



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU**

Civil Appeal 236 of 1996

**NATIONAL BANK OF KENYA LIMITED.....
APPELLANT**

AND

**KWANZA HOUSE LIMITED.....
.....RESPONDENT**

**(Appeal from a Decree of the High Court of Kenya at Nakuru (Justice Rimita)
dated 10th day of June, 1996**

IN

H.C.C.C. NO. 303 OF 1995

JUDGMENT OF THE COURT

The crucial issue in this appeal is whether the charge on the property of the respondent, Kwanza House Ltd., known as L.R. Nakuru Municipality Block 9/90 which we shall hereinafter, refer to as the respondent's property, could be discharged on the ground that the consideration for it namely, that the appellant would grant to Kwanza Motors Ltd. a letter of credit in the sum of Kshs.75million, had totally failed.

We will now analyse the relevant evidence on this issue that was presented in the superior court. The appellant is a well known Bank and it is undenied, that the managing director of the respondent, Geoffrey Makana Asanyo, approached the appellant to open a letter of credit on behalf of Kwanza Motors Ltd. another company in which Asanyo and his wife were also directors, in favour of Aveling Barford, a firm in the United Kingdom who were to supply ten motor graders to Kwanza Motors Ltd. Mr. Asanyo on 14th July, 1994, wrote to the appellant applying on behalf of Kwanza Motors Ltd., for a letter of credit in respect of the ten motor graders which Kwanza Motors Ltd. was going to purchase from Aveling Barford. This letter which was produced in evidence by the appellant, also gave details of the cost of the purchase of the motor graders, particulars of potential purchasers and how much profit Kwanza Motors Ltd. stood to gain from the transaction and which would go towards paying off Kwanza Motors LTD's existing debts to the appellant. An interesting note dated 16th July, 1994, made by an official of the appellant on that letter was in the following terms:

"Advance

- What Security is he offering
- Write to him to clear arrears in this accounts".

Another letter from Mr. Asanyo also on behalf of Kwanza Motors Ltd. and dated 19th July, 1994, was produced by the appellant. This letter referred to the application for a letter of credit made in Mr. Asanyo's earlier letter and stated how the interest of the appellant would be protected through its retention of the shipping and customs clearing documents until the motor graders were bought and fully paid for. On 31st August, 1994, Mr. Asanyo again wrote to the appellant giving further details of how Kwanza Motors Ltd. would be able to meet its obligation to the appellant if it established the letter of credit to pay for the motor graders.

These letters of application to the appellant for the establishment of the letters of credit and which did not contain any offer of security by way of a guarantee or charge, for the establishment of the letter of credit and which, if the above notation on Mr. Asanyo's letter of 14th July, 1994, is anything to go by, were obviously rejected by the appellant and nothing more was heard of them. They must, however, have been followed by negotiations between Mr. Asanyo and the appellant which culminated in the letter of 15th September, 1994, from the appellant to its advocates giving them instructions which supercede anything contained in the three letters from Mr. Asanyo already referred to. This letter which was taken by Mr. Asanyo to the appellant's advocates and which was tendered in evidence at the trial by consent, we think, gives the true picture of what was finally agreed upon. It is as follows:-

"Dear Sir,

RE: M/S KWANZA MOTORS LTD

We advise that our above customers have approached us for further banking facilities in form of letter of Credit so that the total facilities will amount to Kshs.115 million. Consequently you have our instructions to perfect our securities as follows:

1. Obtain fresh joint and several guarantees from The directors of Kwanza Motors Ltd. for Kshs.115 Million together with a suitable resolution to borrow a similar amount from the bank.
2. Obtain guarantees for Ksh.75 million from the Directors of Kwanza House Ltd. to secure the Liabilities of Kwanza Motors Ltd. together with a suitable resolution of the directors of Kwanza House Ltd. to guarantee Kwanza Motors. Ensure to be furnished with a copy of the Memorandum and Articles of Association of Kwanza House Ltd. for your study and subsequently forward the same to us for our records.
3. Create a legal charge for Kshs.75 million Over L.R. Nakuru Municipality/Block 9/90 i.n.o. Kwanza House Ltd. to cover the borrowing of Kwanza Motors Ltd. We enclose herewith the title deed document for your further action."

