the stamp duty, transfer fees and subsequently the monthly instalments for the Plaintiff's share in total amounting to a sum of Kenya Shillings Three Million Three Hundred and Seventy Thousand (Kshs.3,370,000) as at October 2013.

9. At the hearing, three witnesses testified. Nabhan Swaleh and Amina Bashir on behalf of the Bank and Walid spoke for himself. Nabhan was the lawyer instructed by the Bank to act in the transaction and acted on behalf of Walid in the sale. He is also the advocate who drew and lodged the Charge for registration. Amina is the Company Secretary and Head of Legal affairs of the Bank. Some facts are not contested while others are not agreed. I rehash the highlights, starting with common cause.

10. Nabhan is an advocate in the panel of the Bank and was instructed by the Bank to act in the matter. He also acted in the sale on behalf of Walid. He drew a sale agreement dated 8th December 2009 between Walid as purchaser and Kassim Ismail Juma and Vincent Okutoyi

Ambundo as the vendors, joint vendors. He subsequently drew the charge dated 27th January 2010 and which was registered on 29th January 2010. He had a further role. He drew and caused to be registered a further charge in respect to the suit property on 19th December 2011.

11. Walid states that the Bank advised him to appoint Nabhan as his lawyer in the transaction but he nevertheless does not begrudge the procedure of that appointment.

12. Nabhan states that Walid was aware that there were squatters on the suit property and that indeed this was contemplated in special condition 5 of the agreement which reads;

> "5. The Vendors shall hand over vacant possession free from squatters and identify the beacons to the purchaser, if any beacon is missing it shall be replaced at the Vendor's costs."

13. The lawyer also told Court that he advised Walid that the land was the subject of the famous Ndungu Report. In his testimony the lawyer was nevertheless of the firm view that the report was inconsequential to the transaction as its recommendations have never been implemented. His further testimony was that he advised Walid that although the suit land was the subject of the proceedings in Mombasa HCCC 227 of 2002, the same had abated. Indeed the Bank showed Court a ruling dated 26th May 2014 by Hon Mukunya J in which he declined an application to revive the abated suit (P Exhibit 1 pages88-93).

14. It does not seem too controversial that Walid has been faced with adversity in asserting ownership over the property. Walid states as follows in his witness statement filed on 16th July 2015;

> [13] It however, and contrary to the a foregoing premises, transpired that in breach of the above express and or implied terms, the Plaintiff not only failed to ensure due diligence was carried out by its agents so as to assure clean title, but proceeded to effect the purchase of the property knowing very well that the same was in occupation of third parties whose relationship with the vendor was not established thereby imposing on me a property that had contested ownership.
>
> [14] This arose when it came to my attention that the title to the intended Musharakah Asset was riddled with claims of ownership by one Sweilem Gheithan Saanun under HCCC 227 of 2002 claiming ownership, another Norman Taherali Dahwoodbhai with a parallel certificate of title and ongoing investigations by the Ethics and Anti-Corruption Commission on legality of title. Annexed is a copy of the certificate of title to this effect marked "WKA 1".

15. At the heart of this matter is whether Walid should be exonerated from repaying the facilities granted to him because of the difficulties that bedevil the suit property. This and the following issues then call for the Court's determination;

> a) Does the Musharakah agreement bestow joint ownership of the suit land upon the Bank and Walid?
>
> b) If so or for whatever other reason, did the Bank have a duty of care in respect to the validity of title and possession of the land?
>
> c) If the answer to (b) above is in the affirmative, did the Bank breach this duty?
>
> d) Even if the answer to (c) above is yes, is Walid still liable because of his conduct?
>
> e) If the answers above are in favour of Walid, is he entitled to his Counterclaim and if so what are the appropriate orders to make.
>
> f) What is the suitable order on costs?

16. The agreement itself defines a Musharakah as follows;

> "Musharakah" means the arrangement between the Bank and the Customer pursuant to which the Bank and Customer will purchase from the vendor an undivided beneficial ownership interest in the Musharakah Asset for the purpose of creating a ' *'Shirkat ul Milk''*(beneficial ownership as proprietors in common in specific shares) in the Musharakah Assets as provided for under and on the terms contained in this Agreement and with the Customer having the right to exclusively use enjoy and exploit the Musharakah Assets".

Construing that definition alone would lead to a conclusion that purchase of the suit property which was the Musharakah asset created *a* "shirkat ul milk" in the asset, that is beneficial ownership as between the Bank and the Customer as proprietors in common in specified shares in the suit property.

