



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NAKURU

CIVIL SUIT NO 55 OF 2011

LAMSONS INDUSTRIES LTD.....1ST PLAINTIFF

LAMS INVESTMENTS LIMITED.....2ND PLAINTIFF

-VERSUS-

INVESTMENT AND MORTGAGE BANK LTD.....1ST DEFENDANT

SPORTLIGHT INTERCEPTORS LTD.....2ND DEFENDANT

JUDGMENT

BACKGROUND

1. The plaintiff filed this suit on 18th March 2011 against the defendant seeking the following orders: -

- a) *Permanent injunction, to restrain the defendants from dealing with, auctioning, or transferring the 2nd plaintiff's property known as L. R No. Nakuru Municipality Block 8/5 and L.R Nakuru Municipality Block 11/59.*
- b) *Accounts between plaintiff and 1st defendant.*
- c) *Damages for breach of trust, duty and negligence.*
- d) *Costs of the suit.*
- e) *Interest on (d) and (e).*

2. The defendants jointly filed defence dated 13th September 2012 on 14th September 2012. The 1st defendant confirmed bank client relationship with 1st plaintiff and confirmed that it advanced various loans which were secured by debentures, supplementary debentures and guarantees by the 2nd plaintiff. The 1st defendant's contention is that the 1st plaintiff is still indebted to the 1st defendant as set out hereunder:

- a. *Overdraft account number 00100071151201 kshs 10,088,902.76 plus interest.*
- b. *Overdraft Ac 001100071151202 USD 879,185.15 plus interest.*
- c. *Term facility Account No.0010007115401002 kshs 5,368,844.00 plus interest.*
- d. *Term loan facility Account No.0010007115401002 USD 112,911.00 plus interest.*
- e. *Term loan facility Account No.0010007115401003 USD 39,545.66 plus interest.*

3. In reply to defence, plaintiff averred that **LR Nakuru Municipality Block 8/5** was charged to 1st defendant to secure facility of kshs 38,000,000 and **LR Nakuru Municipality Block 11/59** for a sum of kshs. 5,000,000. Plaintiffs deny executing loan facilities to **Kaka Wholesalers Limited** and the purported guarantee was a forgery to fabricated securities which were inexistent.

PLAINTIFF'S EVIDENCE

4. The plaintiff availed two witnesses. PW1 who is the manager of the 1st plaintiff adopted his witness statement dated 1st March 2019 and list of documents dated 6th August 2012 and also showed court forensic report which was done after forensic examination done following court's directions. It was marked for identification. He testified that **Lamsons Investment Limited** is a holding company while **Lamsons Industries Limited** is an industry producing blankets. He testified that the 1st defendant advanced credit facilities to the 1st plaintiff (**Lamsons Industries Limited**). He stated that, for credit facilities they were granted, they secured with properties, insurance policies, personal guarantees and indemnities. He said the company has been running for many years and that it faced difficulties in the year 2008 leading to liquidation of some securities by the bank.

5. He testified that the bank liquidated life policy of 331 pounds, which came to 50 Million. The amount was credited to **Lamsons** Account and after a month, the bank transferred to another company known as **Kaka Wholesalers** without their authorization and there was no relationship between **Lamsons** and **Kaka Wholesalers**. He said neither him nor his father signed authorization of transfer. He said the signature was found to be a forgery.

6. He testified that on 17th March 2011, they received notice from the 2nd defendant for auctioning of their assets to recover finances. He said initially, the bank was running their accounts well. He said they had no relationship with **Kaka Wholesalers**. He said when auctioneers called them, he realised the accounts were not tallying. He said kshs. 4,091,182 was transferred as shown in paragraph 21 of the plaint.

7. On cross-examination, he said **Sureshchandra Lalji Shah** is his father and confirmed that he was a director of **Lamsons Industries Ltd** (1st plaintiff) but he is now deceased. He said **Sobhagchandra Lalji** was not a director of Kaka. He testified that the directors of 1st plaintiff who may have forged the guarantee and stated that to date, they have not reported them to police neither have they reported **Kaka Wholesalers** to police for getting their money.

8. PW1 confirmed that on various occasions, the plaintiff borrowed money from the 1st defendant on terms agreed. He said the 1st defendant would send letters of offer to the 1st plaintiff and the 1st plaintiff's directors would sign in their premises and return to the bank. He said the 1st plaintiff never wrote a letter of complaint when the bank started failing to send them statements. He said they never got any statement until their lawyer wrote to the bank. He said when they went to the bank, they got a document saying they gave guarantee to **Kaka Wholesalers**. He said the guarantee given to Kaka are the ones forged by directors of **Kaka Wholesalers** and **Lamsons Industries Ltd** (1st plaintiff).

9. On further cross-examination by **Mr. Nyaberi** for the defendants, he said before the problem arose, they were getting regular statements from the bank and the statements had no errors. He said the statements they got after requests by their lawyer had errors, which made them to ask the lawyer to write to the bank pointing out the errors. He however said they never confirmed if the lawyer wrote the letter. He confirmed that at the bottom of the statement it is indicated that they were required to notify the bank within 28 days and that they never notified the bank of the error.

10. He also confirmed that the facilities stated by the 1st defendant were given to the plaintiff and the facilities are correct in the manner indicated by the 1st defendant and at the time they received demand from the 1st defendant the facilities had not been paid. He further said he is not aware if part of facilities to **Kaka Wholesalers** were guaranteed by Lamsons investment Limited.

11. He confirmed that at page 342 of the documents on letter of guarantee and indemnity at paragraph 2b, the guarantor acknowledged **Kaka Wholesalers** was indebted Kshs. 105,601,870 and guarantor is **Lamsons Industries Ltd**. He further confirmed that there are 2 signatures; one being for his father **Sureshchandra Lalji** and the other is late **Sobhagchandra Lalji** who was a co-director. He said his father's signature is not correct but he does not know if the other director's signature is correct.

12. He further stated that, as at 1st February 2010, the loan given to 1st plaintiff was outstanding. He said they did not pay in full what was demanded. He confirmed at some point the 1st plaintiff sold some machinery to settle some of the facilities owed to the 1st defendant; this was done after writing to the 1st defendant to be allowed to sell. He said the proceeds was deposited to the bank in cash. He however confirmed that kshs.2.5Million was deposited in account of **Kaka Wholesalers** as shown in statement at page 387 of 1st defendant's documents. He added that kshs. 4,091,182 was wrongly deposited and at page 378 is a letter asking account to be debited and credit loan account of **Sobhagchandra Lalji**. He said what he is challenging is his father's signature in the document but not late **Sobhagchandra Lalji**'s signature. He said the account was credited with kshs 4,091,182 on 20th August 2009.

13. PW1 further said he is challenging the manner in which interest was charged by 1st defendant on the facilities and said according to *In duplum* rule, it should not be 2 times the principal amount. On further cross-examination, he said he is not challenging the interest rate.

14. On re-examination, PW1 said that it is in 2010 when they learnt that the bank was not operating their account properly; that it is at that time when the bank started realising their securities. He said they had known that the bank had applied money to offset **Kaka Wholesaler's** loan. He said there were no written instructions to transfer the money. He said they are challenging guarantee given by 1st plaintiff and the amount the bank is demanding is principal and interest and it include money transferred to Kaka Wholesalers.

15. PW2 who introduced himself as a document examiner with experience of 20 years' operating under the name **Forensic Security Services**, testified that he prepared report dated 25th January 2016 following instructions from **Suresh Chandra Shah** on 21st January 2016 to examine and compare signature items on questioned documents. He did a report on 25th January 2016. His finding was that the questioned signature had variation with the standard signature. He concluded that the hand that made the standard signature is not the same hand that made the questioned signature. He produced his report in court as exhibit.

16. On cross-examination, he said none of the signatures he referred was executed in his presence. He said he was not given guarantee document for comparison. He said the only document with questioned signature is letter of guarantee and indemnity. He confirmed that **Emmanuel Karisa Kenga** is a handwriting expert and was his boss. When shown **Kenga's** report he confirmed his findings were that there are similarities in the signatures. He said their findings might not agree because they did not use the same samples. He admitted that factors such as age or health of a person, surface for signing, sitting position and mental condition like fatigue can affect a person's signature. He said all the documents he examined were given to him by **Suresh** and he did not witness them being done.

17. On re-examination he said that his conclusion was that the signatures were by different hands and that he considered all factors that affect handwriting. He further said the documents he was examining were different from the ones examined by his colleague. He said he had no letter of guarantee or indemnity in his report.

DEFENDANT'S EVIDENCE

18. Defence availed two witness. DW1 **Lakshinaraya Napuram Sivaramakrish** who introduced himself as head of business at 1st defendant's bank and said he has worked for the bank from the year 2003. He adopted his witness statement dated 19th February 2019 as evidence. He stated that page 3 of the plaintiff's documents show breakdown of outstanding debt and what is stated as outstanding debt is correct.

19. He testified that at page 226 of defendant's document is guarantee and indemnity and it is extended on 22nd August 2006 and paragraph 2b is existing liability as at 7/8/2006 at kshs. 22,082,182.91 and USD 542,114.09 and it adds up to what is stated in page 3 of plaintiff's written statement; and the said amount was the principal amount as at 7th August 2006. He said he has calculated interest from August 2006 to June 2008 and its approximately kshs 3.5Million; He said the total interest charged on the facility is kshs 3.5 Million and USD 100,000 interest for USD 542,114.09. He said they did not breach the *In duplum* rule as the interest is nowhere near the principal. DW1 stated that the plaintiff did not mention any figure while stating it is in breach of *In duplum* rule.

20. DW1 testified that it is the plaintiff who instructed them to effect transfer of funds to a particular account by a written letter dated 19th January 2009 signed by two directors. That at page 378 of defendant's documents is a letter dated 18th August 2009 signed by 2 directors instructing the bank to transfer funds to another account shown in the statement at page 380. He said they sent to the plaintiff bank statements on monthly basis. He said the letter dated 19th November 2009 GBP 390,000 referred to by plaintiff at page 4 item (e) instructed them to convert to Kenya shillings and transfer (debit) to **Kaka Wholesalers Ltd** and the signatures in the letter are the ones given to document examiner **Mr. Kenga** and specimen signatures given to the bank and he found they were signed by the same person.

21. DW1 said they carried out instructions given to them in writing. He said he knows both directors personally; the deceased and the one who is still alive as he was the one handling the account from 2003 to 2010 and they used to meet them in their offices in Nakuru. He said the latest transaction was in January 2009. He said plaintiff never lodged any complaint with them before filing this suit.

22. On further examination by Mr. Nyaburi, DW1 said at page 382 of defendant's document are machinery the plaintiff wanted to sell which were part of the bank's debenture. He confirmed that plaintiff wrote to the bank seeking permission to sell the property. He confirmed that it was cash sale and the amount was remitted directly to 2 accounts; Plaintiff's Account and Kaka Wholesalers' account; that deposits were done by plaintiff's themselves. He said plaintiff never wrote to explain why it was being deposited to Kaka Wholesalers' account.

23. DW1 on cross examination said at page 382 of defendants document are machinery the plaintiff wanted to sell which were part of the bank's debenture. He confirmed that plaintiff wrote to the bank seeking permission to sell the property. He confirmed that it was cash sale and the amount was remitted directly to 2 accounts plaintiff's Account and Kaka Wholesalers' account; that deposits were done by plaintiff's themselves. And plaintiff never complained that the money was deposited in Kaka Wholesaler's account.

24. DW1 said on transfer of 45Million, the directors called, sent a letter by fax and hard copy dated 21st January 2009. He said the fax indemnity was executed by the client and on 19/8/2009 kshs. 4,091,822 was transferred to account of **Sobhagchandra Shah**. He said the plaintiff in statement filed confirmed various facilities and how they liquidated, are accurate account of what happened.

25. He said they issued demand notice on 29th January 2009 as shown at page 375 of defendant's; that the plaintiff never responded nor disputed the figures. He denied allegations that the bank mismanaged the plaintiff's account and stated that they acted on per instructions of the customer.

26. On cross-examination by **Mr. Kisila** for the plaintiff, DW1 confirmed that he has been handling the plaintiff's account since 2003 but it moved to one **Narairam** when it became non-performing. He said the amount owing from the plaintiff as per the demand notice dated 29th January 2009 is kshs.33.799Million being kshs. 11,037,880 in one account and USD 693,623.70 in another account as shown on page 379.

27. He further stated that for money transfer, the customer does not have to be there personally, the bank relies on letter of transfer signed and bank officials will verify the signatures with specimen signatures. He confirmed that kshs 45Million was transferred from 1st plaintiff's account and 390,000 pounds was received by the bank to clear liabilities and that it was one of the securities; that on 24th August 2009 1st plaintiff gave instructions to debit the account. He said the directors usually called before they received instructions to transfer. He said money was received from Hong Kong and credited to the account on 19th January 2009. He said it was offered as security for **Lamsons** for purposes of liquidating liabilities. He further stated that the security from Hong Kong was utilized to liquidate liabilities of **Kaka Wholesalers**.

28. He confirmed kshs. 4,091,822 was transferred to account of **Sobhagchandra Shah** as instructed. He said if the plaintiff had not instructed transfer, the amount owing would have been lower. He said the complaint came after statutory notice was issued.

29. On re-examination, DW1 said that prior to filing of this case, the plaintiff had not complained that the bank acted on a document without seal. He said they look at authorised signature in the system before effecting transfer. He said directors of 1st plaintiff had given personal guarantees of borrowing by **Kaka Wholesalers**. He said the money, which came, was meant to clear liabilities linked to **Lamsons Ltd**; that they were to take it as security. He said since the year 2003, the plaintiff would first call giving instructions then fax would follow and hard copy would come next. He said no one has complained of fax sent to the bank.

30. He said the first written request for statement is dated 21st October 2010. He further said when the lawyers asked for documents, they were supplied. Further that the bank sent statutory demand stating the amount outstanding and from the time statutory demand was made, no amount has been paid and plaintiff has not written to the bank asking for current amount owing and he has not been referred to any letter in the documents asking for the amount owing. He said the bank has not made any error as they have been acting on instructions given by client. He prayed for dismissal of the suit and money owing to the bank be recovered.

31. DW2 **Emmanuel Kenga** a document examiner testified that he was trained as document examiner for a period of 5 years and has work experience as document examiner for 28 years. He testified that he examined documents under instructions of I& M bank by letter dated 13th November 2014. He said the documents given to him to examine were letter of guarantee and indemnity dated 22nd August 2006, specimen signatures and documents bearing known signatures. His role was to examine and compare. He testified that on comparing the signatures, he made an opinion that the signatures were made by the same hand. He said there were similar characteristics in all the documents. He produced report dated 14th November 2014.

32. On cross-examination by counsel for the plaintiff, he said he worked on actual documents forwarded to him by the bank including card bearing specimen signatures. He said the letter 19th January 2009 and letter of guarantee and indemnity dated 22nd August 2006 are among the documents he examined though it is not attached to his report.

33. DW2 said PW2 was his student but he never completed the course and he is not therefore a document examiner; that he does not have any certificate. On further re-examination, he said **Daniel Gutu** (PW2) did not attach the documents he examined to his report and he could not therefore tell which documents he examined.

PLAINTIFF'S SUBMISSIONS

34. The plaintiff started by giving brief facts of the case and evidence adduced which I have captured above.

35. On whether the directors of 1st plaintiff were guarantors of **Kaka Wholesalers**, the plaintiff submitted that the 1st defendant claimed that the 1st plaintiff's directors made an undertaking to be guarantors of a company by the name **Kaka Wholesalers Ltd** in respect to loan facility advance to it; that they did advance monies to **Kaka Wholesalers Ltd** on an understanding that the facilities would be secured *inter alia* by the securities already charged in respect of credit facilities advanced to 1st plaintiff.

36. Plaintiff submitted that under the **Law of Contract Cap 23** a guarantee is a written promise by guarantor to answer for debt of another and that other is the principal debtor made to a person namely the lender to whom that other is already or is about to be liable. That the guarantee must be in writing or there must be a memorandum of it in writing, signed by the guarantor.

37. The plaintiff quoted the **Law of Guarantees** by **Gerald Andrews & Richard Millet 2nd Edition, at page 156** as follows: -

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

38. The plaintiff also cited the case of **Mwaniki Wa Ndegwa Vs National Bank of Kenya & Another HCCC No.86 of 2000[2008] eKLR** where guarantee was defined as an undertaking by one or more persons to another person's or persons to be liable and make good the liability or obligation of another person or persons.

39. Counsel for the plaintiff submitted that a guarantee is a contract between parties who agree to engage and thus must abide with the set guidelines that provide for legality of a contract. That the guarantor agrees not to discharge the liability in any event but to do so only if the principal debtor fails to honour his duty.

40. Further that a guarantee is distinct form the agreement that gives right to the obligation as described in **Gerald Andrews & Richard Millet “The Law of Guarantees” at page 156**.

41. Counsel further submitted that the plaintiffs herein are body corporate and allegations by the 1st defendant signed, approved and bound it to guarantee does not arise and cited the case of **Arthi Highway Developers Ltd Vs Westend Butchery Ltd & 6 Others Civil Appeal No.246 of 2013** where the court followed the summing up of **lord Denning M.R in Moir Vs Wllerstainer [1975] 1All ER 849 at pg. 857** as follows: -

“It is a fundamental principal of law that a company is a legal person with its own corporate identity, separate from directors or shareholders and with its own property and interests to which alone it is entitled.”

42. Plaintiff further submitted that the legality of promise of guarantee comes to effect when the promise is written and has been signed and

submitted that contrary to allegation by the 1st defendant that directors of 1st plaintiff gave instructions that charged securities of 1st plaintiff be used as securities to advance credit to **Kaka Wholesalers Ltd** is not true as documents provided to this court are not valid. As signatures form purported directors are forged as shown by evidence of forensic expert who said the signatures were not matching those of the directors; that the 1st defendant failed to demonstrate that the directors signed the guarantee in their capacity as directors or agents of the company or in their individual capacity and that it was the duty of the bank to ascertain if the signatures were for the directors; and cited the case of **Patel & Others Vs Standard Chartered Bank[200]AII ER** where the court held that it is the duty of the bank to clarify customers mandate if it is ambiguous and if failed to do so it will be held liable.

43. Plaintiff submitted that looking at plaintiff's documents page 243 and 244 in **Kaka Wholesalers Ltd** letter of guarantee, it is evident that 1st plaintiff never guaranteed Kaka Wholesalers Ltd; that the 1st defendant went ahead to obtain signatures purported to be for 1st plaintiff. That it doesn't have company seal; that the plaintiffs were never at any moment guarantors of Kaka Wholesalers.

44. On whether transfer of fund from 1st plaintiff to Kaka Wholesales was fraudulent, plaintiff submitted that the bank is first to receive instructions from its customer before engaging in any transaction. Further that it is not in dispute that the 1st defendant liquidated part of securities charged in respect to credit facilities awarded to the 1st plaintiff as it was admitted by DW1. That in respect securities namely Bank Guarantee by **Hong Kong (HSBC Bank PLC)** the amount was admitted as received by DW1 and deposited into 1st plaintiff's account; plaintiff submitted that no notification of default by Kaka Wholesalers Ltd was sent to 1st plaintiff who were purported to be their guarantors.

45. That further transfer of kshs. 4,091,822 was transferred on 20th August 2009 to Kaka Wholesalers Ltd without authorization. Plaintiff cited the case of **Lopkin Gorman Vs Karpnale [1992] 4 All ER** where the court held that in a civil case of current account, the basic obligation of the bank is to pay his customer's cheques in accordance with his mandate and in **Ross Cranston Principles of Banking Law, 2nd Edition at page 187** stating that a bank can be in breach of duty of care if it fails to make enquiries.

