



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**Civil Suit 28 of 2007**

**ALI EL BUSAIDY... ..PLAINTIFF**  
**VERSUS**  
**KENYA COMMERCIAL BANK .....DEFENDANT**

**JUDGMENT**

The suit was filed by Harith Ali El Busaidy (plaintiff) against Kenya Commercial Bank (defendant) (referred to herein as KCB). The plaintiff died before the matter was heard and was substituted with his widow Amina Mohammed Harith.

The plaintiff's claim is that the deceased was the registered proprietor of Title No. LR 2645 at Malindi as lessee from the Government of Kenya for a term of 99 years from 1<sup>st</sup> November 1975, on which stands a storey building known as Cleopatra Theatre.

By a letter of offer, the defendant offered to Cleopatra Theatre Ltd, overdraft and loan facilities of Kshs. 250,000/- under the following conditions.

- (a) Registration of a debenture for Ksh. 900,000/- over the entire assets of the company.
- (b) Registration of legal charge for Kshs. 900,000/- over LR No. 2645 Malindi
- (c) Execution of Kshs. 500,000/- guarantees each by the directors
- (d) Furnishing to the defendant a Board of Directors resolution authorizing the borrowing.

The said letter of offer also contained the following special condition precedent.

*“No draw down of these facilities will be permitted, until all securities documentation has been finalized and registered and the duplicate copy of this letter of acceptance has been signed and returned to the bank. ..(a) Failure to accept the terms of this letter of offer or to draw down the facilities by the dates stated will constitute automatic cancellation of the facilities offered.”*

The said Cleopatra Theatre Ltd has never caused to be signed the letter of offer in acceptance or observed or performed the terms and conditions contained therein and the deceased was therefore not legally obliged to effect the legal change over his property. Alternatively there was a total failure of consideration upon which the deceased could change his property. Further in the alternative, that no charge has ever been created over and registered against the deceased's property since the date of the said letter of offer.

The plaintiff in the alternative and without prejudice to the foregoing, will contend that if any facilities were ever availed to Cleopatra Theatre Ltd, the same should under the facts and the circumstances of the case, be treated as money had and received and ought to be recovered from Cleopatra Theatre Ltd as such subject to the Limitation of Actions Act.

Against this background, the defendant has taken steps through Messers A. A. Shariff Ahmed Auctioneer to wrongfully exercise its purported power of sale under the unlawful purported charge.

That if this court will find the charge to be lawful, then it is the plaintiff's contention that the interest and other charges raised by the defendant are not lawful as the same are oppressive, exorbitant, harsh, unconscionable and without basis.

Plaintiff seeks a declaration against the defendant, that the charge registered against the subject property is not valid and lawful and for an order directing the defendant to execute a discharge of charge and deliver the same to the plaintiffs together with the title document and in default, the said execution be effected by the Deputy Registrar of this court. The plaintiff also seeks for a permanent injunction to restrain the defendant either by itself, its servants and/or agents from selling, disposing of, offering or advertising for sale, alienating or however dealing with LR 2645 Malindi in any manner adverse to the plaintiff's interest.

Also sought are general damages for maintaining a wrongful charge against the subject property.

A declaration as an alternative and without prejudice to the other prayers that the interest and charges levied by the defendant are not only unjustified and unlawful, but are oppressive, exorbitant, harsh, unconscionable and without basis and therefore unpayable.

The defendant admits that deceased was the registered proprietor of the leasehold interest in the parcel of land known as LR No. 2645 Malindi. A letter of offer issued and executed by the borrower and or by he deceased as guarantor.

The defendant states that in or about December 1985, the deceased executed a charge over the suit property in favour of The defendant, to secure banking facilities, loan and/or advances to Cleopatra Theatre Ltd in the sum of Kshs. 900,000/-

The defendant states that, the said charge provided inter alia, that:

- (a) The charge shall constitute a continuity security to the defendant notwithstanding any settlement of account or other matter.
- (b) The defendant shall have full power to charge different rates of interest for different amounts and that the defendant shall not be required to advise the deceased prior to any charge in the rate of interest payable.

The defendant states that in executing the aforesaid charge document, the deceased confirmed having understood the provisions of section 69(1) of the Transfer of Property Act 1882 of India as incorporated by the Indian Transfer of Property Act 1959. It is pleaded that the said provision preserves the defendant's statutory power of sale in respect of the charged property.