17. Yet the definition itself contemplates that it would be held under and on terms in the agreement,some of which are that;

> a) The legal title of the asset would remain vested in the customer (clause 2.3.1).
>
> b) Walid would have the right to exclusively use, enjoy and exploit the asset.
>
> c) The arrangement was to be deemed to be a financing agreement.

18. While the Bank would have a beneficial interest in the property while the payments to it are due and outstanding from the customer , it was not the legal owner of the asset .Ownership vests in the Customer and the Banks' interest in the property was limited to that of a financier.

19. Turning to the next issue, it is of course true that under the terms of the agreement , Walid had a central role in carrying out due diligence on the property to be purchased .That responsibility was prescribed in clause 3.2 as follows;

> "The customer shall be responsible for ensuring that the vendor has good valid and marketable title to the Musharakah Assets and all the customer shall (if required by the Bank) prior to the Musharakah Commencement date furnish the Bank with a report on title issued by an advocate approved by the Bank a valuation report and a survey report in accordance with sub-clause 11.1.10 and the customer shall also procure possession of the Musharakah Assets on terms satisfactory to the Bank on or before the Musharakah commencement date"

20. Yet again, as submitted by Counsel for Walid in these proceedings, the Bank was not without a role in the verification of title. Clauses 11.1.4 and 11.1.8 are correctly cited in this regard. The Bank was to ensure that it received documents and other forms of evidence as to;

> "[11.1.4] Legal opinions in form and substance satisfactory to the Bank having been obtained from legal advisors acceptable to the Bank"

> "[11.1.8] Such reports on title by advocates approved by the Bank valuation searches in respect of the Musharakah Assets survey report from a licensed surveyor approved by the Bank inspection agency reports expert reports and confirmation in relation to the Musharakah Assets as the Bank may require".

21. I would think that such responsibility was made more acute in this matter because the person who was to carry out the due diligence on behalf of Walid, though appointed by Walid, was from a limited list of lawyers provided by the Bank. Walid's choice of an advocate was obviously curtailed. Advocate Nabhah was to represent not only the Bank in the perfection of the securities but also Walid in the purchase of the suit property. By, in a sense, imposing an advocate on Walid in the sale transaction, the Bank took upon itself any shortcomings that the advocate may have had in the conduct of the sale transaction.

22. So did Advocate Nabhan fail in his duties? From the Defence, the matters dogging the suit property are said to be;

> a) Occupation of squatters,
>
> b) It being subject of litigation in Mombasa HCCC 227 of 2002 and HCCC 15 of 2015,
>
> c) The existence of a parallel certificate of title in the names of Swelim Gheithan Saanum and Norman Taherali Dahwoodbhai.
>
> d) Adverse listing in the Ndungu report.

23. Nabhan states that he advised Walid of the listing in the Ndungu report but that it would not affect the transaction. That he advised him of HCCC 227 of 2002 which had in any event abated. That Walid was well aware of the presence of squatters as he visited the land before the purchase. Walid denies all these and says that it came to his knowledge in the year 2012.

24. I consider these in no particular order. It would seem to me that Walid knew of the presence of squatters as he visited the property before the purchase and he signed into an agreement that required the vendors to remove them. Clause 5 reads;

> "5. The Vendors shall hand over vacant possession free from squatters and identify the beacons to the purchaser, if any beacon is missing it shall be replaced at the Vendor's costs."

25. As to the law suits, one has abated and an effort to revive it has been formally declined by Court. The other was not in existence at the time of purchase and the Advocate could not possibly advise on a non-existing suit. Nothing can turn on the two suits.

26. Regarding the existence of a parallel title, the alleged title was not shown to Court nor were questions fielded to Nabhan in that respect. As to whether Nabhan advised Walid about the Ndungu report matter, it is the word of Walid against that of Nabhan although I would expect the advocate to have put such critical advice in writing.

27. Yet in the end, I resolve this matter on favour of the Bank because of the representations made by Walid to repay the debt. On 9th November 2012(P Exhibit 1 page 66), Walid writes as follows:-

> 09/11/2012
>
> Hi Assad;
>
> Further to our several discussions I am now officially resigning from GAB and since we agreed we need not to have any notice period to my departure I have now moved on.

In our discussions I had requested that the Bank allows my home finance facility to be on staff rate for 8 months as I am in the process of selling the property, while my car loan I will continue servicing until completion. In the same context my new employer will officially take over my study loan with immediate effect. I am reporting on the 15/11/2012 in my new position and will ensure the take-over of the study loan is done smoothly while will ensure repayment on my two facilities with the GAB start form 24/12/2012

Thank you for your continued support.