46. Plaintiff submitted that the 1st defendant failed to act in good faith and transferred large amounts of money and that liquidated amount of kshs. 45,182,065 realized from Bank Guarantee by **Hong Kong (HSBC Bank PLC)** would have offset a large amount of outstanding credit facilities owed by it to the bank; that it defeats logic for 1st plaintiff which had a huge balance to instruct the bank to offset a third party's credit facility. The 1st plaintiff maintained that the bank transferred funds from its account without authority and it should have paid off the credit facilities issued in favour of the plaintiff.

47. On whether plaintiff is entitled to reliefs sought the prayer submitted that prayer to restrain the 1st defendant from selling the 2nd plaintiff's property charged as security is merited; that the 1st defendant through 2nd defendant have proceeded to issue a notice of sale against 2nd plaintiff's property that was charged to the bank in favour of credit facilities awarded to the 1st plaintiff.

48. That the 1st defendant through its witness did not produce any document to show money owing from plaintiff; that it's not clear why 1st defendant made transfer of kshs. 2,500,000 to **Kaka Wholesalers Ltd**.

49. Further that no valid demand has been issued by the 1st defendant as envisaged in **Section 65(2) of the Registered Land Act CAP 300 Laws of Kenya**. That the 1st defendant issued defective notice which mixes the account of 1st plaintiff and **Kaka Wholesalers Ltd** leading to inability of 1st plaintiff to determine its indebtedness and in effect rendering the same incapable of compliance and thus defeating the purpose and spirit of statutory requirement.

50. In conclusion plaintiffs submitted that the amounts leading to sale of the property known as **Nakuru Municipality Block 8/5 and Nakuru Municipality Block 11/59** are not certain and if the sale continues it would be an abuse of terms of agreement it entered with the 1st defendant that its credit facility would have been cleared now why it not be transfer of its money to 3rd party's account; and interest would not have accrued; further that due to breach of duty by 1st defendant, the 1st plaintiff was unable to operate its business effectively leading to its collapse.

51. Plaintiff prayed for an order of accounts to ascertain amount owed in terms of credit facilities, amount already paid, interest charged and outstanding amount. Plaintiff prayed that orders sought be allowed.

DEFENDANT'S SUBMISSIONS

52. The defendant started by giving the background of the case and stated undisputed facts as hereunder: -

a. The 1st plaintiff requested and was granted credit facilities by the 1st defendant.

b. The 1st plaintiff provided securities set out in paragraph 5 and 6 of the submissions.

c. The 1st plaintiff defaulted in meeting its obligations in various lending agreements which resulted in liquidation of bank guarantee issued by Hong Kong (HSBC) Bank Plc on or about January 2009 and following the said guarantee the 1st plaintiff received kshs 45,182, 065.00.the said amount was transferred to account number 00100255111201 in the name of KAKA.

d. That thereafter the 1st plaintiff defaulted in making payments with respect to overdraft account and consequently, the 1st defendant the life insurance policy numbers C.126683A and C.109993G which policies realised the sum of kshs GBP45,604.85 and GBP 17,906.41 which amounts were credited to 1st plaintiff's account number 00100071151201.

e. That the 1st defendant issued demand notice dated 29th January 2009 to the plaintiff for the following sums

- i. Overdraft facility (account number 100071151201 together with interest accruing from 1st January 2009 until payment in full
- ii. Overdraft facility (Account Number 100071151202 for USD 693,623.76 with interest from 1st January 2009 until payment in full
- iii. Term Loan facility (contract 10007115400001) for kshs 4,583,333.24) together with interest at 17% from 1st January 2009
- iv. Term loan facility (contract number 10007115400002) for USD 112,500.00 with interest 6.14875% per annum from 1st January 2009
- v. Term loan facility (contract Number 10007115400003) for USD 39,392.98 at interest 6.14873% per annum (subject to minimum rate of 6% per annum)

53. The defendants submitted that while the plaintiffs are not denying various facilities and default in making payments, they argue that the directors of the 1st plaintiff are not guarantors of **Kaka Wholesalers Ltd** of the facilities advanced to **Kaka Wholesalers Ltd** and the said kaka is alien to directors of the plaintiff.

54. That the plaintiff did not agree to or authorize the transfer of any of their funds to pay any debts owed by **Kaka Wholesalers Ltd** and letters issued by the plaintiffs instructing the defendant to transfer funds to Kaka Wholesalers 'account or that of **Sobaghchand L Shah** (1st plaintiff's director) were forgeries.

