



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 457 OF 2002

HELLEN NJERI NDERITU.....PLAINTIFF

-VERSUS-

THE CO-OPERATIVE BANK OF KENYA LIMITED.....1ST DEFENDANT

CO-OPERATIVE MERCHANT BANK LIMITED.....2ND DEFENDANT

JAMES K. NDERITU.....3RD DEFENDANT

(By Original Action)

THE CO-OPERATIVE BANK OF KENYA LIMITED.....PLAINTIFF

-VERSUS-

KENYA CONTINENTAL HOTEL LIMITED.....1ST DEFENDANT

JAMES K. NDERITU.....2ND DEFENDANT

HELLEN NJERI NDERITU.....3RD DEFENDANT

(By way of Counterclaim)

JUDGMENT

1. James K. Nderitu (the 3rd Defendant) and Hellen Njeri Nderitu (the Plaintiff) are husband and wife and are joint owners of LR No. 1870/VI/162-1(IR 49244), LR 9255 and Ngong/Ngong/13162 (jointly called **the suit properties**). In these proceedings the two, on the one hand, are pitted against Co-operative Bank of Kenya Limited (**the 1st Defendant or the Bank or Co-op Bank**) and Co-operative Merchant Bank Limited (**the 2nd Defendant or CMB**) in a tussle over the validity of Charges taken over those properties and, on the other, against one another.

2. On the first property rests a hotel and restaurant business owned by Kenya Continental Hotel Ltd (**Kenya Continental or 1st Defendant in the Counterclaim**). Although it is common ground that the husband and wife are the sole directors of Kenya Continental, the Plaintiff alleges that she is merely a nominal director and does not participate in the day to day management and/or in the financial affairs of the Company.

3. In her Amended Plaintiff dated 15th May 2002, the Plaintiff cites seven charges or further charges taken over the various suit properties by either the Bank or the Financial Institution. Common to these charges and/or further charges, and around which issues are raised, is an allegation that attestation of the instruments was improper.

4. The Plaintiff challenges the validity of the charge documents and asserts that after preparation of the documents, they were given to her by her husband with express instructions that she should sign beneath his signature. She avers that at no time did she appear before advocate

Kembi Gitura or any other advocate in relation to the documents. In addition, that the two lenders willfully concealed from her the need to obtain independent legal advice prior to execution of the documents.

5. Urging that she reposed full trust and confidence in her husband, the Plaintiff pleads that the charge instruments were signed by her on account of misrepresentation, fraud and deceit listed thus:-

a) *The Plaintiff was not informed as to the true nature and/or character of the security instruments.*

b) *The 1st and the 2nd Defendants sole intention was to extort a benefit from the Plaintiff's signature without disclosing to the Plaintiff that Kenya Continental Hotel Limited had made substantial borrowing and there was no prospect of recovery of the sums so advanced.*

c) *As a consequence to the foregoing, no competent or reasonably competent advocate could advise the Plaintiff to proceed with the transaction in that the transactions had all the ingredients of nefarious dealing.*

d) *The Plaintiff did not appear before Kembi-Gitura Advocate for execution of the security instruments. Notwithstanding, a false declaration was made that the Plaintiff did appear before the advocate.*

e) *The Plaintiff did not attend any Land Control Board meeting. Notwithstanding, consent to charge Ngong/Ngong/13162 was irregularly obtained.*

6. That aside, the Plaintiff states that each of the security documents were signed at her matrimonial home and at the behest of her husband and that the lenders were privy to the undue influence, fraud and deceit around their execution.

7. The Plaintiff also asserts that the interest, charges and levies set out in the security instruments are unconscionable and the instruments permit interest, charges and levies in excess of the regulatory limit set out in Kenya Gazette Notice No. 1617/1990.

8. In Paragraph 24 of the pleadings, the Plaintiff puts forward a case of what would fall within the concept of reckless lending. That the lenders, by laches, negligence, indulgence and acts of accommodation or connivance with Kenya Continental, failed to recover the debt or continued to give further loans and advances when they knew or ought to have known that the debtor was unable to pay its debts.

