



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 107 OF 2016

BETWEEN

SKYCRAPERS AFRICAWAY COMPANY LIMITED.....1ST PLAINTIFF

ENOCK OSORO KINARA.....2ND PLAINTIFF

AND

FIRST COMMUNITY BANK LIMITED.....1ST DEFENDANT

AFRICA MERCHANT

ASSURANCE COMPANY LIMITED 2ND DEFENDANT

JUDGMENT

Introduction and background

1. The facts giving rise to this suit are not disputed. The 1st plaintiff wanted to construct a block of apartments on Land Parcel Ngong/Ngong/10892 (“the suit property”) registered in the name of the 2nd plaintiff, a director of the 1st plaintiff. The plaintiffs approached the 1st defendant (“the Bank”) which agreed to finance the project. In order to consummate the transaction, the 1st plaintiff signed a letter of offer dated 19th February 2014 (“the Letter of Offer”) and a Musharaka Ending With Ownership Financing Agreement (“the Musharaka”) and Client’s Letter of Undertaking to Purchase Musharaka Units (“Letter of Undertaking”). Under the terms and condition of the Letter of Offer, the plaintiff was required to take out a Contractor’s All Risk Insurance Cover (“the Policy”) during the construction period. The 2nd plaintiff executed a legal charge dated 11th April 2014 (“the Charge”) over the suit property in favour of the Bank. Thereafter the Bank released Kshs. 39,600,000/- to be utilized towards financing of construction of the apartments and Kshs. 3,488,592 to clear a loan advanced to the 2nd plaintiff by Kenya Commercial Bank Limited.

2. In due course, the 1st plaintiff engaged a contractor start construction of the apartments. Unfortunately, the building collapsed on 6th September 2015. When the claim was lodged with the 2nd defendant, it became apparent that the Contractors All Risk Insurance Cover had lapsed on 19th August 2015 hence there was no policy in place at the time the building collapsed.

3. Claiming that the plaintiffs had defaulted on the terms of the facility, the Bank issued statutory notices demanding repayment of the amount advanced to the 1st plaintiff and threatening to sell the suit property. The plaintiff filed suit to forestall the threatened action. In the Further Amended Plaint dated 9th August 2016, the plaintiff sought the following reliefs:

a) A declaration that the financing agreement subsequent contracts between the Plaintiffs and the 1st Defendant have been frustrated by the collapse of the project, being a block of apartments, on LR No. NGONG/NGONG/10872 and the 1st plaintiff is discharged from its obligations in the financing agreement subsequent contracts under the doctrine of frustration.

b) An order declaring the statutory notices issued to the Plaintiffs a nullity.

c) An order of Permanent injunction restraining the 1st Defendant either by itself, employees, servants or agents from advertising,

putting up for sale, either by public auction or private treaty, an or otherwise commencing and or proceedings with any realization process in respect of all that property known and registered as LR NO. NGONG/NGONG/10872 in an attempt to recover the outstanding amount.

d) An order of Permanent injunction restraining the 1st Defendant from listing the Plaintiffs as defaulters with all licences Credit Reference Bureaus in Kenya being Credit Reference Bureau Limited, Credit Reference Bureau Africa Limited t/a TransUnion and Metropol Credit Reference Bureau Limited.

e) That in the alternative to prayer (c) the Honourable Court be pleased to withdraw and/or lift the listing of the Plaintiffs by the 1st Defendant, as a defaulter with all licenced Credit Reference Bureaus in Kenya being Credit Reference Bureau Limited, Credit Reference Bureau Africa Limited t/a TransUnion and Metropol Credit Reference Bureau Limited.

f) A declaration that the financing instruments between the Plaintiffs and the 1st Defendant were Musharaka Contracts.

g) A declaration that the 2nd Defendant is liable for the loss in the project to the extent that is proportionate to its capital contribution.

h) An order compelling the 2nd Defendant to relased the assessors report to the 1st plaintiff and to the 1st Defendant.

i) A declaration that the 2nd Defendant is liable to indemnify the 1st plaintiff for the claims made under the Contractors All Risk policy.

j) An order compelling and directing the 2nd Defendant to compensate the 1st Plaintiff in the sum insured being Kshs. 39,600,000.00.

k) In the alternative to prayer (a) the court issues an order converting the facility for the sum of Kshs. 47,764,706.97 into a term loan to facilitate repayment thereof.

l) Costs of the suit.

m) Interest on (g) and (i) above at court rates.

