REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

HCCC No.2257 OF 2000

FIDELITY COMMERCIAL BANK LIMITED.....PLAINTIFF

Versus

PLANT INDUSTRIES LIMITED (IN RECEIVERSHIP)....1st DEFENDANT

RAJESH VYAS…….2nd DEFENDANT

JUDGMENT

Agreed issues

[1] Parties filed the following agreed issues for determination:-

a) Whether the purported guarantee has been duly discharged as against the 2nd Defendant.

b) Whether any demands were made by the plaintiff for the sum of Kshs. 15,784,738.30

c) Is the Plaintiff entitled to the reliefs sought?

d) Who pays the costs of this suit?

Plaintiff's claim

[2] According to the plaint, the plaintiff claims for judgment against the Defendants jointly and severally for:-

a) The sum of Kshs. 15,784,738.30;

b) Interest on (a) above at the rate of 30% p.a. from 1st December 2000 until payment in full

c) Costs of the suit;

d) Interest on (c) above from the date of judgment until payment in full;

e) Any other relief the court may deem fit and just.

Plaintiff's Evidence

[3] The Plaintiff filed a witness statement dated 25th March 2014 and documentary evidence (PEX1). The Plaintiff called one witness STELLA MBULI. She emphasized on the facilities which the Plaintiff granted the 1st Defendant. According to her statement, on or about the 26th January 1998, the Plaintiff granted the 1st Defendant an overdraft facility of Kshs. 4,000,000; a term loan of Kshs. 5,000,000 and a letter of credit facility of Kshs. 6,500,000. On 27th April 1998, the 2nd Defendant who was also the principal shareholder and director of the 1st Defendant executed a guarantee on the debt of the 1st Defendant and a charge was created over LR. NO 15099 Nairobi (I.R No 72132) as security for the credit facilities granted herein. The 1st Defendant opened a current account number 1538 and a loan account number 967. The two accounts were later consolidated to account number 2066 on 30th December, 1999. The letter of credit was settled on 29th July 1998 on the current account. The 1st Defendant defaulted to pay the rest of the facilities and a statutory notice and notification for sale of the charged property were accordingly issued. The default persisted. On 23rd February 1999, the Standard Chartered Bank appointed ERNEST and YOUNG as Receivers and Manager of the 1st Defendant under a Debenture held by them over the company's assets. In a letter dated 12th March 1999, the Plaintiff informed the Receivers that it was proceeding to sell the security. Due process was commenced but the auction did not take place. Further attempt to sell the security were made in vain.

[4] Through a letter dated 5th August 1999, the plaintiff informed the Receivers that they had located a buyer who was willing to buy the security for Kshs. 10,500,000. They also offered the Receiver the option to redeem the security. The 2nd Defendant was also informed of these happenings and through his letter dated 11th August 1999 he agreed to the sale of the security. Subsequently, the security was sold on 9th November 1999 for Kshs. 10,500,000. The proceeds were credited to the debtor's account on 20th April 2001. However, the sale took over one year to complete. The delay was caused by the fact that; 1) the 2nd Defendant was not available to sign the transfer form and the plaintiff had to resort to executing the same under its statutory power; 2) the Lands Office delayed to give its consent; 30 there was no record of the security in the City Council's Office; and 4) the 2nd Defendant and Receivers refused to pay the accrued rate which the plaintiff paid ultimately. As a result of these delays, the account continued to attract interest and by 20th April 2001 when the proceeds of the sale were credited to the account, the outstanding amount was Kshs. 5,940,002.30. The debt continues to attract interest to date and despite demand made, the 2nd Defendant has refused to pay. Also note of worth is that the sale was after the suit had been filed.