9. Last is that the lenders' attempt to enforce their purportedly statutory power of sale is unlawful for failure to serve a statutory notice as required by law.

10. The Plaintiff seeks the following orders and or declarations:-

a) *An order that the 1st and 2nd Defendants do discharge and deliver to the Plaintiff all the security instruments together with the titles relating to all that parcel of land comprised in L.R 1870/IV/162(I.R 49244) Rhapta Road, Westlands, Nairobi; all that parcel of land comprised in L. R No. 9255 (I.R 14797) situate in Karen, Nairobi and all that parcel of land comprised in L.R Ngong/Ngong/13162, Ngong Township, Kajiado.*

b) *An order to set aside the security instruments registered by the 1st and 2nd Defendants against the suit property namely; L.R 1870/IV/162(I.R 49244) Rhapta Road, Westlands, Nairobi; L. R No. 9255 (I.R 14797) Karen Nairobi and Ngong/Ngong/13162, Kajiado.*

c) *An injunction restraining the 1st and 2nd Defendants, by themselves, agents, employees, servants or whomsoever from seeking, offering for sale or in any manner alienating or interfering with the Plaintiff's rights and/or possession of L.R 1870/IV/162(I.R 49244) Rhapta Road, Westlands, Nairobi; L. R No. 9255 (I.R 14797) Karen Nairobi or Ngong/Ngong/13162, Kajiado.*

d) *A declaration that the Plaintiff did not execute the charge instruments on the Plaintiff's free will due to undue influence, coercion, and absence of independent legal advice and to which the 1st and 2nd Defendants were privy to.*

e) *Damages.*

f) *Such other or further orders as this Honourable Court may deem expedient.*

11. The lenders respond to the Plaintiff's case through a further Amended Defence and Counterclaim filed on 28th January 2004. In it, is alleged that the Plaintiff cannot maintain an independent cause of action from her husband as the two are joint tenants to the property. In addition, that the concept of nominal director is unknown to them and that they are strangers to the day to day running and management of Kenya Continental.

12. The lenders defend the validity of the charge instruments and manner of execution. They deny that the Plaintiff did not appear before Kembi-Gitura Advocate and plead that in any event she is estopped from denying that she did not so appear. In regard to independent legal adviser, the lenders deny that they were under any obligation to advise the Plaintiff to seek such advice.

13. The lenders think the action before Court to be a conspiracy between the couple and set out the following particulars:-

a) *The Plaintiff and the 3rd Defendant are husband and wife.*

b) *The Plaintiff and the 3rd Defendant are the sole directors and shareholders of the undertaking known as Kenya Continental Hotel Limited which company is the principal debtor in respect of the monies owed to the 1st and 2nd Defendants.*

c) *The property known as L. R No. 9255 (L.R 14797) Karen, Nairobi is the matrimonial home of the Plaintiff and the 3rd Defendant and is jointly owned by the said Plaintiff and the 3rd Defendant as joint tenants and they accordingly have a joint interest in protecting the said property from sale under the 1st and the 2nd Defendants statutory power of sale.*

d) *The property known as L.R 1870/IV/162-1 Rhapta Road, Westlands, Nairobi is the property on which the hotel built by Kenya Continental Hotels Limited stands and the Plaintiff and the 3rd Defendants being the sole directors and shareholders of the said company have a joint interest in protecting the said property on which the hotel stands.*

e) *Title No. Ngong'/Ngong'/13162 is jointly owned by the Plaintiff and the 3rd Defendant as tenants in common and presently let out and the rental accruing therefrom constitutes family income accruing to the benefit of the Plaintiff and the 3rd Defendant jointly.*

14. The two Defendants contend that the Plaintiff is a director of Kenya Continental and was at all times aware of the purpose for which the security instruments were required and fully participated in the process by which Kenya Continental authorized the borrowings. The lenders assert that, in that instance, the Plaintiff is estopped and precluded from alleging that she was not informed and/or not aware of the true nature or character of the charge documents; that the transactions had ingredients of nefarious dealings; that she did not appear before Kembi-Gitura Advocate; that she did not attend the Land Control Board; and that the lenders sole intention was to extort a benefit from her signature.