The defendant insists that a charge was duly created and executed by the deceased over the suit property in favour of the defendant and registered against the title at the Mombasa Lands Registry as No. C. R. 15334/6. It is he defendant's contention that the outstanding debt Kshs. 4275, 908.50 as at 1<sup>st</sup> August 2003 against the plaintiff remains secured by the charge over the suit property.

Defendant confirms having instructed M/s Shariff Ahir Ahmed, Auctioneer to sell the suit property by public auction on 5<sup>th</sup> February 2000 – but the bids received at the auction were below the reserve price. It is the defendant's further contention, that the interest and other charges raised by the defendant are lawful and grounded on the letter of offer, charge document, and other security documents executed by the deceased. It is also pointed out that by offering the suit property as security for banking facilities, the said property became a commodity for sale and the charge created by the deceased over the suit property in favour of the defendant remains lawful and valid and plaintiff is not entitled to the prayers and remedies sought.

The defendant now pleads that as at 31<sup>st</sup> May 2006, the deceased was indebted to the defendant in the sum of Kshs, 11,789,390.45 for which the defendant has filed a counterclaim together with accrued interest at bank rates.

In the counterclaim, the defendant avers that the deceased made part payment in relation to the outstanding amount and by a letter dated 1<sup>st</sup> December 1999, the deceased clearly stated that "he serviced the loan and by the end of 1996, the balance was around Ksh. 253,000/-." In that letter, the deceased acknowledged in writing to owing the defendant money in relation to the loan account and even proposed to settle the outstanding amount in installments of Ksh. 50,000. It is the defendant's contention that the deceased's action of making payment of the debt outstanding, then the cause of action accrued afresh as at the date of the acknowledgement and/or part payment.

Defendant prays that the plaintiff's claim be dismissed and judgment be entered in its favour as sought in the counterclaim.

At the hearing, Amina Mohammed (PW1) testified that she and her late husband were the directors of Cleopatra Co. Ltd and they had an account with Kenya Commercial Bank. She confirms that they obtained a loan in 1980, so as to carry out construction. They deposited the title deed of plot no. 2645 as security (the plot was registered in the name of deceased). A copy of the Grant in respect of that plot was placed as exhibit 1 – and entry no. 6 showed that on 10-1-86, the same was charged to KCB. A copy of the charge (which was entered as entry No. 6 in exhibit 1) was produced as exhibit 2. The couple gave a guarantee and indemnity individually (produced as exhibit 3A and B showing them as personal guarantors). It was PW1's testimony that the loan was repaid in full. She told the court that by a letter dated 24-11-93, the bank offered her deceased husband another facility, but she objected to the offer. This one was accompanied by a personal guarantor – one being deceased's and the other one was PW1. The couple declined to sign the personal guarantees PW1 explained that, the letter requested that if they accepted the offer, then they should sign the personal guarantees and send them back to the bank – the letter was produced as Ex 4A and the guarantees s Ex 4B and 4C.

It is PW1's contention that no contract arose therefrom between KCB and themselves she insists that Cleopatra did not draw any money from the bank, as a consequence of that offer.

She explained that before her husband's demise, he filed this suit demanding for return of their title and discharge thereto and she prays that judgment be entered in their favour.

Evans Mwamuye (DW1) the KCB lending officer at Malindi confirmed that Cleopatra Theatre applied for a loan facility and the same was secured by way of a charge and they obtained the loan. The charge was registered in relation to plot no. 2645 and the one produced as Ex.1.

Further that pursuant to the charge document, the directors of Cleopatra gave personal guarantees which they executed (being Ex 3A and 3B). However it is his testimony that Cleopatra has not fully paid the debt advanced.

It is confirmed that the sum advanced was Kshs. 900,000/- but that the bank had no obligation to consult the guarantors before revising the rate of interest. He told this court, that the initial rate of interest was 14%. The borrower defaulted in repayments and the bank through its lawyer issued a demand letter dated 16-3-98 demanding for Kshs. 906,636/300 – produced as D.Ex1.

The bank received correspondence from the borrower i.e Cleopatra Theatre as per letter dated 1-12-99, signed by H. A. El-Busaigy who is the same one who had signed as guarantor. He made reference to an outstanding amount of Kshs. 900,000/- as original overdraft and loan, and that by end of 1996, the balance owing was Ksh. 253,000/- and he made proposal to pay Kshs. 50,000/- per month as per the letter produced as D.Ex 2

The bank responded to the letter vide the one dated 17-12-99 (DEX3), advising that the overdraft had remained unserviced for a long time thus attracting a penalty at 44% p.a.

The bank again received a letter dated 20-2-03 from the borrower (DEX4) signed by H. A. El-Busaigy, stating that the business went down and that the balance of account left 253,000/- unattended. He complained that bank interest rates had shot up and confirmed that his account had gone up to over Ksh. 4,000,000 (four million).

It is the bank's contention that having so acknowledged then the same continued to attract interest at 32% and now stands at Ksh. 11,789,390/45 case which it must recover.

At the hearing, Amina (Plaintiff) on cross-examination confirmed that the title to the property Malindi 2465 was charged to KCB and that it has not been discharged.

She also confirmed that the bank is at liberty to charge interest rates without reference to the borrower, but it was her contention that by 1983, they had paid all the sums due.

Then how does she explain the letter dated 1-12-99, signed by her late husband, in which he sought to make repayments by installments of Ksh. 50,000/- per month? What about the letter dated 20-2-03 in which her husband again sought for indulgence in repayment of the sum owed to the bank?

She says that all she knows is that they completed paying the first loan, and is unaware of any other subsequent loan.

It is her contention, that the offer for a fresh facility dated 24-11-93, made no reference to balance arising in respect of the initial loan, so there was no way the bank could have made a fresh offer to them.

She then introduces a new angle to the issue saying the letters written by the deceased were on Cleopatra's letterheads referring to the debt owned by Cleopatra not the deceased.

There is no dispute that plaintiff and her late husband executed a charge in 1985 in favour of KCB, so as to secure loan of Kshs. 900,000/-. Was this sum fully paid – is KCB entitled to claim Ksh. 11m plus?

DW1 on cross-examination explained that although the letters were on Cleopatra's letterhead, they were written and signed by the deceased in his capacity as director and that he acknowledged the debt on behalf of the company and he had offered to liquidate the debt too, in that capacity.

He further stated that in 1999, the guarantor acknowledged indebtedness amounting to Ksh. 4m i.e. fourteen years after obtaining the facility and that amount included interest. According to DW1 Cleopatra is the plaintiff, and the counterclaim is for recovery of the sum owing from the plaintiff.

Was there a subsequent loan other than the Ksh 900,000/-? DW1 stated on cross-examination that no debenture was registered later on 23-11-93 nor was any personal guarantee signed by any of the directors after November 1993. He also confirms that the letter of offer produced as Ex 4A required the parties to sign it and send it back to the bank, but this did not happen. He confirmed that the letter of offer is talking about a different facility being Ksh. 250,000/- and is not related to the 1985 one and the bank did not grant a further charge because the offer was not accepted. He explained that the offer made by the bank in Ex 4A was pursuant to letter by the customer (dated 22-6-93) requesting for the facilities, but it was not granted.

The loan was given to Cleopatra Theater Ltd – the deceased and plaintiff were guarantors. The loan was for Ksh 250,000 upon registration of a debenture for Ksh 900,000/- over the entire assets of the company among other conditions. It is Mr. Mulwa's submissions on behalf of the plaintiff, that the offer was not accepted as stipulated at all and so no liability arose as against Cleopatra Theatre Ltd to which the deceased could be a guarantor on the security of his property and that it is for this reason that the charge registered against the said property must be found to be wrongful and is invalid. Mr. Mulwa has referred to section 59 of the Transfer of Property act which provides that where the principal money secured by a charge is one hundred rupees or upward, a mortgage can only be effected by a registered instrument signed by the mortgagor and attested by at least two witnesses. He points out that the charge document produced as exhibit was attested by only one witness and was thus nullity ab initio – he asks this court to be guided on this issue by the decision in the case of Ecccon Construction And Engineering Ltd V Giro Commercial Bank Ltd HCCC No. 371 of 2003.

He argues that, assuming for a moment that the charge was valid for having been executed in 1985, and in the light of evidence adduced on behalf of the defendant, not a single payment was made since 1985, then under the terms of section 19(1) of the Limitation of Actions Act (Cap 22), the defendant is not entitled to any relief because the right to recover the money accrued twenty – three years ago and if the principal debtor escapes liability, then a guarantor cannot be liable on the same cause of action. Furthermore, a charge already registered in 1985 cannot bind the guarantor on a facility in 1993 (which event never materialized) as this would be a past consideration which cannot be enforceable in law.

He argues that although the defendant attempts to bring the case within the limitation period by pleading acknowledgement of indebtedness,

that purported acknowledgement cannot bind the plaintiff as a guarantor. He pointed out that a similar situation presented itself in the case of Shire v Thatiti Finance co. (2002) EA 279 where it was held that:

*“In view of the fact that the letter of 13<sup>th</sup> July was written on the letterhead of a limited liability company and signed by the appellant, in his capacity, as the managing director of that company, it could not be said that it was an acknowledgement by the appellant that he borrowed the money in his personal capacity...”*

Mr. Mulwa argues that since the letter of offer did not result in a binding agreement which could constitute a new consideration. Further, that even if the defences advanced there were unavailable to the plaintiff, she would still succeed on the sole ground that, in order to prove liability as against a guarantor, the liability of the principal debtor has first to be established and that the several acknowledgments alluded to by the defendant were made on behalf of Cleopatra Theatre Ltd (the principal debtor) who was not enjoined in the counterclaim and so the liability can be against the guarantor. He urges the court to order for the release of the subject title document and dismiss the counterclaim.

Counsel for the defendant, on the other hand submitted that the charge being complained about is not identified by either date of registration or presentation or at all and that this leaves the plaintiff's case unproven as the court cannot grant orders in respect of an unspecified charge document. Further that since by the plaintiff's own admission, the charge document that was presented before court is a valid document, that the plaintiff's case ought to be dismissed.

It is submitted that the counterclaim claim is grounded on the every charge document which plaintiff produced and conceded that it still subsists and that the statement of account produced as D.Ex 5b is prima facie evidence of the plaintiff's indebtedness under section 176 of the Evidence Act – he seeks to rely on the case of John Njoroge Warui v Universal Bank Ltd – HCCC No. 583 of 2000 (Milimani) It is also pointed out that no questions were raised regarding the said statement of account nor did plaintiff offer any evidence to show that it was unfounded or unproven.

As regards limitation of actions, Mr. Momanyi submits on behalf of the defendant, that the defendant's claim is not time barred because although a demand notice was sent to the deceased on 16-03-99 for the sum of Ksh. 996,636/30 the deceased wrote to the defendant (D.Ex2) on 01-2-99 admitted to owing the sum of Kshs. 253,000/-, where he also conceded that interest as accruing and that he had been making part payments, and as late as 2003, that indebtedness was still acknowledged.

Mr. Momanyi argued that since the account is still open, and operational, then it is a running account or a mutual open account and therefore limitation has not set in, since there are rights and obligations which are still accruing to the parties arising from the lending contract. Defence counsel cited the following cases to support his argument.

- 1) Abdallah Jadh Jivry v Ali Kassam Virani Ltd (1960) EA 264.
- 2) Italian Construction Co. Ltd V Panciroli (1967) EA 264
- 3) Kenya Ports Authority v Kool Kenya Ltd. where Ringera J held as follows;

*“The last principal issue for consideration is whether the plaintiff's claim is statute barred. In my opinion, having regard to the evidence that Kobil maintained and maintains a current running account with KPA in which all port charges are debited from time to time, it would not matter what precise moment in time, any part of the outstanding amount was incurred, and accordingly, the defence of limitation is not open to the debtor as long as the account remains open”*

He further refers to section 19(3) of the Limitation of Actions Act which provides that:-

*“The right to receive a principal sum of money secured by a mortgage and the right to foreclose on the property subject to the mortgage does not accrue so long as that property comprises future interest on any life insurance policy which has not marked or been determined.”*

On the basis of this provision, Mr. Momanyi submits that limitation has not set in yet as it involves a charge and interest is still

accruing. Further that even if the court were to hold that the account is not a running account or a mutual open current account, then the several acknowledgements by the deceased regarding indebtedness, kept the cause of action alive. He draws from the case of Re-Footman Bowyer & Co. Ltd (1961) 2All ER E2 16 where Buckley J held:

*“In the case of a current account, where the debtor creditor relationship of the parties is recorded in one entire account into which all liabilities and payments re carried in order of extending over a considerable period, the true nature of the debtor’s liability is, in my judgment, a single and undivided debt for the amount of the balance and on the account for time being without regard to the several items which as a matter of history contribute to that balance...”*

Mr. Momanyi further urges the court to consider the provisions of section 23(3) of the Limitation of Actions Act which states that:

*“Where a right of action has accrued to recover a debt or other liquidated pecuniary claim or claim to movable property of deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment.”*

The defence counsel points out that at the time when the counterclaim was filed on 05-03-08, the cause of action was alive due to the said acknowledgements and proposals or payments – the last acknowledgement and proposal having been made on 20-02-03.

Should Cleopatra have been joined as a party to the counterclaim?

Mr. Momanyi submits that by both plaintiff and deceased signing the letter of administration, the charge document, they made the documents their own and agreed to be bound by the terms therein. He points out that plaintiff and deceased went ahead to receive funds pursuant to the lending contract contained in the said documents, and they must know that their end of the bargain – in support of this, reference is made to the case of Lavuna and others v Civil Servants Housing Co. Ltd & Anor. He urges this court to adopt the ratio decidendi by Kwach and Okubasu JJA in the case of Mrao Ltd v First American Bank Ltd & others in finding that the plaintiff fully understood what they were getting involved in and do not need anyone’s sympathy or avuncular protection otherwise this will transfer courts into a haven for defaulters.

It is submitted that the effect of the guarantees executed by the plaintiff and her husband is that the plaintiff is liable to settle the borrower’s indebtedness as well as the indebtedness of her late husband and her own indebtedness or personal guarantee.

Further that the effect of the indemnity as spelt out at clause 2 of the guarantee and indemnity – is that the plaintiff is still liable to the defendant even if for any reason the court were to hold that the claim is barred by limitation or for any other reason because plaintiff is the administration of the estate of the late Harith Ali El-Busaidy.

He urges this court to dismiss the plaintiff’s claim and enter judgment as prayed in the counter claim.

What clearly stands out from the evidence is that the loan facility of Ksh. 250,000/- was given to Cleopatra Theatre Ltd.

The plaintiff and her late husband executed documents as guarantors and to secure the facility they charged their property in Malindi to the bank. To date that loan is disputed with the bank maintaining that no repayments have ever been made, whilst plaintiff insists that they paid the full amount.

The status of the charge is also in issue, with plaintiff’s counsel saying it is not valid because it was only witnessed by one person instead of the required two persons as envisaged under the Indian Transfer of Property Act.

Then there is the question as to when the cause of action brought by ay of counterclaim arose – with plaintiff insisting that the claim is time barred under the Limitation of Actions Act visa vis the acknowledgement of indebtedness by the late guarantor/director of the borrower.

It is acknowledged by both parties that the sum of Ksh. 250,000/- was received by Cleopatra Theatre Ltd, whose directors were also the guarantors. It is admitted that the charge document was attested by one witness. Does his make the charge a nullity and does this therefore

nullify even the money advanced to Cleopatra?

Mr. Mulwa's argument is that the validity of the mortgage instrument is a very serious matter which gets to the very root of the entire transaction so that if the instrument is invalid, then the subsequent transactions fall with it.

See 59 of the Indian Transfer of Property Act provides as follows;

*“Where the principal sum secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attest by at least two witnesses.”*

However this provision must be viewed and considered in perspective when Njagi J addressed the matter in the case of Eccon Construction & Engineering Ltd v Giro Commercial Bank Ltd & Anor HCCC 371 of 2003.

It was with regard to the bank exercising its statutory power of sale and indeed the learned judge observed that:

*“Read with section 59...the input is that before a mortgage can be entitled to exercise the statutory power of sale, the mortgage instrument should be witnessed by at least two persons; one of whom should be an advocate”*

That is a different scenario from the one obtaining here – the bank has not yet exercised its statutory power of sale – they are simply holding the charge document – true I is admitted that at one point there had been an attempt to a sale which collapsed due to low bids. The court is not addressing that past event – the present situation is that the bank has not yet exercised its statutory power of sale and so the issue of the charge not being attested by two witnesses is a non starter – it is premature.

However, if that reasoning was found to be faulty, then Clause 10 of the Charge Instrument seems to take care of the situation as it reads:

*“That notwithstanding anything to the contrary contained in the Indian Transfer of Property Act 1882 of India as applied o Kenya, and as mended by the Indian Transfer of Property Act (Amendment) Act 959, the statutory power of sale and the appointment of a receiver shall be immediately exercisable by the Bank at any time after the bank has demanded payment ....and the provisions contained in the said act as to .....other reductions on the said powers shall not apply to this security.....”*

I think the parties should stop playing ping pong with the charge document, it is acknowledged to have been executed and is currently held by the bank.