Issues for determination

4. The defendants filed their respective statements of defence denying the plaintiffs' claims and at the close of the hearing, the parties filed written submissions in which they elucidated the following agreed issues framed for determination:

1. Whether the plaintiff and the Bank are bound by the terms and conditions set out in the letter of offer dated 19th February 2014 and the Musharaka Agreement annexed thereto.

2. Whether the Plaintiffs and the Bank complied with the terms of the said Letter of Offer dated 19th February 2014 and the Musharaka Agreement.

3. Whether the Bank is entitled to realise the security created over LR NGONG/NGONG/10872 as per the terms and conditions provided in the Legal Charge and Musharaka Agreement.

4. Whether Agreements between the Plaintiffs and the Bank were frustrated by collapse of the Building.

5. Whether there was a valid contractors All Risk Policy at the time the Building collapses on 6th September 2015 and if so, whether the 2nd defendant should indemnify the 1st plaintiff.

The hearing and evidence

5. Three witnesses testified at the hearing. Enock Osoro Kinara (PW 1) testified on behalf of the plaintiffs. Muhammed Aden (DW 1), the Bank's Assistant Manager of Recovery and Ken Kiprop, the 2nd defendant's Claims Manager also testified. I will not summarise the testimony but will only refer to it in the determination where necessary since the parties agreed on the facts and the dispute turns on the interpretation of the contractual documents executed by the parties.

Plaintiffs' Submissions

6. Issues No. 1, 2 and 3 framed for determination implicate the interpretation and meaning of the relationship between the plaintiffs and the Bank. The plaintiffs case was that the relationship between the plaintiffs and the Bank was not that of the normal relationship between as a borrower and lender. They contended that it was based on the concept of Islamic banking known as *Musharaka* which according to Dr M. Imran Usmani, **A Guide to Islamic Banking** which states as follows:

The root of the word Musharaka ... means being a partner. Under Islamic Jurisprudence Musharakah means a joint enterprise

formed for conducting business in which the profit ... and loss is shared according to the ratio of the contribution.

7. The plaintiff also referred to Bank's website where Musharaka Contract is defined as follows:

Musharaka means a JOINT ENTERPRISE formed for conducting some business in which the PARTNERS share profits realized according to an agreed ratio while LOSSES shall occur on the capital proportionate to the RATIO of contribution of the partners ...

8. The plaintiffs submitted that the hallmark of such agreements is that the parties refer to themselves as partners who contribute to a project, share and profits and loss proportionate to their contribution and in this instance instead of a lending agreement the parties entered into the Musharaka. The plaintiffs further submitted that the Musharaka interest was not charged and there was no schedule of payment by instalments instead the Musharaka provided for reduction of the Bank's shares by the 1st plaintiff purchasing the Bank's shares which were in the form of the apartment units to be constructed. The plaintiffs submitted that the court should construe the parties' intentions and agreements in light of the Musharaka principles otherwise the court would be re-writing the agreement which is not permitted in law.

9. Counsel for the plaintiffs emphasized that the Letter of Offer and Musharaka were incorporated into the Charge under Clause B thereof and that all the documents must be read together and as a whole. The plaintiffs relied on specific provisions of the agreements to demonstrate that the parties were bound by the Musharaka. Counsel submitted that in the Letter of Offer, the 1st plaintiff was not referred to as a borrower but as a Client and that the facility was not framed as a loan. They contended that the Bank's share was referred to as an investment and that the terms of the facility were that the 1st plaintiff's share of the investment was 34% valued at Kshs. 20,635,857/- while the Bank's share was 66% and valued at Kshs. 39,600,000/-. The plaintiffs submitted that since there was no repayment schedule, the parties did not anticipate that plaintiffs would make out of pocket payments but the Bank's share would only be reduced by the 1st plaintiff purchasing the apartment units. In the plaintiffs' view, the Bank's share was tied to the apartment units and the amount advanced to the 1st plaintiff would only reduce through the sale of the apartment units as such the Bank's security for its capital contribution was the apartment units.