15. In a Counterclaim launched against the couple and Kenya Continental, it is explained that by Gazette Notice No. 6404 of 2002, the Minister for Finance gave approval to the takeover of all assets and liabilities of CMB by the Co-operative Bank of Kenya Limited in terms of Section 9 of the Banking Act, Chapter 488. The Bank alleges that Kenya Continental was indebted to it in the sum of Kshs.521,318,439.35 as at 24th November 2003 together with interest at the rate of 20% per annum.

16. The couple are joined to the Counterclaim as guarantors to pay or cause to be paid to the Bank the sum of Kshs.100,000,000.00. The Counterclaim seeks Judgment as follows:-

a) *Against the 1st Defendant for Kshs.521,318,439.35 together with interest thereon at the rate of 20% per annum from 25th November 2003 until payment in full.*

b) *Against the 2nd and 3rd Defendants (in the Counterclaim) jointly and severally for the sum of Kshs.100,000,000.00 together with interest thereon at the rate of 20% per annum from 25th November 2003 until payment in full.*

17. The 3rd Defendant states that he was solely running Kenya Continental and signing for all cheques and cash transactions with the lenders. He supports the Plaintiff on the manner of execution of the charge documents. He denies the allegation of conspiracy made by the vendors.

18. The 3rd Defendant sets up a Counterclaim. He states that the instrument of guarantee and indemnity dated 28/11/96 is invalid and unenforceable and in any event, cannot attract liability exceeding Kshs.60 Million inclusive of interest.

19. Jointly, in a theme taken up also by Kenya Continental, is that amounts in the charge documents were never disbursed in full and that the charges created over the suit properties were without consideration. Specifically in regard to agreement to advance some Kshs.215,000,000.00, the 3rd Defendant and Kenya Continental state that it was not a further facility but a consolidation of all the agreements previously arrived at and negotiated between the Bank and Continental.

20. Both the 3rd Defendant and Continental assert that as the lenders failed to honour the financial arrangement and to fully disburse the sums agreed in the letters of offer, the company's obligation to commence repayment had not accrued, and the issue of default and therefore regularization of the accounts never arose.

21. Continental sets up a Counterclaim against the Bank. The backbone of its claim is that the suit properties were charged for consideration that the Bank would afford financial facilities to the company for improvement and refurbishment of the hotel to completion and full operation. That in breach of the consideration, the Bank failed to disburse the facilities as agreed; stopped the finance before completion; recalled the facilities before completion; demanded repayment before completion and without default; and frustrated the agreed financial arrangement.

22. Elsewhere, Continental alleges that the Bank mishandled drawings of the facility without the authority, consent or approval of the 3rd Defendant or the company. And also, without providing supportive vouchers and cheques. It is said that the Bank failed to furnish it with statements of accounts and engaged in other fraudulent behaviour which included falsifying of vouchers and forging of signatures of the 3rd Defendant.

23. It is also the case of Continental in the situation it found itself, it had to source for off-shore finance to complete the project but the Bank failed to furnish it with vouchers supporting all payments and disbursements and the financial statements of accounts necessary for obtaining the facility. That as a consequence, the company did not procure the off-shore finance and lost opportunities, income and profits. In this

respect the company claims a sum of Kshs.404,785,225.00.

24. Four witnesses gave testimony in this matter. The Plaintiff, the 3rd Defendant, Joseph Irungu Kariuki and Alex Nguli. The last two are witnesses for the Bank. At the end of the hearing it became clear to Court that some of the issues raised in the pleadings were not pressed.