55. As to whether the plaintiff defaulted in making payments, the defendants submitted that by letter dated 15th January 2004, the 1st plaintiff indicated to the 1st defendant that it wanted to place the sum of USD 18,694.62 as lien for the margin for excess on LC limit confirming that it was aware that it had defaulted and exceeded its limits which explain why it was seeking to offer additional securities. Further that the PW1 in his testimony confirmed that 1st plaintiff had defaulted resulting in negotiation for fresh credit facilities. Defendants urged the court to find that the 1st plaintiff had defaulted resulting in liquidation of life policies and that the plaintiff remained in default and had outstanding amount at the time of issuance of statutory notices in question.

56. On bank statements the defendants submitted that the 1st plaintiff submitted receiving regular bank statements and no error was brought to the attention of the 1st defendant.

57. On relationship between 1st plaintiff and **Kaka Wholesalers**, the defendants submitted that **Kaka Wholesalers Ltd** were granted credit facilities by the 1st defendant which were secured partly by the guarantees of the 1st plaintiff's directors, **Ritesh Sobaghchand Shah** and **Sobaghchand Lalji Shah** and corporate guarantee by the 2nd plaintiff dated 22nd August 2006.

58. The defendants submitted that PW1 confirmed that there was family relationship between directors of 1st plaintiff and those of Kaka Wholesalers Ltd; that **Sobaghchand Lalji Shah** who was the director of 1st plaintiff was the father of directors of **Kaka Wholesalers** and to confirm the relationship, when the 1st plaintiff sold machinery, it deposited an equal amount of Kshs. 2,500,000 into account of 1st plaintiff and account of Kaka Wholesalers Ltd.

59. On whether the 1st defendant received instructions to transfer kshs 45,182,065.00 to account of Kaka Wholesalers Ltd, the defendants referred to a letter dated 19th January 2009 at page 137 of 1st defendant's documents; that the letter is signed by **Sobaghchand Lalji Shah** and **Sureshchandra Shah**; that the 1st plaintiff did not complain of the said transfer of funds and complaint of forgery of signature of **Sureshchandra Shah** is baseless. And no material was placed before court to challenge the signature of **Sobaghchand Lalji Shah** and further the evidence of DW2 confirmed that the signatures were made by the same hand with specimen signatures given to him.

60. The defendant submitted that the 1st defendant's duty was to compare the signatures with specimen signatures and further that the 1st defendant's employees are not handwriting experts, neither is 1st defendant possessed with equipment to scrutinize signatures and if the signatures appeared similarly they were at liberty to proceed to transact. Defendants cited the case of **Barclays Bank of Kenya Limited Vs John Peter Yagetari Simba (Liquidation of Lakestar Insurance Co. Staff Retirement Benefits Scheme) in liquidation [2015] eKLR** where the Court of Appeal cited the case of **Rising Freight Limited Vs Bank Limited Nairobi HCCC No.313 of 2009** which state as follows: -

“...that the bill payable to order or demand on a banker is a cheques. It is further stated that to entitle him to Section 60 (1) of the Bills of Exchange Act Protection, the banker must pay the cheque in good faith and in the ordinary cause of business. And ordinary banker does not possess the skill and knowledge of a handwriting expert. All that is needed of him is merely comparison of signatures. Further, a bank does not have specialized equipment for scrutinizing signatures before payment of a cheque.”

61. The defendants submitted that the said transaction was undertaken in good faith and the defendant cannot therefore be faulted.

62. On allegations of fraud, illegality, breach of duty and negligence, the defendants submitted that the 1st plaintiff did not adduce evidence to show that the 1st defendant unilaterally altered terms of the loan agreement, that the 1st defendant applied securities given for the 1st plaintiff to facilities advanced to Kaka Wholesalers upon directors of plaintiff signing guarantees securities and guaranteeing the performance of Kaka Wholesalers.

63. On statements the defendants submitted that the 1st plaintiff during the hearing failed to establish the anomaly in the statements of accounts submitted that PW1 testified that the forgeries were by 1st plaintiff's directors **Sobaghchand Lalji Shah** and his children and it is strange that they have not made any reports of such forgery of signatures nor made attempts to recovery from Kaka Wholesalers and complete exclusion of **Sobaghchand Lalji Shah** and **Kaka Wholesalers** from these proceedings puts into question the genuineness of the 1st plaintiff's claims against the defendants.

64. That it is also noteworthy that the signature of **Sobaghchand Lalji Shah** one of the directors of 1st plaintiff and it cannot therefore be argued that the 1st plaintiff did not give instructions to 1st defendant merely because its challenging **Sureshchandra Shah**'s signature; further that it is not true that all authentic documents signed on behalf of the 1st plaintiff had 1st plaintiff's seal and referred the undisputed letter of guarantee dated 4th March 2002 at page 51 and 52 of defendants' list of documents and letter of guarantee and indemnity dated 8th August 2002 at pages 71 and 72 of defendants' list of documents signed by the 2 directors but without company seal.

65. On charging of interest in violation of *In duplum* rule, defendants submitted that DW1 in his testimony confirmed that 1st defendant did not violate *in duplum* rule.

66. Further that no evidence of illegality, breach of duty or negligence was adduced and the 1st plaintiff is indebted to 1st defendant and as at 18th June 2010 owed monies as shown in paragraph 67 of the defendant's submissions. Defendants submitted that plaintiff's claims have not been established to the required standard and urged the court to dismiss with costs to the 1st defendant.