Kind Regards,

Walid Khlaid

28. He is making a proposal of how to retire the debt, he makes no mention about difficulties of the property. Although he denied instructing KTK Advocates, the advocates wrote as follows on 28th July 2014(P exhibit 1 page 79);

Amina Bashir

Head of Legal &

Company Secretary

Gulf African Bank

Geminia Insurance Plaza

Kilimanjaro Avenue

UPPERHILL

Dear Madam

RE: MUSHARAKAH AGREEMENT

~HON WALID KHALID

We act for Hon. Walid Khalid, the Ministere for Finance, Mombasa County, who has instructed us to write to you as follows:-

- That he entered into a Musharakah Agreement with yourselves dated 07.09.11 over the property known as Mombasa/Block XVII/1517

- That he has given you proposals on how to amicably resolve this matter to mutual satisfaction.

We await your confirmation that you are amenable to the above course of action to bring this dispute to a closure.

Yours sincerely

29. That letter is consistent with an earlier one on the promise to amicably resolve the debt. And I have to hold that as this and another letter of 9th December 2013(P. Exhibit 1 page 75) from the same law firm were received as exhibits without protest by Walid, the onus was on him to satisfactorily disprove that they were written on his instructions. I hold that both were written by the said advocates at his instance.

30. I am inclined to agree with the Bank that the issue of the validity of the title have been set up by Walid for purposes of avoiding his obligation to pay facilities granted to him.

31. Now, it is common ground that the debt remains unpaid and this Court has accepted as authentic the letter from KTK of 9th December 2013. The importance of this letter is concession by Walid that he was duly served by the Bank's lawyers with a statutory notice dated 29th November 2013 as required by Section 90 of the Land Act which provides;

90. (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—

(a) the nature and extent of the default by the chargor;

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may—

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may—

(a) appoint a receiver of the income of the charged land;

(b) apply to the court for an order to—

(i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;

(ii) sell the charged land to any person or group of persons referred to in the law relating to community land.

(5) The Cabinet Secretary shall, in consultation with the Commission, prescribe the form and content of a notice to be served under this section.

32. Both the Charge and Further Charge were registered under the provisions of the repealed Registered Land Act. Although there was a possible argument that the law to be complied with was the repealed statute, this was not taken up by the parties. Nevertheless, even if the dispute was to be placed in the past setting I would still find that the Bank's notice of 29th November 2013 complied with Section 74 of the repealed statute which provided as follows;

74. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

(3) The chargee shall be entitled to sue for the money secured by the charge in the following cases only -

(a) where the chargor is bound to repay the same;

(b) where, by any cause other than the wrongful act of the chargor or chargee, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor a reasonable opportunity of providing further security which will render the whole security sufficient, and the chargor has failed to provide such security;

(c) where the chargee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the chargor;

Provided that -

(i) in the case specified in paragraph (a) -

(a) a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and

(b) no action shall be commenced until a notice served in accordance with subsection (1) has expired;

(ii) the court may, at its discretion, stay a suit brought under paragraph (a) or paragraph (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge.

33. There is no disputing that the Walid was not only the borrower but also the person as chargor who was bound to repay the secured debt. For that the reason one of the remedies available to the Bank would be the right to sue for the money secured by the Charge. This is a remedy expressly reserved by Section 74 (3) of the old statute and Section 91 of the current statute. The Bank was therefore within its prerogative to commence this action. On the part of Walid, he would be entitled to seek postponement of these proceedings until the exhaustion of other remedies that may be available to the Bank. That is the law set out in Section 91(2) of the Land Act which is a variation to the proviso to Section 74(3) (c) the retired statute. I reproduce both provisions;

S. 91 (2) The court may order the postponement of any proceedings brought under this section until the chargee has exhausted all other remedies relating to the charged land, unless the chargee agrees to discharge the charge.

Section 74(3)(c):

(3) The chargee shall be entitled to sue for the money secured by the charge in the following cases only –

(a)……..

(b)…….

(c) where the chargee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the chargor;

Provided that -

(i) in the case specified in paragraph (a) -

(a) a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and

(b) no action shall be commenced until a notice served in accordance with subsection (1) has expired;

(ii) the court may, at its discretion, stay a suit brought under paragraph (a) or paragraph (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge.