[5] During cross-examination, the witness admitted that the plaintiff's latter dated 8/8/1999 informed the Defendants that the sum of Kshs. 10,500,000 would be enough to cover outstanding amount including legal fee, advertisement fee and auctioneers' fee etc. she stated that the 2nd Defendant fully complied with their call and gave instructions for them to proceed with the sale at Kshs. 10,500,000. She also told the court that she did not have any document to show that they called upon the 2nd Defendant to sign the transfer form. But she insisted that she was sure he must have been called through telephone. Nonetheless, she said that she was not the one who called the 2nd Defendant. She also said that although she testified that there was delay by the Commissioner for lands to grant consent to the transaction and that there were no records of the security at the City Hall Office; she could not attribute any of these failures to the 2nd Defendant. She testified that the letter they wrote to the Defendants did not state that the Defendants were to pay rates but that was a matter of procedure and law that they were obliged to pay rates as chargors. Eventually, she stated that the latter in question was not the basis of total settlement of this matter. She could not explain why the bank accepted to pay auctioneers charges for the chargor.

[6] She gave further information that the letter dated 5/8/1999 carried terms that were different from the guarantee, and, therefore, the said letter did not alter the guarantee. They would still go after the guarantor if the sum realized was not sufficient to clear the debt. In an attempt to refute the claim by counsel that the bank misrepresented the debt, she stated that the letter dated 1/4/2000 merely contained an error on the sum outstanding. She admitted that 2nd Defendant was not holding the Kshs. 10,500,000 except interest was charged because the 2nd Defendant had not paid the rates. The rate paid was Kshs. 1,370,000

plus another Kshs. 160,000. She spoke to the discrepancies in the demand letters and specifically noted that the letter dated 30/3/2000 was written on the assumption that the proceeds of sale would be credited to the loan account. She claimed that the plaintiff placed the 1st Defendant in receivership on 23/2/1999 and communicated that fact to the 2nd Defendant, but she said that she did not have any papers to show for the receivership. She could not agree with Counsel that the Receiver and the plaintiff colluded to sell the security and failed to credit the proceeds thereof to the debt account.

[7] The witness informed the court that the bank did not have a valuation of the property before sale. She admitted that the transfer form before court indicated that the value of the property was Kshs. 21,500,000. But she refused to accept the suggestion by counsel that the 2nd Defendant accepted the property to be sold at a much lower price because he was made to believe that the sale would clear the entire debt as communicated by the bank and his guarantee would be discharged. She stated that the bank had tried to sell the property on numerous occasions in vain. So they resorted to the debtor to sell by private treaty.

Plaintiff's Submissions

[8] The Plaintiff also filed elaborate submissions which are in the court file. In the submissions the Plaintiff admits:1) that is the 2nd Defendant was a guarantor of the debts of the 1st Defendant; 2) the 1st Defendant was subsequently placed under receivership; and 3) that the Plaintiff sold the 1st Defendant's property. The submissions addressed the issues as follows.

Discharge of guarantee

[9] According to the Plaintiff the Guarantee executed by 2nd Defendant executed provided under Clause 1 that the 2nd Defendant:

> **"HEREBY GUARANTEE to you the payment and satisfaction to you on demand of all and every sum and sums of money which are now or shall at any time be owing to you on account whatsoever and all and other liabilities (certain or contingent) incurred to you by the Debtor solely or jointly with any other person or persons firms or companies including all sums (with interests) ….including legal costs and charges occasioned by or incidental to any such indebtedness of the Debtor to you or by or to the recovery thereof."**

The 2nd Defendant, therefore, guaranteed to pay interest on the overdue account as well as expenses incurred in selling the security Property.