10. In order to buttress the plaintiffs case, counsel argued that the unlike ordinary banking transactions where the security covers both principal and interest, in the case of Musharaka, it is the apartment units and the proceeds therefrom that are the security and it is only by sale of those apartment units that the Bank is able to recoup its investment. In the circumstances, counsel maintained that the Bank could only start recovery once the apartments were complete and upon either the presale or sales of the apartments.

11. The plaintiffs submitted that following the collapse of the apartment units, both parties suffered a loss and in line with the Musharaka, both parties must bear the loss in proportion to their investment hence the Bank cannot demand any amount from the plaintiffs. Counsel for the plaintiff relied on Dr Imram Usmani in **A GUIDE TO ISLAMIC BANKING** where he states that;

Loss is distributed exactly according to the ratio of investment...e.g if A has invested 40% of the capital and B, 60%, they must suffer the loss in the same ratio, not more not less. Any condition contrary to this principle shall render the contract invalid.

12. The plaintiffs further submitted that since the construction of the apartments was fundamental to the agreements, the collapse of the apartment without fault of either party, fundamentally changed the obligations of the parties and therefore the Bank could not insist on the performance based on non-existent units. As a result, the plaintiffs argued, the agreements were frustrated. The plaintiffs relied on **National Carriers Ltd v Panalpina (Northern) Ltd [1981] All ER 161** and **Davis Contractors Ltd v Fareham U.D.C [1956] 2 All ER 145.** and **Tamplin Steamship Company Ltd v Anglo-American Petroleum Products Company Ltd [1916] 2 AC 397** to submit that the doctrine of frustration calls upon the courts not to vary the contract but to examine it and the circumstances under which it was made and to mitigate the rigour of insistence on the literal performance of a contract so as to give effect to the demands of justice.

13. As regards the insurance policy, the plaintiffs submitted that the duty to ensure that there was an insurance over the project was an obligation contractually imposed on 1st plaintiff and the Bank under Clause 3.8 and Clause 6.2 of the Musharaka. They argued the Bank was negligent in failing to take out insurance despite the fact that they had a 66% share in the project. They further submitted that the policy issued by 2nd defendant was valid for a period of 18 months, from 20th August 2015 to 19th August 2015 inclusive of a 6-month maintenance period up to **18th January 2016** and since the collapse occurred on **6th September 2015** during the maintenance period, the policy was valid and they ought to indemnify the plaintiffs.

14. In conclusion, the plaintiffs submitted that the its case was that the parties were in law bound by the agreements and that it was unlawful for the Bank to abandon the representations it made and product it offered under Islamic Banking and unilaterally choose to convert a Musharaka Contract to a conventional commercial lending Agreement. It further urged that following collapse of the construction project, the investment became loss making and it was frustrated and could not be performed hence the prayers in the further amended plaint should be allowed.

1st Defendant's Submissions

15. The Bank's position is that the all agreements executed by the parties show that the relationship created between the 1st plaintiff and the Bank was that of a borrower and lender and not that of a joint partnership as contended by the plaintiffs. The Bank submitted it advanced money to the 1st plaintiff after its interest was secured by the Charge executed in its favour by the 2nd plaintiff and upon provision of the Contractors All Risk Insurance Policy required not only in the Letter of Offer but also in the Musharaka.

16. The Bank maintained that all the agreements dispelled that notion that the relationship between the parties was a partnership. Counsel for the Bank submitted that the Charge described the 1st plaintiff as the borrower and the 2nd plaintiff as Chargor and that under Clause 7 of the Charge, the Bank was entitled to recall the debt and commence realization of the security in the event the plaintiffs defaulted on their obligations under the agreements. Counsel pointed out that under Clause 2.1 of the Musharaka, the 1st Plaintiff was to repay the principle

sum borrowed in monthly instalments. The Bank contended that having financed the project, it a beneficial interest which would only be that of the Chargee, limited to recovering its principal amount disbursed at the financing rates together with the expected profits, and such beneficial interest would reduce with each payment made by the plaintiffs which was not tantamount to ownership of the property. In its view, the profits referred to was an equivalent of interest charged by other Banks in normal lending.

17. On the issue whether the agreements were frustrated and whether there was a valid Policy in force, the Bank case that was that the loss caused by the collapse of the apartment was fully attributed to the plaintiffs who failed to renew the Policy. The Bank further submitted that the plaintiffs hired the Contractor who was under their direct control of the contractor hence the issue of frustration could not arise as it's in the property was purely financial.

