REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 2 OF 2003

ROBERT NJOKA MUTHARA.....….....….....1ST PLAINTIFF

EVANGELINE WANJIRA NJOKA.....2ND PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

EL-DIMA LIMITED.....……..2ND DEFENDANT

J U D G M E N T

The Plaintiffs in their amended plaint dated 3rd July 2007 prayed for the following orders.

i. ***A permanent injunction restraining the Defendants by themselves, their agents and/or servants from advertising and/or selling and/or transferring and/or interfering in any manner whatsoever with the following parcels of land.***

EVURORE/EVURORE/1332, NGANDORI/KIRIGI/3408,

NGANDORI/ KIRIGI/3409,NGANDORI/KIRIGI/3408,

NGANDORI/KIRIGI/3410,NGANDORI/KIRIGI/3411,

NGANDORI/KIRIGI/3577,NGANDORI/KIRIGI/4149,

NGANDORI/KIRIGI/4150, NGANDORI/KIRIGI/4151,

NGANDORI/KIRIGI/4159, NGANDORI/KIRIGI/4160,

NGANDORI/KIRIGI/4161,NGANDORI/KIRIGI/4162,

NGANDORI/KIRIGI/4163, NGANDORI/KIRIGI/4164,

NGANDORI/KIRIGI/4165,NGANDORI/KIRIGI/4004,

NGANDORI/KIRIGI/6044, NGANDORI/KIRIGI/6045,

GATURI/NEMBURE/6045, GATURI, NEMBURE/3831,

EMBU/TOWNSHIP/114, and EMBU/TOWNSHIP/328 and

NGANDORI/KIRIGI/4005 situated in Embu District.

ii. ***An order that the 1st the 1st Defendant do discharge***

EVURORE/EVURORE/1332, NGANDORI/KIRIGI/3408,

NGANDORI/ KIRIGI/3409,NGANDORI/KIRIGI/3408,

NGANDORI/KIRIGI/3410,NGANDORI/KIRIGI/3411,

NGANDORI/KIRIGI/3577, NGANDORI/ KIRIGI/4149,

NGANDORI/KIRIGI/4150, NGANDORI/KIRIGI/4151,

NGANDORI/KIRIGI/4159, NGANDORI/KIRIGI/4160,

NGANDORI/KIRIGI/4161,NGANDORI/KIRIGI/4162,

NGANDORI/KIRIGI/4163, NGANDORI/KIRIGI/4164,

NGANDORI/KIRIGI/4165,NGANDORI/KIRIGI/4004,

NGANDORI/KIRIGI/6044, NGANDORI/KIRIGI/6045,

GATURI/NEMBURE/6045, GATURI, NEMBURE/3831,

EMBU/TOWNSHIP/114, and EMBU/TWONSHIP/328 and

NGANDORI/KIRIGI/4005 situated in Embu District and release the Titles thereof to the Plaintiffs.

iii. ***An order that the 1st Defendant do discharge L.R. No. EMBU/TOWNSHIP/328 and do release the certificate of lease thereof to the 1st Plaintiff.***
iv. ***An order for taking of accounts.***
v. ***Costs and interest at court rates.***

They have pleaded that the charges and guarantees in respect of the said above properties were defective as not all the directors of NJOKA TANNERS LTD had executed them. Secondly that no consents were obtained from the Land Control Board. They further pleaded that double the amount borrowed had been paid but the 1st Defendant had failed to give statements of accounts.

In their joint statement of defence dated 1st August 2007 the defendants denied all the plaintiffs' claims. Its their case that it was the plaintiffs' duty to obtain the requisite land consents for the charged properties. Any omission should not be used as a relief by the plaintiffs. The 1st defendant states that the plaintiffs represented themselves as the only directors of the said company.

A reply to the defence dated 8th August 2007 was filed by the plaintiffs on 9th August 2007. When the matter came up for hearing the 1st plaintiff adopted his witness statement dated 16/12/2011 and filed on 13/1/2012. In it he has explained his transactions with the 1st defendant. Upon cross-examination and re-examination the 1st plaintiff's position was that they had fully repaid the the loan of Shs. 9 million.

Secondly they were never shown the charged documents. Thirdly no consents were obtained from the Land Control Board in respect of the charged properties. Infact he said the consents produced in Court were not genuine. Finally they were never issued with account statements inspite of asking for them.