Has the loan been fully repaid? Despite plaintiff's insistence that the same was repaid in full, she has not produced a single shred of evidence to support this position. As a matter of fact, that position is contradicted by the correspondences written by her co-director acknowledging the indebtedness and make proposals on how to liquidate the amount – this he did as late as the year 2003. In fact from the evidence tendered before this court it is apparent the borrowed sum has never been repaid at all – it has risen to such an astronomical amount due to non payment over the years, which has attracted rate interests – whose rates defendant had the liberty to review and charge without reference to the plaintiff. Of course the acknowledgment and proposals were written with regard to the debt owed by Cleopatra – which is a limited liability company, and whose affairs therefore could only be conducted through the agency of a human person – in this instance one of the directors, so for the plaintiff to contest the acknowledgements on the basis that they were written by her husband yet the borrower was Cleopatra Ltd, is rather myopic.

My finding on that issue is that the money was borrowed, a charge as executed, the money has not been repaid and has therefore escalated due to the interest charged over the year.

There is no basis therefore for ordering discharge of the charge instrument and the plaintiff's claim is dismissed with costs.

So would the defendant then be entitled to recover the money as prayed in the counterclaim? Plaintiff says no, the claim is time barred. Mr. Mulwa sought to rely on he ruling by Ombija J when the defendant sought leave to amend the statement of defence, and the honourable judge held that:-

- (a) a claim may not be brought to recover the principal sum of money secured on land or movable property or to recover proceeds

of land after the end of 12 years. He then stated:

*“The claim herein is in respect of a charge which was executed in or about December 1985. Moreover, interest on a charge or contract is not recoverable after 6 years under section 19(1) (4) of the Limitation of Actions Act. In the premises the defendant’s counterclaim to the extent it seeks to recover the principal sum and interest outstanding since 1985 is statute – barred and hence illegal...”*

My view or limb is that it was settled by Ombija J – Ombija J was very clear that the proposed amendment should be limited and not include the claims outside the limitation period. The defendant skirted around this by pleading acknowledgement of indebtedness. However that approach is contested by plaintiff’s counsel who seeks to rely on the decision in Shire v Thabiti Finance (2002) EA 279 which held that because a letter was written on the letterhead of a limited liability company and signed by the managing director of the company, then it could not be termed an acknowledgment that the director borrowed the money in his personal capacity – very true – but it does not take away the fact of acknowledgment of the debt – and in this instance the director was also the guarantor.

It is true that section 19(1) provides that an action may not be brought to recover a principal sum of money by a mortgage on land or movable property or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.

However that provision seems to be qualified by section 19(3) which recognizes future interest. I find that this claim reduces around a future interest which is still accruing and so is not statute barred.

What’s more because of the acknowledgements made, then section 23(3) of the Limitation of Actions Act comes to the defendant’s aid that the right accrues on the date of the acknowledgement – and here the last acknowledgement was on 20-02-03.

Finally should the defendant sue the plaintiff or should Cleopatra have been joined in the counterclaim?

I think Mr. Mulwa is, with all due respect, mixing up issues – there was no new agreement constituting a new consideration – subsequent offer was made but was never taken up, and the counterclaim relates to the initial offer. However he argues that since the offer was made to Cleopatra, then it should have been joined in the counterclaim and the failure to do so then means that no liability can be held against the plaintiff as a guarantor.

The defendant’s counsel maintains that the effect of the guarantors and indemnity is that plaintiff is liable to settle the borrower’s indebtedness as well as that of the guarantors.

In Clause 1 (a) of the instrument of guarantee and indemnity the guarantor (plaintiff and her husband) bound herself to pay and satisfy the bank on demand, every sum owing from the loan advanced to Cleopatra.

Clause 2 provides for the guarantor indemnifying the bank against all losses, or damages whilst Clause 3 makes he guarantor personally liable for the sum accruing and limited to Ksh. 500,000/-

- this appears to be the amount of her liability under the guarantee – which must be read alongside Clause 2 and Clause 1.

These provisions then give the defendant teeth to seek to recover the sum owing directly from the plaintiff as the guarantor along with her husband.

The terms on that document are so clear and the failure to enjoin Cleopatra Theatre Ltd in the counterclaim is not fatal.

The upshot is that the counterclaim has merit and judgment is entered in favour of the defendant as prayed in the counterclaim in the sum of Kshs. 11,789,390/45 (eleven million, seven hundred and eight nine thousands, three hundred and ninety shillings and forty five cents).

I award costs of the counterclaim to the defendant.

Delivered and dated this 1<sup>st</sup> day of March 2010 at Malindi.

**H. A. OMONDI**

**JUDGE**

No appearance for parties.