18. The Bank also submitted that it was the responsibility of the 1st plaintiff to take out the Policy as one of the conditions and security for the facility as provided in the Letter of Offer and the Musharaka. It further submitted that from the evidence, the Policy issued by the 2nd defendant was in force from 20th August 2014 to 19th August 2015 hence by the time the building collapsed, there was no valid Policy in place. The Bank dismissed the plaintiffs' argument that the building collapsed during the maintenance period as there was no evidence to show that the building had been completed before it collapsed.

2nd Defendant's Submissions

19. The 2nd defendant case is that by the time the building collapsed on 6th September 2015, the Policy was not valid hence it could not indemnify the plaintiffs for the loss of the building. It pointed out that in any case, the Plaintiffs had not lodged any claim for consideration by it to date. The 2nd defendant further submitted that even if the Policy was in force, any claim during the maintenance period was subject to the issuance of Certificate of Completion and to regular reports furnished by the contractor all of which were never provided. In conclusion, the 2nd defendants submitted that the insurance policy lapsed on 19th August 2015, was never renewed by any party hence it could not assume any risks under it, carry out a loss adjustment assessment or compensate the plaintiffs.

Determination

20. The parties are agreed and I accept that the relationship between the parties was governed by the agreements reduced into writing. In this case, the plaintiff do not plead any grounds for invalidating the agreement between the parties. Thus the statement by the Court of Appeal in **National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR** where it held as follows, is apposite:

A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved... it is ordinarily no part of equity function to allow a party to escape from a bad bargain.

21. As I stated earlier, the basic facts leading to this suit were not disputed. The witnesses gave testimony based on their perception and understanding of the agreements. Since the matters in issue concerned the interpretation of the agreements, their testimony was not useful due to the application of the rule against parol evidence. The rule against parol evidence is grounded on **Part VI of the Evidence Act (Chapter 80 of the Laws of Kenya)** titled, "Exclusion of oral by documentary evidence." In **Fidelity Bank Limited v Kenya Grange Vehicle Industries Limited NRB CA Civil Appeal No. 61 of 2013 [2017] eKLR** the Court of Appeal citing a previous decision captured the meaning and application of the rule as follows:

In Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

"It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence."

The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing.

22. The same principle was stated by the Court of Appeal in **Twiga Chemical Industries Limited v Allan Stephen Reynolds NRB CA Civil Appeal No. 300 of 2006 [2014] eKLR** as follows:

The parole evidence rule is a well-grounded rule in law, the circumstances prevailing in this case, however, exclude its application. The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement. [Emphasis mine]

23. It is with these principles in mind that I now turn to determine the issues framed for trial.

The central issue in this case is whether the Letter of Offer, Musharaka, Letter of Undertaking and Charge are in the nature of an investment partnership agreement as contended by the plaintiffs or a lender-borrower agreement as urged by the Bank. The answer to this question is to be found in construction of the documents which defines that duties and responsibilities of the respective parties to the agreements.

24. It is common ground that under the Musharaka concept of Islamic banking, the bank does not charge interest but the parties share profits from the investment. Under Clause 19 of the Musharaka, the parties unconditionally agreed to waive or reject any entitlement to recover interest from each other as this was repugnant to Sharia.

25. For purposes of the agreements between the plaintiffs and the Bank, the meaning assigned to Musharaka is to be found in Clause 1(q) of the Musharaka which states as follows:

“Musharaka” means the agreement between the Client and the Bank to which the Bank and the Client will purchase from the seller of the Property an undivided beneficial interest in the property for the purpose of creating a beneficial ownership as proprietors in common in specified shares in the Property as provided for in this Agreement and the Client having the right to exclusively enjoy and exploit the Property.

26. The terms of the agreement is further elucidated in Clause 2 of the Musharaka which sets out the financing agreement as follows:

2.1 It is agreed that the Client shall, subject to compliance with the conditions precedent specified in Clause 12 below, purchase the Property from the seller and the Bank shall make available the Bank’s investment in the Financing Arrangement to the Client or his nominee for the purposes of completing the sale in the name of the Client.