The only meaning that we can attribute to this letter are as follows: The appellant had agreed to extend to Kwanza Motors Ltd. a letter of credit to the value of Kshs.75 million which together with the existing facilities already granted by the appellant to Kwanza Motors, would come to a total of Kshs.115 million. Consequently, the appellant's advocates should obtain from the directors of Kwanza Motors Ltd. a guarantee for repayment in respect of this total amount of Kshs.115 million. Next, that a similar guarantee should be obtained from the directors of the respondent in respect of the Kshs. 75million which can only be the amount of the letter of credit which the appellant would establish in favour of Averling Barford and finally, that the respondent's property should be charged in respect of the same Kshs.75 million which was, we must again emphasize, in respect of the letter of credit to the amount of Kshs. 75 million which the appellant was to establish in favour of Averling Barford if, and only if, the letter of

credit to Averling Barford was established, and not in respect of the Kshs.115 million or any other transaction. If that was not the case, what would have been easier than to have created the charge on the amount of Kshs.115 million instead of on Kshs.75 million. It follows from this that the guarantee that the directors of the respondent would give in respect of the sum of Kshs.75 million or the charge on the respondent's property, would only have any meaning or be applicable if, and only if, the letter of credit as sought is established.

In accordance with the appellant's letter of 15th September, 1994, its advocates prepared a charge on the respondent's property for the following significant and fundamental future objective:

"the Bank ... having agreed at my/our request to make advances to KWANZA MOTORS LIMITED ... by way of loan by permitting the Borrower to overdraw the Borrower's current account with the Bank or granting to the Borrower other financial accommodation from time to time an aggregate amount not exceeding Kenya Shillings: Seventy Five Million (Kshs.75,000,000/=) or such lower limit as may from (sic) the time being and from time to time by fixed by the Bank DO HEREBY CHARGE my/our interest in the land comprised in the above mentioned title..."

This charge without the directors of the respondent having first adopted a resolution to guarantee the repayment of the Kshs.75 million, was executed by the parties on 15th September, 1994, the very same day that the appellant's letter of instructions was written and received by its advocates.

The appellant having failed to establish the letter of credit, the respondent sued the appellant for the discharge of the charge on the respondent's property and for other ancillary reliefs.

The wording of the facilities to be granted to the respondent as reproduced above, is admittedly in general terms. However, having regard to the evidence of Mr. Asanyo which the Judge of the superior court preferred to that of Mr. Mutua who though the author of the appellant's letter of 15th September, 1994, to the appellant's advocates, sought to deny its clear meaning, to the effect that the appellant had agreed to establish a letter of credit in the sum of Kshs.75 million; the very letter of instructions itself, from the appellant to its advocates that the appellant had agreed to establish for Kwanza Motors Ltd. "banking facilities in form of letter of credit" to the amount of Kshs.75 million to be secured by a guarantee and a charge on the respondent's property; and the very amount of Kshs.75 million which was to be made available under the charge, we have no doubt at all, just as the learned judge of the superior court did, that what the charge was all about, was the granting of banking facilities to Kwanza Motors Ltd. by way of a letter of credit up to the amount of Kshs.75 million and nothing more.

The other parts of the charge which give the impression that it was made to secure existing as well as future loans such as:

"... whether in respect of moneys advanced or paid to or for the used of the Borrower ... shall not at any time exceed the sum of Kenya Shillings: Seventy Five Million Kshs.(75,000,000/=)..."

Are merely words used with the aim of providing the lender protection against any eventuality that may have been overlooked, but which do not, in our view, having regard to all the surrounding circumstances of the matter including the letter of instructions from the appellant to its advocates, which gave rise to the execution of the charge, affect the crucial issue that what the charge was all about, was to be security for the letter of credit to the value of Kshs.75 million which the appellant was yet to establish and which, and this is admitted, it did not, or would not, do.