The defendants called one witness Mr. Ken Kiura (PW1) who is a Manager, Corporate Recoveries. He too adopted his witness statement dated 22nd May 2012 and filed on 23rd May 2012. It is his evidence that NJOKA TANNERS LTD were loaned Shs.9 million which they did not repay as agreed. And that as at 2/3/1999 the outstanding balance was Shs.16,168,327/60. He also admitted an error by the bank whereby the 1st plaintiff's account and Njoka Tanners account were consolidated. He however said this error was amended and reversed. He further stated that the outstanding amount was Shs.101,989,012.50.

Under cross-examination he said the Bank only instructed an auctioneer to scout for buyers but not to sell the property of the Plaintiffs. He further confirmed that the Bank was unable to get the plaintiffs' statement for May 1998 – 1/3/1999, as statements are destroyed after six (6) years. His stand was that statements of account used to be supplied to the 1st plaintiff. Their prayer was that they be allowed to execute.

Mr. Mureithi and Mr. Mbaluto for the plaintiffs and defendant respectively both agreed to file written submissions which they did. Mr. Mureithi has submitted on the following points.

i. That the transaction between the plaintiffs, Njoka Tanners and the 1st defendant was void abinitio as the relevant charges were not registered and that no consents were obtained from the Land Control Board. He cited the cases of

- ***SHAKESPERE INVESTMENT & ANOTHER VS PAUL KIPSANG KOSKEI [2006] eKLR***
- ***RE ESTATE OF JOSEPH GITONGA MIGWI (DECEASED [2008] eKLR***
- ***KISUMU HCCA NO. 20/2002 WASHINGTON OTIENO OGINALO VS THE CO-OPERATIVE BANK OF KENYA (U/R)***

ii. The 1st defendant's purported exercise of statutory power of sale was premature as no statutory notices had been issued and/or served. Ref: ***OFFICE EQUIPMENT SERVICE LTD. VS CO-OPERATIVE BANK OF KENYA [2005] eKLR***
iii. The 1st defendant failed to produce statements of account for the period May 1998 – 1st March 1999.
iv. The arbitrary increase of interest without notification to the plaintiffs was unlawful.
v. The consents produced by the 1st defendant in their supplementary list and bundle of documents dated 29/5/2013 were all not relevant to this suit.

Mr. Mbaluto for the defendants in his submissions raised the following points.

I. The plaintiffs on 3/1/2007 signed a deed of guarantee and indemnity. This deed had salient terms which included

(a) payment by guarantor on demand

(b) continuing security and termination notice

(c) set off and lien. And that this deed was binding on the plaintiffs. Failure by all directors to sign the said deed was not fatal. He referred to the TURQUAND'S case as adopted in ***MARJORIA VS KENYA BATTERIES [1981] LTD & OTHERS [2002] 2 EA 479.***

II. He submitted that the 1st defendant had satisfactorily produced land control consents in respect of all the charged lands save two which fell within Embu township.

He referred to Section 2 of the Land Control Act for that purpose. Mr. Mbaluto also submitted that the guarantee and the charges constitute continuing securities. He referred to the letter of offer dated 27th

May 1998 and Deed of Guarantee.

III. That the plaintiffs failed to prove their allegations of fraud against the defendants. Ref: ***URMILA W/O MAHENDRA SHAH VS BARCLAYS BNK INTERNATIONAL LTD & ANOTHER [1979] KLR 76.*** He further stated that what the 1st defendant did was to scout for potential buyers before commencing the sale process and not placing for sale the plaintiffs property.

IV. That the plaintiffs did admit being indebted to the 1st defendant in the sum of Shs.16,587,091/= and could therefore not restrain the 1st defendant from exercising its power of sale. Further it is never a ground for issuance of an injunction when there is a dispute as to the accounts. Ref: ***PELICAN INVESTMENT LTD VS NATIONAL BANK OF KENYA [2000] 2 EA 488*** and ***MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 126.***

V. On interest he said there was indication in the letter of offer that the interest to be charged on the facility was 4% above the Bank's base rate as published by the bank from time to time. And that infact the 1st defendant charged 3% interest.

He referred to the case of ***MRAO LTD (supra)***; ***MORRIS & CO. LTD VS KCB LTD & OTHERS [2003] 2 EA 600, MORJORIA VS KENYA BATTERIES (1981) LTD & OTHERS [2002] 2 EA 479.*** And that the application of the **induplum** principle would see the 1st defendant recover shs.73,000,000/= out of the pending amount.