2.2 The Client shall be responsible for checking the specifications, conditions and all other matters relating to the Property, including ensuring proper legal, marketable title and possession to be obtained from the seller.

2.3 Provided that where the Property is already in the name of the Client, the Bank shall make available the investment of its Share by making payment direct to the Client and by virtue of this payment the Bank will acquire the proportionate equity/ownership of the Property which shall be documented by a sale/purchase receipt between the Client and the Bank.

2.4 The Parties have agreed to contribute their respective shares towards the Financing Arrangement.

2.5 The respective Bank’s share and its proportionate equity Units and the Client’s Share will be set out in the Letter of Offer and the Bank’s Investment in the Financing Arrangement may be made available to the Client in one or more tranches in accordance with the terms and conditions of purchase of the Property between the Client and the seller of the Property as applicable subject to this Agreement.

2.6 The Client shall have the exclusive right to use and occupy the Property including the Bank’s share arising in respect of the Financing Arrangement.

2.7 The Client shall pay to the Bank the Monthly Payments in accordance with the Monthly Payments Agreement.

2.8 The Client shall agrees that the Client shall be responsible, at the Client’s cost and expense, for the due and punctual performance of all Ordinary Maintenance and Repair required to be undertaken in connection with the property.....

2.9 In performing Ordinary Maintenance and Repair, the Client shall ...

*2.10 The Bank and the Client shall be responsible for the costs and expenses incurred in connection with any Major Repair
[Emphasis mine]*

27. The Musharaka was not an independent agreement but was to be read together with the Letter of Offer in which the Bank financed 66% share of the investment while the 1st plaintiff would finance 34% of the share of the investment. The repayment period would be nine months’ and the payments made in quarterly installments with an initial grace period of 12 months. The financing rate was agreed at 20.5% on reducing balance basis. The facility was to be secured by a first legal charge on the suit property, direct assignment of the 2nd plaintiff’s salary from his employer and joint guarantees and indemnities executed by the 1st plaintiff’s directors. Under the terms and conditions, the plaintiffs were to provide a Contractor’s All Risk Insurance Cover.

28. What emerges from the Musharaka and the Letter of Offer is that both documents show that the relationship between the parties is a financing agreement and not a partnership agreement. The Bank advanced money to the 1st plaintiff equivalent or proportionate to its investment in the property. As the Client, in this case the 1st plaintiff, pays monthly instalments in line with Clause 2.7 of the Musharaka and or makes pre-sales and sales, the Banks share in the investment is reduced. At all times the Bank does not assume ownership or control of the property as evidenced by Clauses 2.6, 2.8 and 2.9 of the Musharaka which provides that the Client retains exclusive right to use and occupy the property including the duty to repair and maintain the property.

29. In addition, under the Letter of Undertaking, the 1st plaintiff irrevocably undertook to purchase all units on terms agreed or upon termination of the agreement or upon any event of default leaving no doubt that the 1st plaintiff was required to pay off the Bank’s investment. Even if the apartment units were not sold, at no time would the Bank be left with the apartment units as owner and failure to pay for the Units would result in the Bank enforcing the security. Clause 5.1 of the Letter of Undertaking states as follows:

5.1 Failure on my/our part to immediately purchase the remaining Musharaka Units at the applicable Outstanding Buy Out Price in accordance with the Letter of Offer and Monthly Payment Schedule shall entitle the Bank at its discretion to proceed to enforce the security interest in the Musharaka Property or otherwise for recovery of the amounts due to the Bank under this Letter of Undertaking and the Financial Agreement including accident and unpaid Monthly Payments, if applicable, plus costs, Taxes and

other dues payable and applicable to the Property.

30. The requirement to provide security was set out as one of the conditions for advancing 1st plaintiff money under the Letter of Offer. The Musharaka at Clause 16.2 incorporated the provisions of the Charge and required the 1st plaintiff to create a charge over the suit property as follows;

16.2 As security for the performance of the client's obligation in accordance with the terms of this agreement the Client will create a charge in respect of the property in favour of the bank and execute such other security documents as the Bank may request.

31. Clause 9 of the Musharaka provides for, "Events of Default" and in particular as follows:

9. Each of the events or circumstances set out in clause 9 is an Event of Default.

9.1 The Client does not pay on the due date any amount payable under or pursuant to the Agreement at the place and in the currency which it is expressed to be payable.

9.2 The Client does not comply with any provision of the Letter of Offer and Agreement or any Transaction Document (other than those referred to in clause 9.1). No Event in Default under this Clause 9.2 will occur if the failure to comply is capable of remedy (in the opinion of the Bank) and is remedied within fifteen (15) days of the Bank giving notice to the Client or the Client becoming aware of the failure to comply.

32. It is worth noting that the Letter of Offer, Musharaka and Letter of Undertaking were signed prior to the Charge and disbursement of the money by the Bank. The Events of Default in the Musharaka were incorporated into Clause 7. 1 of the Charge which includes the failure of the plaintiffs to pay any amount of money on its due date or default on any loan agreement, facility letter or any agreement or obligation related to the borrowing.

33. Contrary to the submissions by the plaintiffs, the provisions I have cited shows that there is nothing in the agreements that negates the duty of the plaintiffs to repay the money advanced to the 1st Plaintiff by the Bank. The Musharaka and Charge all provide that failure to pay sums due is an event of default underlying the fact that the relationship between the 1st plaintiff and the Bank was that of borrower and lender.

34. I now turn to consider whether the agreements between the 1st plaintiff and the Bank were frustrated. The basis of this claim is that the building collapsed on 6th September 2015. The essence of the nature of doctrine of frustration is that the event leading to frustration is not attributed to the fault of any of the parties to the agreement. In **National Carriers Ltd v Panalpina (Northern) Ltd (Supra)**, the court stated as follows;

[F]rustration of a contract takes place when there supervenes an event without default of either party ... which so significantly changes the nature of the outstanding contractual obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the circumstances; in such case the law declares both parties to be discharged from further performances.

35. It is true, at any rate, from the evidence that neither party was to blame for the collapse of the building. But was such an event contemplated by the parties? The purpose of the insurance was to indemnify the Bank against events like the collapse of the building which would diminish the value of the security hence the requirement of insurance was a key condition of the lending.

36. Under the Clause 3(e) of the Letter of Offer, the plaintiffs were required to take out a Contractors All Risk Policy during the construction period and subsequent Fire, Burglary and other insurance perils. Clause 3 of the Musharaka imposed on the Client, in this case the 1st plaintiff, the duty to keep the property insured for the duration of financing arrangement for the full reinstatement value of the property. Finally, under Clause 6.5 of the Charge, one of the covenants of the borrower/chargor is to keep the property insured at its expense. These provisions dispose of the plaintiffs' contention that they were in partnership with the Bank and it was the obligation of the Bank and the plaintiffs to keep the property insured.

37. It is not in dispute that the Policy issued by the 2nd defendant was in force for one year from 20th August 2014 to 19th August 2015 and that the building collapsed outside the period covered by the Policy. The plaintiffs' whose duty it was to pay for the insurance, did not provide any evidence that they had renewed the policy. Since the policy was not in force, there was no obligation on the 1st defendants to indemnify the Plaintiffs or the Bank.

38. The plaintiffs argued that the building collapsed during the 6-month maintenance period under the Policy. Clause 3 of the Extensions to Contractors all risks Insurance provides as follows:

3. Maintenance or Defects Liability period and I.C.E Standard Conditions of Contract

Notwithstanding the provisions of Exclusion 2(F) the Company will indemnify the insured for Damage to the permanent works or any part hereof occurring during:

A. Any maintenance or defects liability period not exceeding 12 months duration specified in the conditions of contract but only in respect of Damage for which the insured is liable

(1) Arising from a cause occurring prior to the commencement of the maintenance period.

(2) Occasioned by the insured in the course of operations carried out by him for the purpose of complying with his obligations under the maintenance conditions such contract.

B. A period of 14 days after the Engineer shall have issued a Certificate of Completion in accordance with the Insured's obligations under Clause 21 of the Institute of Civil Engineers' Contract Conditions (Fifth Edition) if applicable (or any subsequent revisions or substitution thereof)

39. The maintenance period is the period after the construction is complete and in the present case under the provisions of the Policy, the cover it only takes effect once the insurer has received Certificate of Completion. In this case, the plaintiffs did not show that the building had been completed by producing a certificate to that effect. Moreover, the plaintiffs did not make any report or file a claim with the 2nd defendant to enable it commissions a loss adjustment report.

40. The aforesaid notwithstanding, I find and hold that the Policy was not in force at the time the building collapsed as the plaintiffs had not paid the premium as required by the Letter of Offer, Musharaka and Charge. The 2nd defendant therefore was not under any obligation, to indemnify the plaintiff or the Bank. Further, the failure by the plaintiffs to pay the premium and maintain the policy during the period the lending was in force constituted an event of default which entitled to the Bank to realise the security.

Conclusion

41. In conclusion and in respect of the issues framed for determination, I find as follows. The plaintiff and the Bank were bound by the terms of the Letter of Offer, the Musharaka and that they complied with the terms thereof whereupon, the 2nd plaintiff executed a Charge in favour of the Bank to secure the facilities advanced to the 1st plaintiff by the Bank. In coming to this conclusion, I reject the plaintiffs' contention that the Musharaka prevented the Bank from exercising its rights under the Charge including the exercise of the power of sale thereunder or under the **Land Registration Act, 2012**.

42. As to whether the Bank is entitled to realise the security under the Charge, I find that the plaintiffs defaulted on the obligation under the Charge. First, the appellant failed to pay insurance premiums under the policy in order to maintain the property insurance during the currency of the financial arrangement in line with Clause 7 of the Charge. Second, and more importantly, the plaintiffs were in default in paying the sums due under the contract. The payment of sums due under the contract is a specific covenant by the 1st plaintiff under Clause 3 of the Charge and the 1st plaintiff was in default.

43. The plaintiffs in fact admitted the default. In this respect, I adopt the sentiments of Ochieng J., in the ruling dated 3rd May 2017 dismissing the plaintiffs' application for an interlocutory injunction on the following term:

[60] In the charge document, the 1st plaintiff is expressly cited as the "Borrower" or as "the principal debtor". Those phrases are more in keeping with the relationship between a lender and a borrower, rather than as between persons who were joint partners in an investment.

[61] At paragraph 12 of the Further Amended Complaint the plaintiffs said;

"The Bank's security was apartments and the proceeds therefrom. It is the proceeds from the sale and pre-sale of apartments that guaranteed the bank that the loan would be serviced".

[62] Clearly, the plaintiffs had recognized the existence of a loan, and the need to service the said loan.

[63] At paragraph 17 of his Affidavit sworn on 7th April 2016, the 2nd plaintiff said;

"THAT on 8th February 2016 I wrote to the bank and requested for the restructuring of the loan, noting that the project had collapsed and I was now forced to pay the facility from my own pockets as opposed from sales from the units as had been previously anticipated...."

[64] Based upon those unsolicited statements from the plaintiffs, I hold the considered view that they appreciated the fact that the bank had accorded them a loan facility, which therefore had to be serviced.

[65] The plaintiffs have indicated that they were unable to service the facility because the building which they were relying upon, to get funds which they could then use to pay-off the facility, collapsed.

[66] The result of the failure by the plaintiffs to service the facility was a default.

44. There is clear evidence and admission of default by the plaintiffs in their obligations under the Charge which entitles the Bank to exercise its statutory power of sale. In light of this finding, I dismiss prayers (a), (b), (c), (f), (g) and (k) of the further amended complaint. Further, prayers

(d) and (e) of the Further Amended Plaint deals with the Bank's reporting obligations to Credit Reference Bureaus. Since the plaintiffs are clearly in default, the prayer cannot be grant and are accordingly dismissed.

45. Having come to the conclusion that Contractors All Risks Policy was not in force at the time the building collapsed, I find and hold that plaintiffs were not entitled to indemnity. In the circumstances, I dismiss prayers (h), (i) and (j) of the Further Amended Plaint

46. It must now be clear from the finding that this suit is for dismissal. It is now dismissed. The plaintiffs shall pay the costs of the defendants.

DATED and DELIVERED at NAIROBI this 21st day of JANUARY 2020.

D. S. MAJANJA

JUDGE

Ms Muraguri instructed by Muraguri, Muigai, Waweru and Company Advocates for the plaintiffs.

Mr Mulanya instructed by Mulanya and Maondo Advocates for the 1st defendant.

Ms Mariengo instructed by Lumumba and Lumumba Advocates for the 2nd defendant.