The appellant produced at the trial, correspondence between Mr. Asanyo or Kwanza Motors Ltd. and the appellant and which were between 10th November, 1994, some two months after the execution of the charge on the respondent's property, and 1st August, 1995, to the effect that Kwanza Motors Ltd. owed the appellant large sums of money. But what is noteworthy about this correspondence and the exhibited accounts of Kwanza Motors Ltd. with the appellant, is that they do not contain any reference at all, to any debit against Kwanza Motors Ltd. in connection with a letter of credit opened by the appellant at the

request of Kwanza Motors Ltd. The correspondence and accounts produced by the appellant may relate to other transactions between Kwanza Motors Ltd. and the appellant but these are not relevant to the fulfillment of the consideration by the appellant namely, the establishment of the letter of credit and for which the respondent risked losing its property by charging it to the appellant.

We will only make reference to one more piece of evidence which by its nature and because of the one who gave it, confirms the view that the charge on the respondent's property had been made because of a letter of credit to the value of Kshs. 75 million, which the appellant was expected to establish and which in the end, it did not. We refer to the evidence of Mr. Sheth, an advocate of twenty years standing, who was called to give evidence by the appellant. In his examination in chief, and referring to the letter of 15th September, 1994, received by his firm from the appellant, he said:

"I see exhibit 2. On or about 15th September, 1994 we received instructions contained in Exhibit 2 from the respondent. We were to act in accordance with Exhibit 2. The letter of instruction was divided in 3 paragraphs."

He then went on to state that his firm had obtained the two guarantees from the directors of Kwanza Motors Ltd. and the respondent which he produced. He does not seem to have been asked any question concerning the charge on the respondent's property which his firm had not only prepared but the execution of which, had also been witnessed by his partner Mr. J.G. Wathigo. In his cross examination, however, Mr. Sheath made the following significant remark:

"I concluded that the customers had applied for letters of Credit. That is why I prepared the charge and the guarantees."

We do not think that one requires any more evidence in support of the evidence of Mr. Asanyo on this issue. If the general and wide working employed in the charge in describing the kind of financial facilities to be affected by the charge was intended to disguise the real position, this was not achieved. It is therefore not at all surprising that the learned Judge of the Superior court concluded in his judgment inter alia that:

"From what has been said before, I do not believe that the plaintiff readily offered its property to secure the debts of Kwanza Motors Ltd. without the letters of credit which had been applied for being opened and issued. The plaintiff's aim was to specifically guarantee a further facility by way of letters of credit from the defendant to buy machines from United Kingdom by Kwanza Motors Ltd. This facility was never extended. The charge over L.R. No. Nakuru Municipality/Block 9/90 was registered without consideration from the defendant to the plaintiff since the letters of credit were never opened as agreed between the plaintiff and the defendant."

But was this sufficient reason to justify the learned Judge of the superior court granting the following reliefs which the respondent as the plaintiff had sought against the appellant as defendant namely, that the appellant should discharge the charge on the respondent's property; that the appellant be restrained from selling or otherwise disposing of or interfering with the respondent's enjoyment of its property; that the appellant should refund to the respondent the stamp duty paid by it in respect of the charge; and that the respondent shall have the costs of the suit and interest at court rates?