[10] They elaborated part of the letter dated 5th August 1999 that the Plaintiff informed the 1st Defendant that the sale proceeds of Kshs. 10,500,000/-:

> **"…would be just adequate to cover our outstanding, including the legal, advertising, auctioneers costs, etc."**

The 1st Defendant was to pay all rates, rents and taxes due on the charged property in accordance with Clause 3(a) of the Charge which provided that the 1st Defendant shall:

> **"Duly pay all rents (if any) and all rates taxes duties charges impositions and other outgoings whatsoever payable in respect of or charged assessed or imposed on the Mortgaged Property… AND WILL on demand produce to the Lender the receipt for such payments… AND WILL indemnify and keep indemnified the Lender from and against all claims and demands in respect or arising out of any non-payment… AND THAT all expenses costs and damages incurred paid or sustained by the Lender by reason of any such non-payment or breach shall be deemed to be expenses properly incurred by the Lender in relation to this**

Security. ”

Therefore, the 2nd Defendant guaranteed payment of rates and rents.

[11] Also Clause 4 of the Charge provided that any expenses incurred by the Plaintiff in regard to payment of rates and rents shall be deemed to be expenses properly incurred by the 1st Defendant under the overdraft facility. Therefore, the 2nd Defendant guaranteed those expenses. See Clause 4 of the Charge which further provided that:

> **PROVIDED THAT nothing done by the Lender hereunder shall be deemed to be or take effect as a waiver of or shall prejudice any right of action which the lender may have against the Chargor in respect of any antecedent breach of the said foregoing covenants and agreements or any of them or otherwise or of any other right of the lender under these presents or otherwise.”**

[12] The Plaintiff submitted that all the above expenses accrued after the letter dated 5th August 1998 and was as a result of default by the 1st Defendant as the Principal Borrower. The letter dated 5th August 1998 was written to the 1st Defendant’s Receivers for the purpose of inviting a bid on redemption of the property as provided under Clause 6(b) of the Charge. The said letter was copied to the 2nd Defendant and the contents were not addressed to him. As at that point the 2nd Defendant had not become party to the transaction by dint of his Guarantee. The 2nd Defendant’s confirmation or approval in his letter dated 11th August 199 was therefore superfluous and of no consequence. The Plaintiff led uncontroverted evidence that the sale took over one year to conclude due to the actions and inactions of the 1st and 2nd Defendant. Due to the aforesaid delay the 1st Defendant’s overdraft account accrued interest as from 9th November 1999 (when the sale agreement was executed) to 20th April 2001 (when the sale was completed and the funds credited to the 1st Defendant’s account.) Thus the Plaintiff submits that the Guarantee was activated on 20th April 2001 for the recovery of the interest on the overdraft account. In answer to issue number one; the guarantee has not been duly discharged as against the Defendant.

Demand for the sum of Kshs.15,784,738.30

[13] The Plaintiff made demand for the satisfaction of the overdrawn amount at various stages. See Letter dated 28th September 1998; Notification of sale dated 19th February 1999; Letter dated 6th April 2000; and Letter dated 9th May 2000. Whereas the exact amount of Kshs. 15,784,738.30 was not demanded it is noteworthy that the suit was filed seven months after the last demand made by the Plaintiff. therefore, in answer to issue number two; no demands were made by the Plaintiff for the sum of Kshs.15,784,738.30; however sufficient demand for the outstanding amount were given.

Is the Plaintiff entitled to the reliefs sought?

[14] According to the Plaintiff, they are entitled to judgment in the sum of Kshs. 5,940,002.30. The Plaintiff has disclosed that subsequent to filing this suit the sale proceeds of the charged Property were credited to the overdraft account and hence the amount for which the Plaintiff is seeking Judgment is Kshs, 5,940,002.30. Interest on this sum should be at the rate of 30% p.a. from 1st December 2000 until payment in full. See Clause (iii) (Financial Charges) of the Advance Facility letter dated 26th January 1998, which provided for interest. This was a commercial transaction in which the interest was mutually agreed upon. Therefore, allow the prayer on interest. The Plaintiff also submitted that it is entitled to costs as demand was made but the 2nd Defendant did not respond. The court should resist the attempt by the 2nd Defendant to mislead this Honourable Court by that the postal address used was not his. The 2nd Defendant uses the same address in the letter dated 11th August 1999, which he personally wrote. Similarly, prayer d should be granted at the discretion of the court. Thus, in answer to issue number three; the Plaintiff is entitled to the prayers sought. Issue four on costs has been answered above. Except, the plaintiff added that, under Clause 5(b)(i) and 5(b) (vi) of the Charge provides that expenses shall include

the costs of Court proceedings and Advocates costs thereof.

SECOND DEFENDANT'S CASE AND WRITTEN SUBMISSIONS

The testimony

[15] The 2nd Defendant testified on 16th March 2015. He adopted his statement dated 11/2/2014. He stated that on 5th August 1999, the Plaintiff wrote to the joint Receiver and Manager of the 1st Defendant with a copy to him where they stated that the sale at Kshs. 10,500,000 will be just adequate to cover the outstanding debt including the legal advertising, auctioneers costs etc. on that basis, he wrote on 11th August 1999 and authorized the sale. He was aware that the property was at a prime location along Mombasa Road and was valued at Kshs. 121,500,000 but he still accepted the sale for a lower sum in order to clear the debt and discharge his guarantee to the company. The Plaintiff had intimated that the proceeds of sale would be adequate to clear the debt. The Plaintiff ought to have inquired about the rates and nothing prevented them from doing that. According to him, once the property was sold at a figure that was adequate to clear the debt, he was discharged. But, the plaintiff kept on writing inconsistent demands even after the sale. See letter dated 6th April 2000 where they claimed for Kshs. 12,770,651.55 less Kshs. 10,500,000 leaving a balance of Kshs. 2,270.651.55. He insisted that he should be discharged from the guarantee.

[16] On cross-examination, he denied having received the letters at page 10 and page 71 because the address used therein was the company's and not his. He said that the letters must have gone to the Receivers who were in office at the time. He stated that he used the company's address in his guarantee because he was a director.

2nd Defendant's submissions

[17] The 2nd Defendant emphasized that the strength of his case lies in the letter dated 5th August 1999 written by the Plaintiff to the joint Receiver and Manger of the 1st Defendant with a copy to the 2nd Defendant. The letter is reproduced as below:-

> **"We have therefore through our own contracts, identified an interested individual who has agreed to purchase the plot at the price of Kshs.10.5 million which would be just adequate to cover our outstanding including the legal advertising auctioneers costs e.t.c.**
>
> **We now wish to conclude the sale by private treaty and are notifying you of our action so that should you wish to intervene and acquire the property at the price of Kshs.10.5 million you may do so. If we do not hear from you within the next 24 hours we will assume that you have no objection to our action or interest in acquiring the plot and will proceed ahead on that basis.**
>
> **By a copy of this letter to Mr. R. Vyas of Plant Industries Limited we are notifying him of the action we are taking as we have been unable to contact him on telephone."**

[18] On 11th August 1999 the 2nd Defendant to the Plaintiffs Managing Director as follows:-

> **"We refer to our conversation of this morning and confirm that you are hereby authorized to sell the above plot at the price of Kshs.10.5 million and credit the proceeds of the sale to our loan account with you."**

They argued that the property was bought for Kshs.21,500,000/- on 30th December 1996 but nevertheless the 2nd Defendant conceded to a lower price of Kshs.10,500,000/-. The 2nd Defendant therefore answered

the issues as below.

Issue 1: discharge of guarantee

[19] The 2nd Defendant submitted that when the Plaintiff's sought approval to sell the charge property for Kshs.10.5 Million and expressly stating that the proceeds of sale was just adequate to cover their outstanding including legal, advertising, auctioneers costs e.t.c.; and the 2nd Defendant approved the request, a contact was created with specific terms. The letter dated 5/8/1999 did not require the 2nd Defendant:-

- to sign the transfer
- to provide receipts for payments to the land registry
- to pay land rates and land rent on the property

Indeed the 2nd Defendant was just being notified and had no control or input on the sale of the property. Nonetheless, the 2nd Defendant did not object but approved the sale on 11th August 1999. Therefore, the amount of Kshs.10.5 Million covered all the 1st Defendant debt including any other charges arising therefrom e.t.c. accordingly, as the 2nd Defendant was not a party to the sale agreement over the charged property, on approval and sale of the property his liability under the guarantee was fully discharged. The instrument of transfer was prepared by the Plaintiff as the chargee and the 2nd Defendant had no role in the transaction after the approval.

Issue No. 2: on demands for the sum of Kshs. 15,784,738.30

[20] The 2nd Defendant urged that no demands were made for Kshs. 15,784,738.30. Indeed the letters received (see page 9 and 10 of the Defendants bundle) demanded for:-

- O/D amount Kshs.236/- DR
- Loan account Kshs.2,438,146/- on 30th March 2000

And then demanded for:-

- O/D Kshs.243/-
- Loan Kshs.12,770,408.55/-

No explanation was offered by the Plaintiff for the disparity. How could the loan account shoot from Kshs. 2,438,146/- to Kshs. 12,770,408.55 in six (6) days?

Issue 3: Is the Plaintiff entitled to the relief sought?

[21] The 2nd Defendant submitted that the debt had been settled in full in terms of the Plaintiffs letter dated 5th August 1999.

Issue 4: costs for this suit

[22] The 2nd Defendant argued that the suit should be dismissed with costs to the 2nd Defendant. They cited the following case law:

1. **Hassan Zubeidi vs Patrick Mwagangi Kibanya and another [2014]eKLR** where F. Gikonyo J. held that:-

The court cannot deviate from the intention of the parties to a contact; the sacred duty of the court is to enforce and/or legitimize what parties have agreed between themselves. See the case of GATOBU M'IBUUTU KAROTHO v CHRISTOPHER MURITHI KUBAI [2014] eKLR where the court cited the decision of the court of appeal in NATIONAL BANK OF KENYA LTD v PIPEPLASTIC SAMKOLIT (K) LTD AND ANOTHER (2002) EA 503 where it stated:-

"**This, in our view, is a serious misdirection on the part of the Learned Judge. 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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause"**."

2. **Michael Njenga vs Rajmuk Investments Limited & 4 Others [2014] eKLR** where Kimondo J. held:-

"Parties are bound by commercial agreements and must keep their part of the bargain. It is not the true province of the courts to rewrite contracts for parties. See Morris & Company vs Kenya Commercial Bank [2003] 2 EA 605 and National Bank of Kenya Limited vs Pipeplastic Samkolit and another [2001] KLR 112. See also Balbir Singh Sadhu and another vs Rose Detho and others Nairobi, High Court case 259 of 2003 [2012] eKLR Isaac Gathungu Wanjohi vs Samson Njoroge and another Nairobi, High court case 614 of 2010 [2013] eKLR, Prime Bank Limited vs Mulji Devraj & Brothers Limited and 2 others Nairobi, High Court case 318 of 2007 (unreported), Consolidated Bank of Kenya Limited vs Securicor Security Services Kenya Limited Nairobi, High Court case 594 of 2003 [2013] eKLR."

3. **Joseph Kanguchu Mwangi vs Old Mutual Life Assurance Co. ltd HCCC. No. 389 of 2004 (unreported)** Gikonyo J.

DETERMINATION

[23] Parties filed the following agreed issues for determination:-

a) Whether the purported guarantee has been duly discharged as against the 2nd Defendant.

b) Whether any demands were made by the plaintiff for the sum of Kshs. 15,784,738.30

c) Is the Plaintiff entitled to the reliefs sought?

d) Who pays the costs of this suit?

[24] This case presents unique circumstances. The Plaintiff lent money to the 1st Defendant. The debt was guaranteed by a personal guarantee of the 2nd Defendant. Subsequently, the 1st Defendant was placed under joint Receivers and Managers by the Plaintiff and Standard Bank Limited. The Plaintiff tried on several occasions to sell off the charged property in vain. But through a letter dated 5th August 1999, they wrote to the Receiver and Managers of the 1st Defendant informing them that:-

"We have therefore through our own contracts, identified an interested individual who has agreed to purchase the plot at the price of Kshs.10.5 million which would be just adequate to cover our outstanding including the legal advertising auctioneers costs e.t.c.

We now wish to conclude the sale by private treaty and are notifying you of our action so that should you wish to intervene and acquire the property at the price of Kshs.10.5 million you may do so. If we do not hear from you within the next 24 hours we will assume that you have

no objection to our action or interest in acquiring the plot and will proceed ahead on that basis.

By a copy of this letter to Mr. R. Vyas of Plant Industries Limited we are notifying him of the action we are taking as we have been unable to contact him on telephone."

[25] The 2nd Defendant was notified of the intended course of action and on 11th August 1999 the 2nd Defendant wrote to the Plaintiffs Managing Director as follows:-

"We refer to our conversation of this morning and confirm that you are hereby authorized to sell the above plot at the price of Kshs.10.5 million and credit the proceeds of the sale to our loan account with you."

[26] There is a part of the letter dated 5/8/199 which is interesting but no evidence was led on the said portion. Nonetheless, see the underlined portion of the letter:-

If we do not hear from you within the next 24 hours <u>we will assume that you have no objection to our</u> action or <u>interest in acquiring the plot</u> and will proceed ahead on that basis.

[27] That notwithstanding, the major question is whether the guarantee was discharged. Invariably, under this issue, the court will determine whether the plaintiff is entitled to relief against the 2nd Defendant. A guarantee is separate from the lender's contract with the borrower. Except, however, the liability of the guarantor arises out of the default of the borrower to pay the debt. But, there is a spin to the facts of this case. There were Receivers and Managers appointed by the Plaintiff on the 1st Defendant at the time the charged property was sold. In such scenario, the Receivers and Managers are under a legal duty to guarantor of the company and ensure that the assets of the company are realized with optimum benefit to the company's indebtedness, so that the Guarantor will only pay the deficiency of the assets of the company in repaying the debt. See the decision on **Kaplana Shashikant Jai & another Versus Eco Bank Kenya Limited & Another [2015] eKLR** that**:-**

''On this see *Kerr, on the law and practice to Receivers, sixteenth Edition.* Therefore, other than the fact that powers of the company are delegated to the receiver, the status of the company in a receivership appointed outside court is not disfigured in the manner suggested by Dr. Kamau Kuria. The company will continue to operate under the receiver and cooperation of the directors on all matters which are necessary during the receivership. The receiver acts in the best interest of the debenture holders as well as the company. Any guarantees given for the company's debts prior to or during the receivership are not invalidated by the receivership as they are properly within the purview of carrying on business, collecting assets and repaying of debts of the company. Except, however, the receiver owes a duty to any guarantor of the indebtedness of the company since the guarantor will be liable only to the extent of the deficiency of the company's assets.

[28] And, also in such situation, the Plaintiff is under a duty to exercise its statutory power of sale within the realization of the role and duty of and in concert with the Receivers and Managers. The cooperation of the directors of the company is also necessary. I do not therefore consider the following submissions that were made by the Plaintiff to be entirely defensible:-

The letter dated 5th August 1998 was written to the 1st Defendant's Receivers for the purpose of inviting a bid on redemption of the property as provided under Clause 6(b) of the Charge. The said letter was copied to the 2nd Defendant and the contents were not addressed to him. As at that point the 2nd Defendant had not become party to the transaction by dint of his Guarantee. The 2nd Defendant's confirmation or approval in his letter dated 11th August 199 was therefore superfluous and of no consequence.