25. The Court sees the following as the issues that remained for resolution:-

- i. Has the Plaintiff and/or the 3rd Defendant proved that the charge documents were signed by the Plaintiff in the absence of Kembi-Gitura Advocate, the advocate said to have attested the signature.
- ii. If so, does that invalidate the charge documents?
- iii. Was the Land Control Board consent obtained in respect to the charge over Ngong/Ngong/13162 irregular?
- iv. If so, does the irregularity render the charge over that property invalid?
- v. Did the Bank fail to provide the consideration for which the securities were taken?
- vi. Is the Plaintiff entitled to the prayers sought?
- vii. Is the company entitled to its Counterclaim?
- viii. Is the Bank entitled to its Counterclaim?
- ix. What order of costs is appropriate?

26. Gravitating as a core issue in the Plaintiff's case is that although she signed the charge and further charge documents, her signatures were not attested by Kembi-Gitura Advocate and no explanation on the effect of the charge was made to her contrary to statute.

27. There is consensus that the law applicable to the charge instruments are the repealed statutes of the Registration of Titles Act and Indian Transfer of Property Act (ITPA) 1882 for LR LR No. 1870/VI/162-1 and LR 9255 and the Registered Land Act for the Ngong property.

28. The statutory provisions of the ITPA that is relevant to this discussion is sub-section 4(a) of section 69. However, for context the entire section is reproduced:-

“69. (1) A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage- money, or part thereof, immediately due and payable.

(2) The mortgagee's statutory power of sale includes the following powers as incident thereto (namely)-

(a) a power to impose or reserve or make binding, as far as the law permits, by covenant, condition or otherwise, on the unsold part of the mortgaged property or any part thereof, or on the purchaser and any property sold, any restriction or reservation with respect to building on or other use of property, or with respect to any other thing; and

(b) a power to sell the mortgaged property, or any part thereof-

(i) with or without a grant or reservation of rights of way, rights of water, easements, rights, and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or any part thereof or to any property sold; and

(ii) with or without covenants by the purchaser to expend money on the property sold.

(3) The provisions of this Act with respect to the mortgagee's statutory power of sale, comprised in this section, or in any other section regulating the exercise of such power, may be varied or extended by the mortgage instrument, and, as so varied or extended, shall, as far as possible, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(4) This section shall apply only-

(a) if the mortgagor's signature to the mortgage instrument has been witnessed by an advocate and if the said instrument bears a certificate signed by that advocate to the effect that he has explained to the mortgagor the effect of subsection (1) of this section and he was satisfied that the mortgagor understood the same; and

(b) if and as far as a contrary intention is not expressed in the mortgage instrument; and

(c) if the mortgage instrument executed after the commencement* of the Indian Transfer of Property Act (Amendment) Act, 1959.”

29. Regarding the Ngong charge taken under the provisions of the Registered Land Act, the following certificate appears:-

“And the above named chargor hereby acknowledges that he understands the effects of Section 74 and 79 of the Registered Land Act and hereby agrees that the lender may exercise the statutory powers of appointment of a receiver and of sale conferred by the said Section 74 of the Registered Land Act with such express variations and additions thereto as are stipulated in Clause 7 hereof.”

Again the person who supposedly witnessed the chargor's signature certified that the two appeared before him on 25th January 2001 and acknowledged the signatures to be theirs and freely and voluntarily executed the instrument and understood its contents.

30. So who bore the onus to prove the allegation that the charge documents were not signed by the Plaintiff before advocate Kembi-Gitura notwithstanding that the said advocate appended his signature signifying that it happened.

31. This Court has read and considered the submissions of counsel. On the burden of proof question, I would think that the decision of Shah J. A in **Lalchand Fulchand Shah & Another v Investments & Mortgages Bank Limited [2000] eKLR** settles it. In that matter a husband and wife challenged the validity of a charged document taken under the ITPA. Regarding the effect of Section 69(1) of the repealed Act, the couple had alleged that though they appended their signatures on the charge, their signatures were not attested by an advocate. An allegation that the advocate had carried out the process of attestation in the absence of the chargors. This is much like the allegation made here by the Plaintiff against advocate Kembi-Gitura.