The appellant has appealed against the judgment of the learned Judge of the superior court on several grounds, but the only ones that are relevant in view of what we have already expressed to be the crucial issue in this matter, are in summary, as follows:

The learned Judge of the superior court erred in holding that there was no consideration for the charge when in fact, the charge covered existing as well as future loans. Also that certain findings in his judgment were against the weight of evidence and that he disregarded evidence given at the trial such as that the motor graders were to be the principal and only security for the establishment of the letter of credit, the evidence of Mr. Mutua and the correspondence produced by the appellant. We are of the view that in charging its property to the appellant so that the appellant would establish a letter of credit for the

benefit of Kwanza Motors Ltd., the respondent who ran the risk of losing its property under the charge, was manifestly interested in the appellant complying with its part of the bargain. That was the consideration which had impelled the respondent to charge its property to the appellant. Whilst it is true that the charge having been registered under the Registered Land Act, had made it by virtue of section 28 of the Act:

"not ... liable to be defeated except as provided in this Act.",

other steps could still be taken to compel the appellant to take appropriate steps such as relinquishing its interest in the charged property. The respondent's contention was that since the purpose for which the charge had been created, had not been, and would not be, fulfilled by the appellant, the charge served no useful purpose but continued wrongfully to put the respondent's property at risk in the hands of the appellant. In our view, the respondent's claim therefore, that under the circumstances, the charge should be discharged by the appellant, makes sense.

Our attention having been drawn to section 28 of the Registered Land Act by counsel for the appellant, it behooves us to consider the effect of that section on the charge of the respondent's property, although in our view, this issue is not crucial to our determination of this appeal. Under section 143(1) of the Act,

"... the court may order rectification of the registered by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake."

Whilst we do not wish to go as far as to say that the registration of the charge of the respondent's property was made by fraud, it can be said that it was made through a mistake. This is because Mr. Mutua in his evidence, which was rightly not believed by the learned Judge of the superior court and on our own consideration of the facts of the case as already set out, was mistaken when he said that the object of the charge was to secure existing as well as future loans from the appellant to Kwanza Motors Ltd. which in our view, was not in the contemplation of the parties to the charge. As we have already observed, the charge was rather for the purpose of securing the establishment of a letter of credit to the value of Kshs.75 million by the appellant for the benefit of Kwanza Motors Ltd. Had the cancellation of the registered charge been sought, we would also have been inclined to grant it.

We have already expressed our views on whether the charge was in respect of existing or future loans and will only state here that we stand by them. We also find unsubstantiated, the submissions made on behalf of the appellant, that the learned Judge of the superior court misdirected himself by disregarding certain evidence given at the trial. In fact, a scrutiny of his judgment shows that he did take them all into consideration. It must also not be forgotten, that he did not as he was entitled to do, and we think rightly so, believe the evidence of Mr. Mutua. That the establishment of the letter of credit was to be secured by the charge and not the motor graders is obvious from the fact that the proposals that may have had that connotation and contained in the respondent's letters of 14th and 17th July, 1994, and 31 August, 1994, to the appellant, were not accepted. What was agreed by the appellant is what is contained in its now famous letter of instructions dated 15th September, 1994, to its advocates. As regards the correspondence produced in evidence by the appellant, we have already expressed our views on them as being evidence that does not affect the agreement as contained in the appellant's letter of 15th September, 1994, that it would establish a letter of credit as asked by Mr. Asanyo upon the respondent executing an appropriate charge and which was for that purpose, prepared by the appellant's advocate and executed by the respondent.

We have carefully considered the submissions made by counsel for the appellant on all these grounds, and they do not make any inroads into the views that we have already expressed that there was more than sufficient evidence to support the crucial holding of the learned Judge of the superior court that the consideration for which the respondent's property was charged to the appellant namely, that the appellant would open a letter of credit to the value of Kshs.75 million, and this not having been done by the appellant, entitled the respondent to have the charge discharged by the appellant. We are also of the

view that the learned Judge's conclusion on this issue alone, was sufficient to support his judgment. In view of this, we do not deem it necessary to consider the other issue raised in this appeal whether the respondent could validly create the charge on its property without a resolution adopted by the respondent's directors to the effect that the respondent would guarantee the payment of the Kshs.75 million by Kwanza Motors to the appellant.

In the result, the appellant's appeal is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 6th day of March, 1998.

A.M. AKIWUMI

.....

JUDGE OF APPEAL

G.S. PALL

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR