IN THE COURT OF
APPEAL AT NAKURU
(CORAM: MATIVO, GACHOKA & ODUNGA
JJ.A.) CIVIL APPEAL NO. 94 OF 2019

BETWEEN

NARWAR SINGH BHOGAL…… 1ST APPELLANT
AMRIK SIGH BHOGAL……2ND APPELLANT JASPAL SINGH BHOGAL…… 3RD APPELLANT ESTATE OF NARANJAN SINGH BHOGAL…… ……..4TH APPELLANT

AND

ZAHIR SHEIKH & ANDREW GREGORY
(*Joint receivers and managers of SAM-CON LIMITED (In receivership*)
……1ST RESPONDENT NATIONAL BANK OF KENYA……2ND RESPONDENT NAT BANK TRUSTEE AND INVESTMENT SERVICE LTD……3RD RESPONDENT COMMISSIONER OF LANDS……4TH RESPONDENT

(Being an appeal against the judgement of the High Court at Nakuru ***(J Mulwa, J.)****, delivered on 16th May 2019*
in
Civil Suit No. 38 of 2003)
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JUDGEMENT OF THE COURT

1. The appellants, who were the registered owners of the different portions of LR No. 455/21 within Nakuru Municipality

(the suit property), by an indenture of mortgage made on 23rd February 1995, offered the suit property to secure a facility of Kshs 30 million to be advanced by the 2nd respondent, National Bank of

Kenya Ltd (the Bank) to the 1st respondent, Sam Con. By a further mortgage dated 19th January 1999, executed in favour of the Bank, the appellants secured a sum of Kshs 15 million in favour of Sam Con. The appellants' case was that under the said two mortgages, their liability was limited to Kshs 45 million which sum they stated to have paid in the year 2000.

2. According to the appellants, without their consent and authority, the Bank on numerous occasions thereafter advanced additional loans and overdraft facilities to Sam Con, which was eventually placed under receivership by the Bank due to default in loan repayments. It was the appellants' case that as their liability was settled in full, they were not liable for the further advances and hence the suit property ought to have been unconditionally released.

3. The appellants sought orders: that the suit property was free from any encumbrances and should be released to them unconditionally; that the loan facility in the sum of Kshs 102,939,542.75 demanded by the Bank was never guaranteed by the appellants nor was it secured by the suit

property; that

the 2nd, 3rd and 4th respondents' dealings in Nairobi HCCC Misc. Application No. 1659 of 2005 were bad in law as the same was filed without the appellants' consent and involvement; that as there was no subsisting loan, the transfer of the suit property to the 3rd respondent, Trustees and Investment Services Ltd, was void *ab initio*; an order revoking the transfer of the suit property to the 3rd respondent; an order directing the 4th respondent to cancel the said transfer and rectify the Title Deed in favour of the appellants; and an order for costs and other reliefs that the court deems fit and just to grant. Singh

4. In his evidence, PW1, Narwar Singh Bhogal (PW1) asserted that the appellants never consented or gave authority to the Bank for the alleged continuing advances to Sam Con. Other than the Kshs 45 million secured by the suit property, the appellants denied that they guaranteed further advances or financial facilities. It was his evidence that the appellants' maximum liability was Kshs 45 million and taking the court through the correspondence exchanged between the parties, he insisted that the limit under the guarantee was Kshs 45

million and that the

appellants ought not to be held accountable nor liable to the Bank for the default of the 1st respondent for any amounts over the said limit. He asserted that the appellants were not parties to Nairobi High Court Misc Civil Case No 1659 of 2005 that ordered the transfer of the suit property to the 3rd respondent and that he only came to know about Sam Con's receivership when its properties were sold by the receivers.

5. It was his evidence that he was the chairman of Sam Con up to 1999 but that thereafter he ceased being the chairman and did not know of the further charges, the extension of the lease and the transfer of the suit property to the 3rd respondent which he averred was illegal and fraudulent.

6. In their defence, the 1st, 2nd and 3rd respondents stated that on 19th January 1999, the appellants as mortgagors, executed a further mortgage over the suit property to the Bank on condition that the Bank would forbear to enforce the immediate payment of advances already made and to make or continue to make further advances or give further credit or financial accommodation to Sam Con in the sum of Kshs 15

million for as

long as the Bank deemed fit. According to the said respondents, the appellants agreed and bound themselves to pay to the Bank, on demand, any monies owed by Sam Con including commissions, bank charges and interests at 28% per annum upon the guaranteed sum. It was the respondents' case that the mortgages and guarantees executed in 1995 and 1999 were continuing securities that allowed the Bank to continue to advance more financial and overdraft facilities to the 1st respondent and therefore by their authority and consent several amounts were thus advanced to Sam Con which did not pay and by 26th March 2003, the amount due was Kshs 102,939,542.75. The Bank denied that the sum of Kshs 45 million was paid and contended that the said sum formed part of the total sum owed, which continued to attract interest at the rate of 28% per annum, secured by the suit property.

7. It was further averred that since the lease to the suit property was expiring, the Bank sought and obtained its extension and immediately transferred the suit property to the 3rd respondent, to hold it in trust for the appellants, subject to

their right of

redemption. It was denied that the mortgages and debentures secured by the suit property lapsed as alleged by the appellants.

8. Samuel Odiyo, Sam Con's receiver manager (DW1), confirmed the existence of the two mortgages for Kshs 30 million and 15 million dated 23rd February 1995 and 19th January 1999 respectively as well as the debentures over the suit property. In his evidence, there existed continuing securities for the enhanced loans and overdrafts to the debtors and referring to the correspondences and documents in their bundles, testified that the further loans were secured by the suit property. However, upon the failure by Sam Con to repay the sum advanced, the Bank appointed receivers who sold off some of its properties. According to him, the Bank tried to sell the suit property but was not successful hence the transfer of the same to the 3rd respondent as trustee for the Bank with the aim of retransferring the same back to the appellants, upon their repayment of the loan. It was his evidence that the said transfer was meant to safeguard the suit property whose lease was about to expire and that the extension and transfer

was done by a court order

obtained in the Nairobi High Court Misc Civil Case No 1659 of 2005, albeit without the knowledge or involvement of the appellants.

9. It was his evidence that as at 31st May 2016, the balance due stood at Kshs 106,266,885.85. While confirming that as at 1999, the appellants were indebted to the Bank in the sum of Kshs 45 million, the witness admitted that some payments had been made, but he did not state the amount paid or raised from the sale of the property along which is on Nairobi-Mombasa Road.

10. In her judgement, the learned Judge identified the issues for determination as follows: whether the mortgages and debenture executed by the appellants on the 23rd February 1995 and 19th January 1999 giving security to the Bank to secure payments by the 1st respondent were of a continuing nature or for a maximum sum of Kshs.45 million; whether the guarantee executed by the appellants on the 19th January 1999 was for a limited maximum sum of Kshs.45 million; whether the appellants consented and authorised the Bank to

continue advancing to the 1st respondent a sum beyond the maximum period, the 19th April 1999; whether

the appellants fully paid the debts under the guarantee and mortgages in the sum of Kshs.45 million; whether the security offered, LR No. 435/21 Nakuru Municipality, which was transferred to the 3rd respondent in trust for the appellants, should be re-transferred and released to the appellants; whether the assignment of lease to the 3rd respondent and the charge instrument over the security was fraudulent and done in bad faith.

11. In arriving at the decision in issue no. 1, the learned Judge noted that in the indenture of mortgage dated 23rd February 1995, the facility was in respect of a maximum limit Kshs.30 million and the rate of interest was 30% per annum. It was secured by LR 455/21 Nakuru Municipality and the rights to exercise statutory power of sale, in the event of default, were reserved. There was a further Mortgage made on the 19th January 1999, and secured by the same security, for Kshs.15 million and it was expressly stated that the total amount recoverable thereunder was not to exceed Kshs. 15 million. Apart from that, there was a guarantee given to the Bank by the appellants dated 19th January 1999,

being a continuing security for the whole amount now due or owing to the principal "including any further advances made by you to the principal during the three calendar months period next after 19th April 1999". In respect of the guarantees the total amount recoverable was not to exceed Kshs.75 million plus interest. The liability thereunder was to crystallise at the expiry of 3 calendar months and the guarantee was to remain a continuing security as to the other or others.

12. The learned Judge found that from the foregoing, the maximum liabilities of the appellants to the bank by the guarantee and mortgages executed by the plaintiffs were collectively KShs.45 million. Under the guarantee, the learned Judge found that the Bank was at liberty to give further advances to the borrower at the request of the guarantors to a limit of three (3) calendar months thus up to the 19th April 1999. The Bank was, however, obligated to request authority for the advances, while other advances that fell beyond the three months were, according to the learned Judge, outside the appellants' guarantee. Citing clause 3(j) of the mortgage,

the learned Judge found that such

further advances to the 1st respondent, beyond the three months restriction, from the date of the guarantee were to be upon request and express consent by the guarantors. In this regard, the learned Judge cited the case of ***Robert Njoka Muthara & Another v Barclays Bank of Kenya Ltd & Another (2014) eKLR*** whose holding was to the effect that a bank cannot give several and different loans without the express assent of the guarantors and keep the guarantors bound. According to the learned Judge the guarantee executed by the appellants stated unequivocally at clause 1 that request and consent were key components in the contract. The learned Judge relied on the decisions in ***Kakamega District Co-operative v Co-operative Bank of Kenya Ltd & Another (2013) e KLR*** and ***Jane Wangui Kinuthia v Barclays Bank of Kenya (2007) eKLR*** to highlight the position that a continuing security can only be interpreted within the description of the charge, and was of the view that it is important to take into account the terms and conditions stated in the mortgage or charge document- in respect of the relationship between the two parties.

13. According to the learned Judge, there was no evidence that the appellants gave their express consent and authority for further advances by the Bank to the 1st defendant after the expiry of the three months after 19th April 1999), yet their consent was necessary for the same. The learned Judge cited ***First American Bank of Kenya Ltd v Gulab P. Shah and 2 Others Nairobi HCCC No. 2255 of 2000*** and ***Halsbury's Laws of England*** 3rd Edition Vol. 18, Par. 818, to restate that a surety's contract must be strictly construed and that a guarantor cannot be liable for more than what he had undertaken to guarantee. The learned Judge also cited ***Harital & Co. v Standard Chartered Bank Ltd (1967) EA 512*** where it was held that it is not open to a bank, without consent of the guarantor, to alter the terms of its dealings with the merchant and require the guarantor to be bound by a guarantee relating to a different course of dealings. It was the learned Judge's view that the purpose of a guarantee is to secure performance of the principal's obligations towards the creditor, and that the surety will be discharged from his liability under the guarantee, if the principal pays the debt

or

performs the obligations which he guaranteed. The payment of the principal debt would therefore discharge the surety in this respect being Kshs.45 million, together with related incidentals. She cited ***Law of Guarantees*****, by Geraldine Andrews and Richard Miller 3rd Edition Page 274** and held that the maximum sum guaranteed by the plaintiffs was Kshs.45 million plus necessary incidentals.

14. The learned Judge wondered why the plaintiff's consent or involvement in ***Nairobi High Court Civil Application No. 1659/2005*** was not sought, yet it involved the plaintiff's property that was sought to be transferred to the 3rd Defendant. She however found that the suit property was held in trust for the appellants by the 3rd respondent, pending redemption, upon full payment of the mortgage debt by the appellants to the 2nd respondent, after which it would be reassigned to the appellants. The learned Judge therefore, found that there was lack of consent and authority of the appellants for the further advances to the 1st respondent and that the appellants were not bound to

repay the advances beyond the maximum sum and beyond 19th April 1999.

15. While appreciating that, on the authority of ***Peter Maina Waihenya v ICDC (2011) e KLR,*** that a charged property becomes a commodity for sale once a charge is registered in favour of a lender, the learned Judge held that, for the charged property to be sold, due process ought to have been followed, as provided under the ***Land Act 2012*** and the repealed ***Transfer of Property Act, 1882***. It was noted that the banks witness PW1, conceded, in his evidence, that the appellants were neither aware of the further advances to the 1st respondent nor the Nairobi High Court case and the assignment of their property to the 3rd respondent. It was however, appreciated that as the appellant's property had a short period of validity and as the respondents had mortgagor's interest thereon, it was in order that they took it upon themselves to extend the lease period to avoid reversion to the Government. Though a good and well-intentioned move it was, however, not explained why they failed to inform the appellants as the proprietors of the

property.

According to the learned Judge there was no justification for this illegality or irregularity. Based on the decision in the case ***Sharok Kher Mohamed Ali & Another v Southern Credit Banking Corporation Ltd (2008) eKLR,*** where it was held that the central document in the exercise of statutory power of sale is the existence of a valid charge incorporating the proper title number and all other relevant expressions, the learned Judge held that a mortgagor is not entitled to redeem the mortgaged property before payment of the debt and before provisions of ***Section 69A*** are properly complied with, and upon due procedure being followed. According to the learned Judge, the whole process of transfer of the suit property to the 3rd respondent, was made in bad faith, by withholding crucial information from the appellants and upon a corrupt scheme, bordering on fraud and illegality.

16. Regarding the issue whether the appellants fully paid the debts under the guarantee and mortgages in the sum of Kshs.45 million, the learned Judge recited the case of ***Waihenya v ICDC*** (supra), and, based on the documents on record and without

going into the issue of the amount recovered from the sale of a Mombasa-Nairobi road property (LR 21692), found that the sum of Kshs.16, 066,302.95 was admitted to have been paid to the bank. However, the appellants fell short in their duty to support their pleadings by sufficient evidence that indeed they paid or settled their full indebtedness as guarantors to the respondents in the sum of Kshs.45, 000,000. According to the learned Judge, a balance of Kshs. 28,933,698 remained unpaid.

17. Consequently, the appellants' suit succeeded in part, to the extent that they had paid a sum of Kshs.16,066,302.95 leaving a balance of Kshs.28,933,698/= out of the sum of Kshs.45 million. The learned Judge directed and ordered that upon payment of the above balance by the appellants to the 2nd respondent, National Bank of Kenya Limited, the 3rd respondent, Natbank Trustees & Investments Services Limited, be under a legal duty and obligation to re-transfer the suit property L.R No.455/21 Nakuru Municipality back to the appellants in exercise of their right of redemption. Each party was ordered to bear own costs of the suit.

18. Dissatisfied with the judgement, the appellants filed this appeal in which ten grounds were raised. However, in their submissions the appellants identified the following issues, as falling for determination: whether the appellants had fully paid the debts under the guarantee and mortgages in the sum of Kshs 45,000,000 and if so, whether the security offered in the context of the 2nd respondent's charge over LR No. 455/21 Nakuru ought to be released to the appellants; whether the respondents' cross appeal is merited; and who should bear the costs of the appeal.

19. As alluded to above, the 1st, 2nd and 3rd respondents filed a Notice of Cross Appeal dated 20th January 2020 in which two grounds were set out. The said grounds raised the issues whether the learned Judge erred in finding that the unpaid balance of Kshs 28,993,689 did not attract interest despite having found that the maximum sum guaranteed by the appellants was Kshs 45,000,000 plus attendant interest and incidentals; and whether the learned Judge erred in attempting to re-write the guarantee contracts between the parties by excluding the element of

interest, which was expressly provided for in the guarantee contracts executed by the appellants.

20. We heard the appeal on the Court's virtual platform on 19th May 2025 when learned counsel, ***Mr Murithi,*** held brief for ***Mr Kisila*** for the appellants while learned counsel, ***Mr Hasea,*** appeared for the 2nd and 3rd respondents. There was no appearance for the 1st and 4th respondents despite due service of the hearing notice. Both counsel wholly relied on their written submissions.

21. On behalf of the appellants, it was submitted: that the learned Judge failed to appreciate that the appellants had not only fully paid the debts under the guarantee and mortgage which was the sum of Kshs 45,000,000, but had overpaid the same; that the learned Judge disregarded the full totality of evidence and submissions presented by the parties; that in the statement of the 1st appellant (now deceased) dated 26th November 2012, evidence of the amounts obtained by the receiver/managers of the 1st respondent were presented which included the statements of accounts with respect to the

sale of the 1st respondent's motor vehicles, the amount of money collected being Kshs 54,238,368;

that the 1st appellant also produced a copy of the Summary of Sales of Parts and Service by the Sam Con indicating that a sum of Kshs 40,307,363 being the proceeds therefrom as well as the proceeds of the sale of Mombasa Road Property for Kshs 50,000,000; that the report of Interest Rates Advisory Centre confirmed that the total overcharge amounted to Kshs 23,047,341.28; that based on the foregoing, the appellants had actually overpaid the debts on account of the guarantee and were entitled to a refund of the excess sums; that having found that the payment of Kshs 57,822,452 to receivers was unjustified, and based on citing various authorities on the duties of receivers, the learned Judge erred in not addressing herself on the issue; that since the appellants had not only fully paid the Kshs 45,000,000 but had made overpayment, the question of interest did not arise; and that the appeal should be allowed with costs.

22. On behalf of the 2nd and 3rd respondents, it was submitted: that the court duly considered and addressed each and every issue before it as pleaded in the superior court; that the learned Judge erred in fact and in law since there is a properly

executed

guarantee by the appellants which increased their maximum liability to Kshs. 75 million; that clause one (1) of both guarantee binds the appellants to pay all moneys owed on demand in the event of any default; that based on the case *of* ***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd*** ***[2002] 2 EA 503*** and ***Fina Bank Ltd v Spares and Industries Ltd*** ***[2000] 1 EA 52,*** a court of law cannot rewrite a contract between parties; that a surety will only be discharged from his liability under the guarantee if the principal pays the debt or performs the obligation which he guaranteed; that the appellants never produced any documentation during the trial to show payment of the debt owed or performance of the obligation by the 1st respondent; that, on the authority of ***Robert Njoka Muthara & Another v Barclays Bank of Kenya Limited & Another [2017] eKLR*** and **Civil Appeal No. 297 of 2015 -** ***Mbuthia Macharia v Annah Mutua Ndunga & Another (2017) eKLR,*** the

appellants who were guarantors, had the burden of proving that the principal debtor had not failed to honour its duty; that the appellants did not produce any form of evidence to show payment

of the debt owed; that the question of payment of the debt as per the mortgages can only be sustained by the Sam Con itself and, despite being a legal person, it did not raise such a claim before the trial court; that the sale of the Mombasa Road property was as a result of a court order and at trial, the appellant's witness testified that they did not know how much it was sold for; that the receiver manager as per the debenture documents were agents of Sam Con and not the bank; that collection of monies by a receiver manager is not evidence of payment of monies owed by the guarantors, since it is an execution of a legal obligation granted to them; and that the learned Judge did not err as the appellants did not discharge their legal burden of proof.

23. On the transfer of the suit property to the 3rd respondent, it was submitted: that as a secured creditor, the 2nd respondent had an interest in the security property and therefore applied to court through Nairobi High Court Misc Civil Case No 1659 of 2005 to have the property registered in the name of the 3rd respondent who held it in trust for the appellants; that since the appellants' witness testified that the title was not free

of encumbrance, it

was only proper for it to be held in trust to secure the interest of both the appellants and the 2nd respondent; that the appellants were never prejudiced since the property was held in trust subject to redemption upon full payment of the debt; that this prayer has been overtaken by events since the 2nd respondent already transferred the title of the security property back to the appellants.

24. As regards costs, it was submitted: that the discretionary power to award cost by the trial court can only be interfered with as stated; that the appellants have not met any of the grounds required for interference of discretionary power by the trial court; that in its judgement, the suit was partially successful to the extent that the appellants were to pay the respondent a sum of Kshs. 28,933,689; that the court went ahead and gave reasons as to why each party should bear its own costs by stating that the circumstances of the case dictated as such; that there is no deviation from the provisions of section 27 of the ***Civil Procedure Act*** since both parties were successful in the trial court hence each bearing its own costs; that the issue of interest was

contractual and that the trial court erred in law and fact in finding that the unpaid balance did not attract interest; and that the cross appeal should be allowed.