34. There is evidence that the Bank's attempt to sell the charged property has not been an easy sail. Paragraph 8 of the written statement of Amina Bashir elaborates on the frustrations faced by the Bank as follows;-

FRUSTRATION IN SELLING THE CHARGED PROPERTY BY PUBLIC AUCTION:

a) Following the issuance of the 45 days notification of sale, the public auction fixed for 19th May 2014 was cancelled following a Court order in Mombasa HCCC NO. 227 of 2002 Said Sweilem Saanun v Commissioner of Lands & 5 Others. The Bank was not a party to this suit at the time it was filed. On 26th May 2014 the Court dismissed the application seeking to review the suit - *a copy of the Ruling is at pages 88-93.*

b) In response to a letter dated 19th May 2014 from the Ethics & Anti-Corruption Commission the Plaintiff's advocates set the record straight by a letter dated 5th June 2014 giving a historical background leading to the charging of the property and confirming that the auction would proceed – *pages 94-94*.

c) The public auction fixed for 23rd June 2014 was cancelled after the Defendants' repayment proposals were accepted – *See the email at page 76*.

d) Following default, the auctioneer re-advertised the charged property for sale on 25th July 2014 but the auction only attracted a bid of Kshs.10,500,000 which was below the reserve price of Kshs.27,000,000 – *See pages 97 to 104*.

e) The County Government of Mombasa did not take any action following the bank's letter dated 5th November 2014 to demolish the illegal structures on the charged property – *page 105*.

f) Another auction fixed for 9th February 2015 was frustrated after an ex-parte order was issued on 6th February 2015 in Mombasa ELC No. 15 of 2015 Nur Sweilem Gheithan (Suing as the legal representative of the estate of the Said Sweilem Saanun-Deceased) v Walid Khalid Abdulkrim & Another. The Bank was not a party to this suit and the order lapsed after 14 days – *At pages 106 to 113 are letters and documents from the auctioneer while at page 114 is a copy of the Order*.

35. This evidence was not debunked in cross-examination and I have no reason to disbelieve it. Coupled with the fact that Walid did not move the Court to postpone the proceedings by dint of Section 91(2), I find that this action by the Bank is merited and I allow it with Costs.

36. In the same breath I dismiss the Defendant's Counterclaim with costs.

37. I turn to a matter on which parties did not make arguments. The Costs sought by the Bank are on an advocate-client basis. This an extraordinary request as costs on litigation are usually on party to party basis. Should I grant this request? For the fact that it is expressly pleaded, there is a platform for the bid .Both the Charge and Further Charge partly constitute the contract between the parties .Clause 1.1 of the Charge(which is similar to clause 1 of the Further Charge) reads;

payment covenant:

> "The Chargor hereby covenant with the Chargee to pay to the Chargee on written demand by the Chargee (the Chargor acknowledging that the date of demand shall in respect of this charge be "the dated specified for repayment" within the meaning and for all purposes of section 65(2) of the Act the Chargor hereby further acknowledges that if any Court of law shall hold that the date of demand as aforesaid shall not be capable of being "the date specified for repayment" within the meaning and for all purposes of Section 65(2) of the Act the 24th day of February 2010 shall be "the date specified for repayment" as aforesaid) all monies (in whatever currency or currencies denominated) not exceeding the Maximum principal amount as may now or at any time hereafter be or become due owing or incurred by the Chargor (as principal debtor or surety) to the Chargee under or pursuant to the [MMA] or for which the Chargor may become liable on any current or other account or in any other manner whatsoever (including profit and all other fees and charges payable pursuant hereto and/or under the transaction documents and/or as may otherwise be agreed between the Chargor and the Chargee) together with all other costs liabilities taxes expenses and charges incurred by the Chargee in enforcing or seeking to enforce payment of such monies and liabilities and in relation to the preparation execution and enforcement of this charge and any other security held by or offered to the Chargee for such liabilities on a full and unqualified indemnity basis (the maximum principal amount together with such other costs liabilities taxes expenses charges and other amounts payable by the chargor pursuant to the provisions hereof shall hereinafter together be referred to as the "Secured Obligation").

38. There is a covenant between the parties that Costs incurred in enforcing the charge would be indemnified by the Chargor on a full indemnity basis. This is an action to enforce the terms of the charge and further charge. The Bank, presumably, must pay its advocate fees levied on Advocate-client basis .This would be more than on a party to party costs. As Walid signed up to fully indemnifying the Bank, then he must be held to his word. The Court allows costs on an advocate-client basis.

Dated, Signed and Delivered in Court at Nairobi this 17th Day of January 2020

F. TUIYOTT

JUDGE

PRESENT;

Kabuga for Plaintiff

No appearance for Defendant

Court Assistant: Nixon