VI. That failure to enjoin Njoka Tanners Ltd as a party was fatal to the suit. Ref:

- ***SALOMON VS SALOMON & CO. [1897] AC 22 HL.***
- ***CANELAND LTD & ANOTHER [1999] 1 EA 29***
- ***MSA HCC NO. 320/2003***

VII. He asked for dismissal of the suit with costs.

The above is a summary of the evidence of the parties herein plus the submissions by both counsels. The undisputed facts of this case are as follows:-

- The plaintiffs are two out of three directors of Njoka Tanners Ltd. They are also the majority shareholders of the said company as they own over 66% of the shares in the said company.
- Njoka Tanners Ltd applied for and were offered an overdraft facility of Kshs.9,000,000/= vide a letter of offer dated 27th May 1998.
- The Plaintiffs have requested for statements of account for the period May 1998 – February 1999 but the same have not been supplied. They have however been supplied with accounts from 1/3/1999.
- There were no Land Board consents specifically registered in respect of this transaction.
- Njoka Tanners Ltd had previously received loans from the 1st defendant prior to receipt of the Shs. 9 million.
- The 1st plaintiff had a personal loan with the 1st defendant.

The issues that then emerge for determination are the following:-

i. ***On what terms and conditions was the overdraft of Kshs.9 million granted to Njoka Tanners Ltd by the 1st defendant?***
ii. ***On what terms was the interest to be computed?***
iii. ***On what terms did the plaintiffs bind themselves as guarantors of the company's liability to the 1st defendant?***
iv. ***Whether the 1st plaintiff's personal account was closed and funds therein credited to the NTL loan account?***
v. ***Whether the money borrowed under the said transaction had been fully repaid?***
vi. ***To what reliefs are the parties entitled?***

The first question to be answered is whether Njoka Tanners Ltd has repaid the money borrowed by the

offer of 27/5/1998. Its the plaintiffs contention that they have repaid the money while the 1st defendant states otherwise.

There is no dispute that Shs.9,000,000/= was lent to Njoka Tanners Ltd. The said Njoka Tanners Ltd is not the complainant/plaintiff herein. Could the plaintiffs sue on behalf of a limited company?

The law is that a limited liability company is a distinct legal entity separate from its members. In the case of ***SALOMON VS SALOMON & CO [1897] AC 22 HL*** it was held

> ***"The company is at law a different person altogether from the subscribee... and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them".***

The Plaintiffs have in paragraph 3 of the amended plaint described themselves as some of the directors and shareholders in Njoka Tanners Ltd. It is nowhere indicated that they were suing on behalf of Njoka Tanners Ltd. It is Njoka Tanners Ltd which borrowed this money. They cannot therefore be said to be Njoka Tanners Ltd and they cannot come to Court to seek reliefs on behalf of Njoka Tanners Ltd. In ***MOMBASA HCCC NO.320/03 DALGIT SINGH THEEMAR & OTHERS –VS- SURJIT SINGH SAGOO (UR)*** it was held;

> ***"Only parties to a suit can complain and get relief when one or the other tries to "steal a match." strangers cannot".***

It follows that Njoka Tanners Ltd not being a party to this suit cannot seek any relief. The money complained of was loaned to Njoka Tanners Ltd and not the Plaintiffs. The plaintiffs were guarantors to the said overdraft. According to the letter of offer dated 27/5/1998 Njoka Tanners Ltd were given an overdraft facility and not a loan. The terms and conditions are set out in the said letter viz;

i. **PURPOSE OF THE FACILITY**

To provide working capital and finance debtors

ii. **REPAYMENT**

Marked facility shall be serviced from export and local sales of hides, skins, leather and factory by-products.

iii. **AVAILABILITY OF THE FACILITY**

(a) The facility has already been drawn.

(b) The facility will be reviewed on 20/5/1999. Whilst we intend that the facility should remain available to you until that date, we nevertheless reserve the right to terminate the facility at any time by notice to you in writing. On termination, all amounts then outstanding under the facility, will be immediately due and payable without further notice on demand.

(c) The availability of the facility is, at all times, subject to your compliance in such manner as we think fit, with any restrictions, rules and regulations of the Central Bank of Kenya or other relevant government authority from time to time in force.

iv. **INTEREST**

Interest to be charged on overdraft at 4% above the banks base rate as published by the bank from time to time, calculated on daily basis and payable monthly in arrears.

v. **COMMISSIONS,NEGOTIATION FEE ETC**

We have already debited your account with 1% of the overdraft and loan facilities being negotiation fee. All other usual charges and fees will be debited to your account. A 1% penalty fees will be charged on monthly basis on any excess over and above the marked limit.

vi. **SECURITY**

It is a term of the facility that we retain the undermentioned security as continuing security for all moneys, obligations and liabilities, actual or contingent, now or hereafter due, owing or incurred by you to us.

1. Gurantee by directors kshs.25 million dated 3/1/97 held

   LM over residential property Evurori/Evurori/1332 RSC Khs. 1,200,000 1,200,000

2. a) LM over industrial properties Ngandori/Kirigi/3408, 3411, 35

   Professional valued kshs.8,700,000/= = (26/10/1996) 5,220,000

   b) Fire Policy C&R covering buildings and stocks in trade on above properties kshs.38.5 million paid upto 9/9/1998 covering buildings, machinery, tanning chemicals and equipment

   (c) Burglary police for kshs.1,068,000= covering stocks in trade chemicalsand fittings on plot No. Ngandori/Kirigi/3408 Exp.9/9/1998

3. LM over commercial cum residential property Embu/Township/114

   RSC KSHS.2.5 MILLION 2,500,000=

   Professional valuation ksh.4. million (22/10/96)

   Fire Policy C&R covering building on the above property kshs.3m paid Upto 9/9/1998

4. LM over plots Ngandori/Kirigi/4159, 4160, 4162, 4163, 4164 & 4165 all RS KSHS.3.85M professional valuation kshs.5.5M (22/10/96) 3,850,000=

5. LM over property Gaturi/Nembure/6044 & 6045 both RS 300,000

   (27/7/93) 300,000=

6. LM over property No.Gaturi/Nembure/3831 RSC 200,00 (26/7/96) 200,000=
7. Floating debenture over machinery RSC Khs.18M
8. LM over Ngandori/Kirigi/4004 RSC 550K FSV 550,000/= 550,000=
9. Lm OVER Ngandori/Kirigi/4005 RSC Kshs.360,000/=

   FSV 360,000 360,000=

10. LM over Ngandori/Kirigi/3409 & 3410 RSC 2,280,000= 2,280,000= 2,280,000=

11. LM over Ngandori/Kirigi/4149-51 RSC Kshs.300,000= 300,000=

CONNECTED ACCOUNTS

ROBERT NJOKA MUTHARA

12. LM over Embu/Township/328 RSC Khs.2,700,000

    Valuation khs.3.8M (5/3/1996) 2,700,000=

    Fire Policy Covering building on above plot kshs.35m exp.7.6.98 19,460,000=

COVENANTS & SPECIAL CONDITIONS

1. Audited accounts to be available within 3 months after the accounting period.
2. No excesses allowed without prior arrangements
3. Quarterly management to be proved by 15th after quarter ending.
4. Debtors/creditors position to be provided on monthly basis not later than 10th of the following month.
5. Account should fluctuate to credit at least once a month thus breaking hardcore
6. Debenture figures to be provided on monthly basis at last by 10th of the following month

The above are I think the terms and conditions of the dispute between these parties. These terms and conditions clearly answer the 1st and 2nd issue. The securities mentioned were to be retained as ***continuing securities*** for all moneys etc. The securities had been previously held by the bank and they were to be retained not as fresh charges to be registered but as continuing security. The argument that the charges were null and void because they were not registered and that there were no Land Board consents obtained is therefore not correct in the circumstances of this case. The charges and consents of the previous transactions were still continuing. The same goes for issue NO.(iii). By a guarantee and indemnity deed signed on 3rd January 1997 the Plaintiffs herein guaranteed a loan of kshs.25 Million to Njoka Tanners Ltd. The deed was signed by both Plaintiffs only. They have enjoyed banking facilities under this deed. Now that they have a dispute on the repayment of the overdraft which is the subject of this suit they cannot turn round and claim that the same documents were not executed by all the Directors of Njoka Tanners Ltd. They have all along carried themselves out as the Directors of Njoka Tanners Ltd and they shall be so held Ref: ***Turquand's*** case as applied in ***MARJORIA -V- KENYA KENYA BATTERIES (1981) LTD & OTHERS [2002] E.A. 479.*** And this deed was part of the security retained as per the offer for the overdraft dated 27/5/1998. It's all in the terms and conditions of offer. As was the case of ***NATIONAL GRINDLAYS BANK LTD –VS- PATEL & OTHERS [1969] E.A. 403*** the Bank was found to be at liberty without affecting its rights under the guarantee to vary the amounts of credit. There had been consent to this. In the present case the consent is found in the terms and conditions of offer. ***"The guarantee deed limits the guarantors liability to 25 million to which shall be added all interest, fees commission costs charges and expenses referred to in clause 1 (b) of the said guarantee deed".***