ANALYSIS AND DETERMINATION

There is no dispute that the plaintiff was advanced several credit facilities by the 1st defendant. Plaintiff admits this and DW1 the bank employee confirmed that the status of accounts as stated in plaintiff's statement is correct. 1st plaintiff through PW1 confirmed that the facilities stated by the 1st defendant were given to the plaintiff and the facilities are correct in the manner indicated by the 1st defendant and at the time they received demand letter from the 1st defendant the facilities had not been paid.

67. The plaintiff argued that the 1st defendant never issued statements when the problem herein commenced until when their lawyer wrote to the bank. No letters of requests by plaintiff were however shown to the Court. The plaintiff further stated that the amount owing to the bank was not made known to them; however, they admitted receiving demand notice dated 29th January 2009 with amount owing stated as kshs.33.799 Million being kshs. 11,037,880 in one account and USD 693,623.70 in another account as shown on page 379. DW1 confirmed owing from the plaintiff to the bank is as stated in the said demand notice.

68. The plaintiff further argued that the 1st defendant started mismanaging their account and even transferred funds to 3rd party namely **Kaka Wholesalers Ltd** which it argues has no relation with the 1st plaintiff. Having noted the above, I find the following to be in issue: -

i. Whether the 1st defendant transferred funds to Kaka wholesalers and third parties without authorization from 1st plaintiff

69. The 1st defendant has not disputed the fact that it liquidated securities that were meant to reduce the 1st plaintiff's liabilities. It is not disputed that of the securities liquidated, kshs.45 Million was transferred to **Kaka Wholesalers Limited** account and kshs. 4,091,822 was transferred to the account of **Sobhagchandra Lalji Shah** who was one of the directors of the 1st plaintiff. The banks argument is that the 1st plaintiff's directors guaranteed credit facilities advanced to **Kaka Wholesalers Ltd**. They argued that they were properly instructed by letters executed by directors of the 1st plaintiff to transfer the said funds to **Kaka Wholesalers Ltd** and **Sobhagchandra Shah**.

70. PW1 argued that the signatures in the said letters instructing transfer of the funds are a forgery. Each party availed hand writing expert; the two experts adduced conflicting reports as to whether the signatures of one director **Sureshchandra Lalji** were forged. No evidence was adduced as to whether the signature of the second director Sobhachandra Shah was a forgery. PW1 who testified for the plaintiff said he did not know whether the signature of the second director was correct.

71. DW2, a document examiner availed by the 1st defendant discredited the document examiner PW2 availed by the plaintiff. He said PW2 was not a document examiner as he was his student but he never completed his course. PW2 confirmed that DW2 was his boss. He said his training was for 3 months and he has had experience of about 20 Years. On the other hand, DW2 said he was trained for 5 years and has had experience of 28 years. I cannot conclusively say PW2 is not qualified as requirements for one to qualify as a document examiner were not placed before me.

72. PW2'S explanation for conflicting results between his and DW2's is that, they examined different documents. He also admitted that there are factors which include age, ill health and surface used that can cause variance on signature; DW2 said among documents examined by DW2 include letter dated 19th January 2009 and letter of guarantee dated 22nd August 2008. He however never attached the said documents to his report. PW2 also never attached documents he examined to his report. I also note that DW2 examined the documents in the year 2014 while PW6 examined in the year 2016.

73. In respect to expert evidence I am guided by decision in **Stephen Kinini Wang'onde Vs. The Ark Limited [2016] eKLR** where the

court held as follows: -

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.

Firstly, expert evidence does not “trump all other evidence”. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.”

74. In view of the fact that there are two conflicting reports by experts and also noting that the two witnesses may have examined different documents at different times which could have affected their findings , I will consider their evidence alongside other evidence adduced to arrive at a determination as to whether the 1st plaintiff guaranteed credit facilities advanced to **Kaka Wholesalers**; and whether instructions were given by 1st plaintiff to transfer funds from 1st plaintiff to kaka wholesalers and Account held by 1st plaintiff’s director **Sobhagchandra Shah**.

75. DW1 testified that the letter dated 19th November 2009 signed by 2 directors referred to by plaintiff at page 4 item (e) instructed them to convert GBP 390,000 to Kenya shillings and transfer (debit) to **Kaka wholesalers**. In his testimony, PW1 said it is the directors of 1st Plaintiff who may have forged the guarantee and indemnity. He however said to date, they have not reported the alleged forgery to police neither have they reported **Kaka wholesalers** to police for receiving the money from their account. He confirmed that they were regularly receiving monthly bank statements until the year 2010 whether they failed to receive the statements and they instructed their advocates to make a request; but even after receiving statements through their lawyers, they never raised any complaint on any error in the statements.