25. This being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned

judgement. This position is anchored in rule 31(1) (a) of the Rules of this Court as read with section 78 of the ***Civil Procedure Act***, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them ***Selle v Associated Motor Boat Co. [1968] EA 123***, and ***Peters v Sunday Post Limited [1958] EA 424.***

26. Having carefully considered the record placed before us, the impugned judgment, the written and oral submissions of learned counsel for the appellant and for the respondents, the cited authorities and the law, we settle the following as the main issues that commend themselves to us for determination, namely: (i) whether the appellants proved that they had settled their liability in full; (ii) whether the appellants were liable to pay the interests accruing from their liability and whether the said interests were paid; and whether the learned Judge in her award on costs.

27. The learned Judge found that the liability of the appellants was limited to Kshs 45,000,000. Since there is no cross-appeal on

that finding, the issue that we have to determine is whether the appellants proved that they had fully settled their liability in respect of the guarantees and the mortgages. PW1, in his evidence maintained that the appellants had paid Kshs 10,000,000.00. No other amount was mentioned in his evidence as having been paid to the Bank by the appellants. He was however, not aware of how the Mombasa Road property was sold. In his own words, regarding the Mombasa Road:

> ***"I do not know how much it was sold for by the receivers. The bank has never given me a receipt of how much it received from the sale. After I left the other director, G. S. Bhogal was the managing director of the plaintiff company. My liability was Shs 45,000,000. The bank called me up to honour my guarantee in 2003."***

28. In his witness statement, the witness stated that apart from the sum of Kshs 10,000,000 that was paid by Sam Con to the Bank, he was able to retrieve evidence from the computer showing sales of Sam Con's vehicles amounting to Kshs 54,238,368.00. He also had a summary of the sale of parts and service of Sam Con amounting to Kshs 40,307,363. He also ascertained that the Mombasa Road property was sold by

the receivers for Kshs

50,000,000 although he was unable to confirm this from the receivers. According to his statement, the report from Interest Rates Advisory Centre confirmed that the total overcharge was Kshs 23,047,341.28. His view was therefore that the Bank had collected far more than Sam Con's indebtedness.

29. The learned Judge, after considering the evidence found that the amount paid to the Bank by the appellants was Kshs 16,066,302.95. This was a finding of fact and as was held by this Court in ***Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja*** ***[1986] KLR 661; [1986-1989] EA 183***:

> ***"The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."***

30. While the respondents do not dispute this finding, the appellants contend that the sum paid was more than the amount that the appellants were liable to pay. Section 109 of the ***Evidence Act*** provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

31. **Lord Brandon** in ***Rhesa Shipping Co SA v Edmunds*** ***{1955} 1 WLR 948 at 955*** once remarked that:

> ***"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."***

32. However, as appreciated by **Rajah, JA** in ***Britestone Pte Ltd v Smith & Associates Far East Ltd*** ***{2007} 4 SLR (R) 855 at 59:***

> ***"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."***

33. We agree that as regards the liability of the guarantor the legal position is as stated by **Geraldine Andrews & Richard Millet in "*The Laws of Guarantees*" at page 156** that:

> ***"A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as***

a contract to indemnify the Creditor upon the happening of a contingency

namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point."

34. Therefore, we agree with the learned Judge that:

"The purpose of a guarantee is to secure performance of the principal's obligations towards the creditor, and that the surety will be discharged for his liability under the guarantee if the principal pays the debt or performs the obligations which he guaranteed."

35. For a surety or guarantor to be precluded from liability it must either adduce evidence showing that the principal debtor has settled the full liability or that the guarantor itself has fulfilled its full obligation under the contract of guarantee. In this case, Sam Con, which was the principal debtor did not adduce evidence. The evidence by the 1st appellant was to the effect that payments were done on behalf of Sam Con either directly or through the sale of its assets. The evidence however fell short of the standard required to prove full satisfaction by the principal debtor. It is not enough to simply prove that payments were made by or on behalf of the principal debtor. What is required is evidence that the debt

was settled in full. Therefore, for the guarantor to

succeed in avoiding liability, it must prove that the amount received from or on behalf of the principal debtor fully satisfied the debt. If it fails to do so, it will be liable to the extent of the guarantee. We agree with the respondents that the burden was upon the appellants to prove this fact. We are persuaded with the view expressed in the case of ***Miller v Minister of Pensions*** ***[1947] 2 ALL ER 372*** cited with approval in ***D.T. Dobie Company (K) Limited v Wanyonyi Wafula Chabukati [2014] eKLR*** that:

> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', thus proof on a balance or prepondence of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

36. The relationship between the principal borrower, the lender and the guarantor was restated in ***Moschi v Lep Air Services Ltd*** ***[1972] ALL ER 393***, where it was held that by

its very nature, a guarantee is distinct from the agreement which gives rise to the

obligation guaranteed. The principal debtor is neither a party to the guarantee nor considered as one with the guarantor. Consequently, the rights and/or obligations of a guarantor as against the creditor accrue to him/her from the relationship created by the guarantee. The same position was adopted by this court in ***Robert Njoka Muthara & another v Barclays Bank of Kenya Limited & another [2017] eKLR.***

37. We agree with the learned Judge that the appellants failed to adduce evidence that would have discharged them from liability. Accordingly, we find no merit in the appeal.

38. As regards the Notice of Cross Appeal, the learned Judge, while finding that the maximum sum guaranteed by the plaintiffs was Kshs.45 million plus necessary incidentals, noted that interest had been suspended, a fact alluded to by the defendants' advocate in his opening remarks. This finding has not been expressly challenged in this appeal. The respondents did not adduce any evidence to show how much was due from the appellants in terms of incidentals, a fact

which was within the

knowledge of the respondents. Section 112 of the ***Evidence Act***

provides that:

> ***In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

39. In the absence of that evidence as to how much was due to the Bank on account of incidentals, the learned Judge cannot be faulted for not taking into account the incidentals in the judgement. There was no basis upon which she could make a finding that incidentals had not been settled and how much it was.

40. In the premises, we find that the Notice of Cross Appeal is similarly without merit.

41. On costs, section 27 of the ***Civil Procedure Act*** provides that:

> ***Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no***

bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

42. The first part of the section gives the court wide powers when it comes to exercise of discretion. However, this being an exercise of judicial discretion, it must be exercised on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. That discretion must therefore be exercised on the basis of evidence and sound legal principles. See ***Gharib Mohamed Gharib v Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.***

43. Similarly, in ***Halsbury's Laws of England,*** 4th ed Re-Issue (2010), Vol. 10, para. 16 it is stated:

"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."

44. The guidance on how to exercise the discretion is provided in the proviso to the section under which the general rule is that costs follow the event unless the court or Judge shall for good reason otherwise order. The above section was considered by this Court in ***Supermarine Handling Services Ltd v Kenya Revenue Authority*** ***Civil Appeal No. 85 of 2006*** where it expressed itself thus:

> ***"Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to***

deprive the successful plaintiff of its costs and yet

it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded."

45. ***Murray, CJ*** in the case of ***Levben Products v Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227,*** weighed in by stating that:

"It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

46. As to what constitute "good reason", the Supreme Court in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR*** held that:

"It is clear that there is no prescribed definition of any set of "good reasons" that will justify a Court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by- case basis, to identify "good reasons" for such a

departure…However, the vital factor in setting the preference, is the judiciously-exercised discretion

of the Court, accommodating the special circumstances of the case, while being guided by ends of justice."

47. The learned Judge, in exercising her discretion in the manner she did, stated that:

"The circumstances of the case dictate that each party bears its own costs of the suit."

48. We agree that the learned Judge could have expounded on "the circumstances of the case" which she considered. However, this being a first appeal, we are under obligation to re-evaluate the record holistically and subject it to scrutiny in order to determine whether the decision of the learned Judge is correct. In this case, none of the parties can be said to have been wholly successful. In those circumstances we are persuaded by the sentiments in ***Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR***, that:

"The words "the event" mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word 'event" is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the "events" of separate issues in an action. Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action

involves separate

issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it."

49. In the premises, we have no reason to disturb the learned Judge's

finding on costs.

50. Consequently, both the appeal and the cross appeal fail and

we dismiss them but with no order as to costs.

51. It is so ordered.

Dated and delivered at Nakuru this 21st day of October, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed
DEPUTY REGISTRAR