Does this mean that the guarantors' liability was limited to shs.25 million? The answer is **NO.** A reading of Part III alongside clause 1a & b of the guarantee deed confirms that the liability of the guarantors is not limited to kshs.25 million and it's not unlimited either. It would all depend on the principal sum, interests plus all other charges and costs.

In my view the bank (1st Defendant) had a duty to explain to the guarantors how these figures were arrived at especially the interests and other charges. The Plaintiffs did not seem to have a serious problem with the outstanding sum as at 1/3/1999. I say so because they continued repaying the loan upto September 2002. This is further confirmed by paragraph 6 of the amended plaint which states;

"The said Njoka Tanners Ltd continued to repay the loan to the 1st Defendant and sometimes

> ***in 1998 the loan repayment fell into arrears after the company's books of accounts and or documents were unlawfully confiscated by KRA and after its goods were unlawfully released to a customer in Italy without repayment and the 1st and 2nd Plaintiffs approached the 1st Defendant wherein an agreement was arrived at as to the mode of repayment of the loan which currently stands at shs.16,587,091/=".***

It is therefore correct to say that as at the time the Plaintiffs filed this case it was very clear in their minds that they had an arrears of shs.16.5 million. They had even agreed with the bank on the mode of repayment. It is therefore not true as the 1st Plaintiff told the Court that they had cleared payment of this debt.

DW1 admitted that an error had been made when the 1st Plaintiff's account and Njoka Tanners Ltd loan account were consolidated. The same was amended vide a reversal of shs.7,570,000/=, shs.1,305,006/= and shs.254,317/25. This is clearly noted on the statement of account at page 116 of the Defendant's bundles. There is a credit and debit of these amounts on 4/3/1999. Issue No.(IV) is therefore answered.

Issue (V)

It was admitted that 1st Defendant used to supply the Plaintiffs with account statements. They do not deny having been supplied with the statements they now demand for. A problem only arose when the books of Njoka Tanners Ltd were seized by Kenya Revenue Authority and have never been released to date. The 1st Plaintiff testified that even as at 1/3/1999 they had paid over double what they had received. Surprisingly they continued repaying the debt upto 26/8/2002 when the last payment of shs.22,000/= was made. Besides his word of mouth there is no evidence he produced before this Court to show that he had indeed cleared payment. The ***"Interest column***" on the account statement shows that the principal sum was attracting huge sums of interest. It is therefore clear that the money borrowed under the said transaction has not been fully repaid.

The 1st Plaintiff at paragraph 8 of the amended plaint pleaded as follows;

> ***"On or about 17th December 2002 the Plaintiffs' learnt that the 1st Defendant has wrongly and unlawfully and fraudulently instructed the 2nd Defendant to secretly sell the Plaintiffs' said properties without serving the Plaintiff with the Statutory Notice as is required under section 74 of the Registered Land Act Cap.300 Laws of Kenya".***

He went ahead to state the particulars. Again here, besides the 1st Plaintiff's word of mouth there was no evidence adduced showing that indeed the 1st Defendant instructed the 2nd Defendant to sell his properties. The 1st Defendant in his bundle of documents at page 108-109 availed a copy of the letter to the 2nd Defendant dated 5/8/2002 by the firm of Kapila Anjamwalla and Khanna Advocates. This letter did not ask the 2nd Defendant to sell the Plaintiffs' properties. The 2nd Defendant was to identify potential buyers before further instructions were given. The Bank refers to this process as ***"Scouting for buyers".*** This never went beyond the identity of potential buyers. The tenant who gave this information to the 1st Plaintiff was not called to tell this Court what he was exactly told by the 2nd Defendant, and if they entered into any sale arrangement. Therefore until proved these remained mere allegations which were not proved to the standards required by the law. ***REF; URMILA W/O MDHEDRA SHAH –VS- BARCLAYS BANK INTERNATIONAL LTD & ANOTHER [1979]KLR 76*** where the Court of Appeal stated;

> ***"Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required".***

I do find that the allegations of fraud by the Plaintiffs have not been proved. However the notices of sale issued after this suit had been filed and injunctive orders issued shall be of no effect.