76. Further, the instructions to transfer funds were given in the year 2009 when they were receiving statements as confirmed by PW1. No complaint to the bank or police was made. PW1 also confirmed that they received demand from the bank in the year 2010; and If they had not given instructions as alleged , the demand from for payment from the bank would have prompted the 1st plaintiff notice the liquidated amount of kshs 45,182,065 realized from Bank Guarantee by **Hong Kong (HSBC Bank Plc)** which was intended to reduce liability of 1st plaintiff was transferred from their account. 1st plaintiff never demonstrated that they raised any complaint even after receiving demand for payment from the 1st defendant.

77. In respect to transfer of funds to **Sobhachandra Shah**, that was done also in the year 2009. If the letter of instruction dated 20th August 2009 was a forgery, a complaint should have been raised following monthly statement received in the year 2009 and further the demand for payment in the year 2010. No complaint in respect to the said transaction has been shown to the court.

78. Further, it is not disputed that the 1st plaintiff was permitted to sell machinery which was part of debenture to the bank. The proceeds was supposed to be deposited into the 1st plaintiff’s account to reduce indebtedness to 1st defendant as intended but of the 5 Million realised, 2.5Million was deposited to Kaka Wholesalers’ account and 2.5Million to 1st plaintiff’s account. No explanation has been given for that and in my view it defeats the 1st plaintiff’s allegation that **Kaka Wholesalers Ltd** was a stranger to 1st plaintiff.

79. Looking at the totality of evidence adduced, I am convinced that the 1st plaintiff authorised transfer of funds to **Kaka Wholesalers** and to **1st plaintiff’s director**.

(ii) Whether the 1st plaintiff was supplied with bank statements

80. In his testimony, PW1 said the 1st plaintiff was not supplied with bank statement but in cross examination, he indicated that they

regularly received bank statements before they started experiencing financial difficulties in the year 2010. He further stated that they requested for statements for the 1st time in the year 2010. And even after receiving the statements through their advocates, no complaint on any wrong entry was raised with the bank. The transactions in issue were made in the year 2009. For the period in question, PW1 confirmed that bank statements were issued regularly to the 1st plaintiff. The 1st plaintiff therefore failed to demonstrate failure on the 1st defendant in so far as issuance of bank statements are concerned.

(iii) Whether the 1st defendant is in violation of *In duplum* Rule

81. The 1st plaintiff through PW1 confirmed that they had no issue with interest charged but argued that the 1st defendant was in breach of *In duplum* rule. *In duplum* rule is anchored in **Section 44A of the Banking Act Kenya Cap 488 Laws of Kenya** which provide as follows: -

44A. Limit on interest recovered on defaulted loans

1. An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).

2. The maximum amount referred to in subsection (1) is the sum of the following—

(a) the principal owing when the loan becomes non-performing;

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

(c) expenses incurred in the recovery of any amounts owed by the debtor.

(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.

82. From the foregoing a lending institution will be in breach of *in duplum* rule if the interests charged is more than the principal at the time the loan become non performing. DW1 who is head of business development at I & M Bank testified that at page 3 of the plaintiff's documents is breakdown of outstanding debt and plaintiff confirmed that what is stated as outstanding debt is correct. DW1 testified that the plaintiff did not mention any figure while stating it is in breach of *In duplum* rule. He stated that interest charged on credit facilities from the 2006 to 2008 is kshs 3.5Million and USD 100,000 for USD 542,114.90 which is nowhere near the principal sum and 1st defendant is not therefore in breach of the duplum rule. No evidence was adduced to controvert Dw1's evidence in so far as interest charged is concerned. 1st defendant is not therefore in violation of *In duplum* Rule.

(vi) Whether the defendants should permanently be restrained from exercising power of sale in respect to the plaintiffs' properties known as L. R No. Nakuru Municipality Block 8/5 and L.R Nakuru Municipality Block 11/59

83. The 1st plaintiff's argument is the 1st defendant transferred its funds without instructions and if not for the said transfers, the indebtedness to the 1st defendant would have been paid. However, as seen above, the 1st Plaintiff failed to prove that the 1st defendant misapplied their funds; it failed to prove that it did not intend to transfer funds to **Kaka Wholesalers** and one of its directors; it has failed to prove fraud, illegality or any wrong doing on the part of the 1st defendant in the manner of dealing with the accounts.

84. There is no doubt that the 1st plaintiff is indebted to the 1st defendant. Statements of accounts were supplied and the 1st plaintiff was made aware of its indebtedness to the 1st defendant through demand by 1st defendant which has not been disputed. I therefore have no reason to restrain the 1st defendant from exercising its power of sale.

85. FINAL ORDERS

1. Plaintiff's suit against the defendants is hereby dismissed.

2. I decline to restrain the 1st defendant from exercising its power of sale over the plaintiff's property the 2nd plaintiff's property known as L. R No. Nakuru Municipality Block 8/5 and L.R Nakuru Municipality Block 11/59.

3. Costs of this suit to the defendants.

Judgment dated, signed and delivered via zoom at Nakuru this 21st day of May 2020.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Court Assistant- Schola

Sheth & Wathigo Advocates for Appellants

No appearance for Counsel for Respondents