32. Shah J. A observed:-

“The fact of attestation or non-attestation is a fact peculiarly within the knowledge of the Shahs. General rule of evidence is that if a negative averment is made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative, is to prove it, and not he who avers the negative. It was therefore for the Shahs to positively prove the same at least to establish a prima-facie case with a probability of success. They could not do so by a mere assertion.”

33. That decision, though in respect to the onus of proof in interlocutory proceedings, is relevant here. Quite clearly, the Plaintiff bore the onus of proving that advocate Kembi-Gitura falsely certified that she had appended her signature in his presence and that he had explained the effect of the charge to her. No doubt a serious charge to be made against an advocate.

34. It is common ground that counsel Kembi-Gitura was not called by either of the parties. It is nonetheless the submission of counsel for the 3rd Defendant that there was sufficient evidence of this misfeasance provided by the Plaintiff, his own client and a Bank official Mr. Charles Muisyo Mutunga who is said to have sworn an affidavit on how the mortgage instruments were executed.

35. Counsel for the Bank, on his part, was doubtful as to the admissibility of and the probative value to be placed in the evidence of Charles Muisyo Mutunga and on this matter the Court thinks that this doubt is well founded. At least on the weight to be given to the evidence.

36. The occasion of the affidavit of Mutunga was an interlocutory application in these proceedings. It later found its way into the substantive hearing as part of the documents produced by the 3rd Defendant as exhibits in support of his case. Having been so accepted, the affidavit itself had been formally received as evidence of its existence. Yet because the maker was not called by the party who sought to rely on it, it was not subjected to cross-examination. As there was no explanation why the maker was not called to give a first-hand account of events, the probative value of its contents has to be significantly watered down. It is untested evidence.

37. The only other evidence left was the word of the Plaintiff and the 3rd Defendant. For some reason, and for which she has to take the consequences, the Plaintiff did not find it necessary to call Kembi-Gitura Advocate as a witness. The allegation made against the Advocate was a serious one. It is not just an allegation of professional misconduct, but possibly of commission of a criminal offence. Indeed, in her pleadings, the Plaintiff asserts the conduct of the advocate to be deceitful and fraudulent. There needed to be cogent evidence of this allegation. The standard of proof being higher than a balance of probabilities, though not beyond reasonable doubt.

38. The Court holds that the oral evidence of the two is far too tenuous to establish the grave accusation against the advocate and to defeat the written word in the instruments charge. In this latter regard the following restatement of law by Khamoni J in **Housing Finance Company of Kenya Limited v Palm Homes Limited & 2 others [2002] e KLR** a case cited to this Court by counsel for the Bank holds true here;

“Otherwise a part from the veracity or the credibility of the parole evidence the second defendant has adduced, I follow and uphold the law on parole evidence as stated in the following passages starting with the case of Jacobs –v- Batavio and General Plantations Limited, (1924) 1 Ch D 287 at page 295 last paragraph where it is stated:

"It is firmly established as a rule of law that parole evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. Accordingly, it has been held that (except in cases of fraud or rectification and except, in certain circumstances, as a defence in actions for specific performance) parole evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties."

Halsbury's Laws of England, Vol 12, 4th Edition 1975 at page 612 paragraph 1478 shows that the parole evidence rule applies to all forms of evidence outside the contract itself, not merely oral evidence. Quoted in Robin -v- Gervon Berger Association Limited And Others (1986) The Weekly Law Reports 16th May 526 at page 530 it is stated:

"Where the intention of the parties has been reduced to writing, it is in general, not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, draft, articles, conditions of sale or preliminary agreements, either to show that intention or to contradict, vary, add to the terms of the document --- Extrinsic evidence cannot be received in order to prove the object with which a document is executed, or that the intention of the parties was other than appearing on the face of the instrument."

39. Flowing from my observations, I find that the Plaintiff and 3rd Defendant have not proved that the charge documents were not properly attested or explained. As a consequence the plank of the Plaintiff's case crumbles. The argument that the instruments were obtained by undue influence, fraud and deceit is also untenable because it has to be taken, as certified by the advocate, that the effect of Sub-section (1) of the Section 69 and Sub-section (1) of Section 100A of ITPA was understood by both chargors. Regarding the Ngong property, it has to be presumed that the chargors not only understood the effect of sections 74 and 79 of the RLA but that they freely and voluntarily executed the instrument and understood its content.

40. The contention that the lenders prevented the Plaintiff from seeking independent legal advice must similarly fail. First, there is no evidence of how the lenders could or indeed prevented the Plaintiff from seeking independent legal advice. The second reason stems from the argument put forward by her counsel. Counsel submits that his understanding is that on the basis of sections 65, 74, 79 and 110 of the RLA, for the charge on Ngong/Ngong/13162 to be valid then the Plaintiff was required to appear personally before an independent advocate or Kembi-Gitura for an explanation as to the purport and effect of Sections 74 and 79 of the Act. As the Plaintiff has not successfully impeached the attestation by Kembi-Gitura, then the Court has held that the explanation was indeed made in accordance with statute.

41. I turn to the alleged infraction of the Land Control Act. There is undisputed evidence that the Plaintiff and the 3rd Defendant are joint proprietors of the Ngong property. There is further evidence that the Bank thought it necessary to obtain consent of the Land Control Board in respect to the charge over the property. The trouble is how the consent was obtained because only the 3rd Defendant executed the application for the consent and there is no evidence that he had the authority of the Plaintiff to do so on her behalf. The Plaintiff pleads that the consent was irregularly obtained. The real issue has to be whether the failure by the co-owner to execute the Land Control Board consent defeats the charge taken over the Ngong property.

42. Counsel did not address this question directly and so there was paucity of argument on the matter. But these are my views. The Court has found and held that, just as the other charge instruments, the charge over the Ngong property was properly and lawfully executed by the chargors. By doing so, both chargors signified an intention to charge the Ngong property to secure a borrowing of Kshs.1,500,000.00 to Kenya Continental Hotel Limited. There is no evidence that the intention was recalled by the chargors before registration of the charge. If, therefore, the perfection of the security required the consent of the Land Control Board, then it cannot be invalidated simply because the consent was granted on the basis of an application signed by only one co-owner. While the 3rd Defendant alone signed the application, he was simply following through a joint intention he and the Plaintiff had evinced when both signed the letter of offer and the charge instrument.

43. Let me now consider the dispute between Kenya Continental and the financier. The borrower contests an attempt by the Bank to enforce its statutory power of sale primarily on the premise that the lender did not disburse the loan for which securities were taken. There is an assertion that consideration had failed.

44. Following this part of the case has not been without considerable difficulty. This is principally because of the evidence put forward not just by the Bank but also by the 3rd Defendant. Stripped to its core, the evidence of Alex Nguli is that a letter of offer of 29th January 1999 was issued and accepted by the company whose purpose and effect was to consolidate and review facilities already extended to the customer by the lenders. This letter of offer is for facilities totaling Kshs.215,000,000.00 (**D. Exhibit Page 161 - 168**). That in addition, there is a subsequent letter of offer dated 29th September 2000, which the witness explains was an acknowledgement of the customers debt to Merchant Bank of Kshs.80,644,151.00.

45. How did the borrower confront this? In Paragraph 7 of its Amended Defence and Counterclaim, the borrower asserts that the letter of offer of 29th January 1999 was a consolidation of all agreements previously arrived at and negotiated between it and the Bank. It is however unequivocal that upon consolidation, no actual disbursements were made to the company, hence failure of consideration.

46. On this important aspect of disbursement, the witness for the Bank did not come out strongly. At one point he testified:-

".... are statements from the Bank. From the statements I cannot tell how much was disbursed."

Later,

"The facilities were amalgamated in January 1999. No, there was a disbursement of Kshs.215,000,000.00."

47. Then in re-examination he improves on the Banks position:-

“The letter of 29th January 1999 was recording facilities already disbursed and the letter of offer superseded the other issued before.... This was an acknowledgement of existing debts. This was a consolidation of accounts.”

48. For the borrower, Mr. Nderitu says as follows in his witness statement:-

“(25) Whereas we were convinced to sign the letter dated 29/01/1999 on a promise to disburse the restructured loans in the sum of Kshs.215 Million as I have stated above, the said sums were never disbursed and the Bank by their own letter of 29/9/2000 which we signed on 09/10/2000 confirmed that the amount outstanding was Kshs.73,644,151/= and agreed to disburse to us a further Kshs.4 Million for refurbishing of the hotel and Kshs.3 Million to take over a loan from Standard Bank. By this letter, it was agreed that we would complete the works in the hotel and start repaying the loan in 10 years from 30/10/2000 at a monthly installment of Kshs.1,598,804/=. The loan was capped at Kshs.80,644,151/= and not the earlier figure of Kshs.215 Million in the letter of 29/01/1999.”

49. In his oral statement Nderitu sought to maintain that of the monies promised, only Kshs.4,877,604.80 was disbursed. And he held on until he was confronted in cross-examination about some payment made on behalf of the company to Standard Chartered Bank. He then yielded the following information:-

“The Bank sent Kshs.3 Million to Standard Chartered. This is not included in the schedule I prepared. The schedule represents what I borrowed. We should add the Kshs.3 M sent to Standard.”

50. Now, this is how I understand the matter. Before the assets of Co-operative Merchant Bank Limited (CMB) was taken over by Co-operative Bank of Kenya Limited, the two were lenders to Continental. Other than facility one in the letter of offer of 29th January 1999, being a loan facility of Kshs.70,000,000.00 granted by CMB, the others were advanced by Co-operative Bank of Kenya Limited.

51. The closing line of that letter of offer reads:-

“Please note this offer letter supersedes all previous offer letters and is in replacement of and not in addition to those offers.”

There is conflicting account as to the effect and object of this letter. The Bank asserts that it was a consolidation of monies already disbursed and thereof of an existing debt while Kenya Continental states that it was entered into on the promise that the restructured facilities would be disbursed after execution of the letter.

52. However, on the evidence of its own witness, Continental admitted that at least some Kshs.7,877,604.80 (Kshs.4,877,604.80 + Kshs.3,000,000.00) was disbursed. But notwithstanding attempts to dissociate from further liability there is clear evidence that this is not the full picture. There is a subsequent letter of offer of 29th September 2000 (**D. Exhibit Page 174-178**) issued by the Merchant Bank. The stated purpose of the Kshs.80,644,151.00 facility offered in that letter leaves an egg on the face of Kenya Continental:-

“Kshs.73,644,151.00 represents the balance outstanding on your loan account domiciled with Co-operative Bank. The additional 7,000,000.00”

53. This letter of offer is duly accepted by Kenya Continental and signifies an admission of a debt of Kshs.73,644,151.00 to Co-operative Merchant Bank as at 29th September 2000. And it has to be asked why would the customer be admitting such a substantial debt when it had not enjoyed the facility.

54. This admission, I would think and hold, has a nexus to the letter of offer of 29th January 1999. The connection is in regard to the first facility mentioned in that letter, which is a loan facility of Kshs.70,000,000.00 to Co-operative Merchant Bank Limited. I hold and find that it is this debt that had grown to Kshs.73,644,151.00 by 29th September 2000 and restructured in that latter facility letter. The Court also finds that the late attempt by Continental to cap its entire debit to Kshs.80,644,151.00 is a vain attempt to scuttle the truth.

55. It is clear from the evidence that the subject matter of the restructure of 29th September 2000 was a single facility, that belonging to Co-operative Merchant Bank Limited. The other four (4) facilities to Co-operative Bank of Kenya were not the subject of that letter. Second, as there is clear evidence that the Kshs.70,000,000.00 to Co-operative Merchant Bank Limited was an existing debt as at 29th January 1999 as compared to Kenya Continental's pleaded case that not a shilling of the Kshs.215,000,000.00 was disbursed, this Court believes the Bank that the true purport and intent of the letter of 29th January 1999 was to provide a roadmap for the repayment of a total of Kshs.215,000,000.00 which was already a debt of Kenya Continental to the two lenders as at 29th January 1999. On a balance of probabilities, there is evidence that the facility of Kshs.215,000,000.00 had been disbursed.

56. There is then an unequivocal admission by Kenya Continental that it did NOT make any repayments to the Bank. For that reason the facility of Kshs.215,000,000.00 could only increase on account of contractual interest.

57. The Court is well alive to the effort by Kenya Continental to rely on the letter of January, 10 2012 (**D. Exhibit Page 27**) to argue that the amount sought by the Bank is incorrect. In it the Bank asks its customer to confirm, for audit purposes, that its balances are as follows:-

01613/0100727/01 Working Capital (P/ARR) 50,726,504.85

01698/0100727/00 Interest Arrears Account 65,360,790.75

The Bank's witness reacted as follows to the letter:-

“I have no way of reconciling this claim with the balances in the letter of 10th January 2012.

58. This Court does not think that the letter downgrades the claim by the Bank because, first, the customer did not write back confirming the extent of its debt. To that extent the figures would have to be tentative. Second, on its own very admission, Kenya Continental did not repay a cent of the loan taken and so did not reduce its debt of Kshs.215 Million. That said, this Court is unable to find proof that the debt had ballooned to Kshs.521,318,439.75 as demanded in the statutory notices of 25th November 2003. Bank statements which did not make sense were thrown to the Court without being explained. The Court cannot make any meaningful inferences from those statements.

59. I now turn to the guarantees issued by the Plaintiff and the 3rd Defendant. There is evidence that there is a guarantee and indemnity dated 20th December 2000 made to Co-operative Merchant Bank Limited. The couple guaranteed the company's debt to a maximum of Kshs.100,000,000.00. That debt has been found by the Court to have been Kshs.80,644,151.00 as at 29th September 2000. The guarantors shall, also, be liable to this debt but not exceeding the limit Kshs.100,000,000.00.

60. The Court concludes by considering the Counterclaim by Continental. To be noted is that this Court does not find breach on the part of the Bank in respect to disbursing the contracted facilities.

61. As to whether the Bank is liable to Kshs.404,785,225.00 for failure to provide information that would have enabled the company obtain off-shore financing, the Court makes two observations. First, the backbone of the claim is that the company had sourced for an off-shore financier to finance the completion of the project. Yet it is curious that not a single piece of evidence was presented by Continental to support the contention that it had sourced or even applied for such finance. The substratum of the claim then vanishes.

62. On another front, the claim of Kshs.404,785,225.00 is one of special damages. And although specifically pleaded, it also needed to be specifically proved. Again, there was not a scintilla of evidence in this regard. The Court is unable to accept the proposition by counsel for Continental that the sum of Kshs.324,120,177.00 should be derived from amounts allegedly transferred from its account by the Bank. This is because the Court has found true indebtedness by the borrower.

63. The outcome is as follows:-

63.1 The Plaintiff's claim is dismissed with costs to the Bank.

63.2 The 3rd Defendant's (being Kenya Continental Hotel Limited) Counterclaim is dismissed with costs to the Bank.

63.3 Judgment is entered for the Bank against Kenya Continental Hotel Limited for:-

- i. The sum of Kshs.145,000,000.00 plus interest thereon at 18% per annum from 29th January 1999 until payment in full.
- ii. The sum of Kshs.80,644,151.00 plus interest thereon at 20% per annum from 29th September 2000 until payment in full.
- iii. Costs of the above shall be against Continental.

63.4 The total of the sum in 63.3 should not exceed what is sought in the Counterclaim.

63.5 Judgment is entered for the Bank against Hellen Njeri Nderitu and James K. Nderitu jointly and severally for the sum set out in 63.3(ii) above but not exceeding Kshs.100,000,000.00.

63.6 Costs of 63.5 above to the Bank.

Dated, Signed and Delivered in Court at Nairobi this 2nd Day of November 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Adere for the Plaintiff.

Kichie holding brief for Ohaga for the 1 and 2nd Defendants.

K'opere for 3rd Defendant.