The Plaintiffs also pleaded that the 1st Defendant charged exorbitant interest. The letter of offer stipulated the interest chargeable i.e. 4% above the bank's base rate. This one is also clear. What may not have been clear would be the bank's base rate. The calculation would however be on a daily basis and payable monthly in arrears. The issue of interest was in one of the terms and conditions of the transaction. The Plaintiffs cannot turn round and say they should not have been charged interest. The lending institutions are in business and they thrive on interest. The interest has to be paid as it was a contractual obligation. Ref:

1. ***OMRAO LTD –V- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 126***
2. ***MORRIS & CO. LTD –V- KENYA COMMERCIAL BANK LTD & OTHERS [2003]2 E.A. 600***
3. ***MORJORIA –V- KENYA BATTERIES [1981] LTD & OTHERS [2002]2 E.A. 479.***

The induplum principle will apply as from its effective date and the Bank is clearly aware of that. The law operates retrospectively. The principle may therefore not cover the whole period of the overdraft, as submitted by the plaintiffs.

From the Plaintiffs' amended plaint they are seeking a discharge by the 1st Defendant of the several parcels of land stated. They also seek an injunction against the Defendants restraining them and/or their servants from any dealing with the said land. It has been shown that indeed these parcels of land are a continuing security for moneys lent to Njoka Tanners Ltd. It has not been shown that the amounts owing have been fully repaid. A permanent injunction cannot therefore issue restraining the Defendants from selling, transferring and/or advertising as this would in effect be stopping the 1st Defendant from exercising its statutory power of sale for money that is due to them. In the case of ***PELICAN INVESTMENT LTD –V- NATIONAL BANK [2000]2 E.A. 488*** the Court held;

> ***"A Court should not grant an injunction restraining a mortgagee whose power of sale has arisen from exercising his power solely on the ground that there is a dispute to the amount due under the mortgage".***

Further in ***MORRIS & CO. LTD VS KCB LTD OTHERS [203]2 EA 600*** the Court stated;

> ***"It is true that the 1st Defendant has not shown precisely how the amount of Shs.523,389,559/= demanded is calculated. No statements have been annexed to the affidavits. And it is also possible true that the bulk thereof comprises of interest. However despite Mr. Regeru's contention that no debt is admitted, the Plaintiff's own pleading in paragraph 13, 15, and 18 admits a debt of KShs.250 million to the first Defendant…….. The Law is well settled that a dispute as to the amount due cannot be a ground for an injunction to restrain a mortgagee from exercising its Statutory power of sale".***

Prayer (a) and (b) are therefore not available to the Plaintiffs. Prayer (c) is seeking an order for taking of accounts.

The 1st Defendant admitted having made errors in closing the 1st Plaintiff's account and crediting the sums to Njoka Tanners Ltd's loan account. It showed the Court the reversal orders, but there was nothing to show that indeed the money amounting to shs.9,129,323.25 was credited back to the 1st Plaintiff's account. The 1st Defendant is directed to comply with that if the same was never done. And if it was never done there shall be interest on that amount from 4/3/1999 to date at Court rates.

A look at the Account statement shows that the last time the Plaintiffs paid any money to the 1st Defendant was on 26/8/02. Thereafter what the 1st Defendant has continued to charge is interest only. In my view this loan became non-performing many years ago and the interests charged from the time when the induplum principle became operational under **Section 44A of the Banking Act (Cap.488) Laws of Kenya** are unjustified. The 1st Defendant will have to apply the induplum principle as is expected under the Banking Act. There is therefore still room for the parties herein to sit down together and agree on the

issue of interest.

Save for the Order made concerning the 1st Plaintiff's account, I find the Plaintiffs' suit not proved. I dismiss it with costs.

Right of appeal explained.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF MARCH 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Mureithi for Plaintiffs

Mr. Mugo for Mr. Mbaluto for Defendants

Njue – C/c