[29] The 2nd Defendant was entitled to information on redemption of the debt by the Receivers and

Managers as well as by the Plaintiff. The crux of this case lies in the letter dated 5/8/1999 and whether the proceeds of sale were adequate to cover the entire debt and other charges/expenses? The decision on this question will determine whether the Plaintiff is entitled to relief sought against the 1st Defendant, and the 2nd Defendant based on the guarantee herein. As I have stated, where a company is under Receivers and Managers appointed under a debenture as is the case here, the guarantor will be liable only to the extent of the deficiency of the company's assets to repay the debt**.** The evidence before the court is that the charged property was bought for Kshs. 21,500,000/- on 30th December 1996. Nevertheless the 2nd Defendant conceded to the property being sold at much lower price of Kshs. 10,500,000/-. His explanations were that he relied on the letter dated 5/8/1999 which stated that…***the price of Kshs.10.5 million…would be just adequate to cover our outstanding including the legal advertising auctioneers costs e.t.c.*** He interpreted the letter to mean that the purchase price would cover the entire debt and so he will be discharged from the guarantee. The Plaintiff on the other hand seems to assign a meaning to the word…*just adequate* to mean that the proceeds of sale could not cover the entire debt. They also argued that under the charge and the law, the borrower was to pay rates and rents as well as legal costs. And that these charges were incurred after the sale of the property. That may be so but the Plaintiff cannot run away from its legal duties to the guarantor and the company. To the company; he must ensure that he has obtained best price available for the property. To the guarantor; he must ensure that the guarantor is liable to the extent only of any deficiency in the assets of the Company. The witness for the bank admitted that there was no valuation of the property before sale. That notwithstanding, the sale received approval from the 2nd Defendant and the property was sold at Kshs. 10,500,000. The conduct of the 2nd Defendant is not of a belligerent person who does not care about the repayment of the debt. He cooperated with the Receivers and Managers as well as the plaintiff to realize the security. Within this context, it will be arrogant and most insincere on the part of the Plaintiff to seek to assign a meaning to the words…just adequate…in their letter herein regardless of the context. They used very wide and general terms such as ***to cover our outstanding including the legal advertising auctioneers costs e.t.c.*** The letter was copied to the 2nd Defendant. I have already found that it was their duty to so copy the letter and the consent or objection of the guarantor was absolutely necessary. Of importance is that the 2nd Defendant was also a director of the company which was under receivership. I do not think it was unreasonable for the 2nd Defendant to have relied on the letter that the proceeds of the sale was adequate to cover the entire debt including legal expenses, advertising expenses, auctioneers costs and other related charges. The mortgagor must always indicate before and at the time of sale the actual sum due and for which he is exercising the statutory power of sale. And that duty does not dwindle because the guarantor is there or the mortgagor believes that the guarantor will pay whatever sums the mortgagor says the borrower owes. The liability of the guarantor arises from the true debt owed and indicated to owe. Therefore, the guarantor must be informed and be given the actual debt owing. The Plaintiff did not give the breakdown of the figure of Kshs. 10,500,000 with details of the principal debt and the respective charges it stated in the letter would be adequately covered by the said sum. This is a duty they owed to the company and the guarantor but they failed to discharge it. It is, therefore, reasonable to take that the said sum represented the entire debt and all the other charges payable under the charge. If there was any deficiency in the repayment of the debt after the sale, the guarantor ought to have been notified before the sale by the Receivers and Managers and the Plaintiff. The policy behind this approach of law is twofold; on one hand, safeguarding the equity of redemption as by the exercise of the mortgagor's statutory power of sale, equity of redemption is forever foreclosed; and on the other, to guard against unscrupulous mortgagor who may contrive ways to make the guarantor pay whatever sum, real or imagined, that the mortgagor sets. The moment guarantors will be treated as if they have no rights, the law will bleed with trepidation; we will have converted the institution of mortgage into channels of undoing all persons who cross the path of the mortgagor.

[30] The Plaintiff made representations in writing to the 2nd Defendant that the sum of Kshs. 10,500,000 would be adequate to cover the entire debt. The 2nd Defendant relied upon the said representation contained in the letter dated 5/8/1999 and accepted the sale of the property at a much lower price in order to have the company debt cleared. And once the company debt is paid in full, invariably the guarantor is discharged from his obligations. The plaintiff deserves to be stopped from claiming any money from the 2nd Defendant. I note also that the sums demanded do not match what has been claimed in the plaint. The Plaintiff admitted the discrepancies and offered some explanations which are not plausible. What about

the arguments that the loan continued to attract interest until the proceeds were credited into the loan account?

[31] The Plaintiff was exercising its power of sale and was in total control of the entire transaction. The control of the company was under the receivers who owed the guarantor a duty to act diligently and realize optimum realization of the company assets so as to let the guarantor pay the deficiency of the assets in repayment of the debt. The plaintiff handled the matter in a casual manner and did not exercise their powers diligently and early enough to save accrual of unjustified interest. The sale was controlled by the Plaintiff and crediting of the sum realized was entirely in their hands. The Plaintiff did not produce any sufficient evidence to show that the 2nd Defendant was responsible for the delay in the completion of the sale. The fact that they decided to exercise their authority to transfer the property after one year is negligent enough to deny them any remedy. They did not show that the 2nd Defendant or the company prevented them from exercising their authority to sign the transfer of the property or credit the loan account with the proceeds in good time. Indeed, the company was under the control of the Receivers and Managers at the time and nothing was shown to suggest that the Plaintiff called upon them to pay rents and rates. The Receivers and Managers are not parties in the suit and have not been sued by the Plaintiff for negligence or breach of duty under the law and the instrument of appointment. In the circumstances of this case, the directors' powers were paralyzed and the Receivers and Managers were in full control. I must emphasize that once a Receiver is also Manager, he bears full responsibilities to transact for the company as its agent. They also owe a duty to the guarantor. The Plaintiff just sought their concurrence or otherwise to the sale and nothing more. Despite the fact that the charge provided that the company will pay the rates and rents, the chargor acted contrary to the representations contained in the letter dated 5/8/1999. The letter was written to the Receivers and Managers of the company and represented the entire debt payable by the company. Once approval was given by the company that the sale be done by private treat for a sum which covered all the outstanding debt and charges, the company cannot not be liable in these circumstances to pay interest which was deliberately made to accrue by sheer negligence of the chargor. The guarantor will also not be liable. This case brings me to the point where I should ask, and other judges have asked this before; Are Banks Kenyan or are just in Kenya?

[32] After careful analysis of the evidence and the law, I answer the issues framed as follows:-

Issue 1: Whether the purported guarantee has been duly discharged as against the 2nd Defendant.

[33] The proceeds of sale of the charged property were in full satisfaction of the entire debt of the company. After the sale and the sum of Kshs. 10,500,000 were paid to the Plaintiff, the debt was fully repaid. A guarantor is only liable for debts which the company owes.

Issue 2: Whether any demands were made by the plaintiff for the sum of Kshs. 15,784,738.30

[34] There were no demands for the sum of Kshs. 15,784,738.30 which were made by the plaintiff. The Plaintiff also admitted this fact.

Issue 3: Is the Plaintiff entitled to the reliefs sought?

[35] The Plaintiff is not entitled to the relief sought. The entire suit is dismissed.

[36] The upshot is that the Plaintiff has not proved its case on a balance of probabilities against the Defendants. And I dismiss the entire case against the Defendants with costs. It is so ordered. I can now answer issue 4.

Issue 4: Who pays the costs of this suit?

[37] Costs follow the event. The successful party is the 2nd Defendant. He is not guilty of any misconduct that would deny him costs. This is also not a matter on which costs may not be payable or does not attract costs. Costs are awarded to the 2nd Defendant and are payable by the Plaintiff.

Dated, signed and delivered in court at Nairobi this 8th day of July 2015.

F. GIKONYO

JUDGE