IN THE COURT OF APPEAL AT NAIROBI

(CORAM: MUSINGA, (P), TUIYOTT & ODUNGA, JJ.A.)

CIVIL APPEAL NO. E145 OF 2023

BETWEEN

GUARDIAN BANK LIMITED.....1ST APPELLANT
AMIT CHANDARIA alias AMIT DINESHKUMAR CHANDARIA
Alias AMIT DINESH CHANDARIA
HETUL CHANDARIA and
BHAVNISH CHANDARIA alias BHAVNISH DINESH CHANDARIA
(*Sued as the Executors of the Estate of*
MAGANLAL MOTICHAND CHANDARIA.....2ND APPELLANT
NISHA DINESH CHANDARIA w/o
DINESH MAGANLAL CHANDARIA (*Sued as personal Representative of the estate of the late* **DINESH MAGANLAL**
CHANDARIA) ..... 3RD APPELLANT
MAHESH MAGANLAL CHANDARIA.....4TH APPELLANT
CONIFERS TRADING LIMITED.....5TH APPELLANT
CHANDARIA HOLDINGS LIMITED.....6TH APPELLANT
DIMA LIMITED ..... 7TH APPELLANT GOLDERA LIMITED ..... 8TH APPELLANT KEVIS INVESTMENTS LIMITED ..... 9TH APPELLANT

AND

SHIVALI INVESTMENTS LIMITED.....1ST RESPONDENT
NAVAL HOLDINGS LIMITED.....2ND RESPONDENT
KETTY INVESTMENTS LIMITED.....3RD RESPONDENT
SAAF HOLDINGS LIMITED.....4TH RESPONDENT

*(Being an appeal against the judgment of the High Court of Kenya at Nairobi (**Mabeya, J**.) dated 17th February 2023*

in

HC Commercial Case no. 560 of 2005)
****

JUDGMENT OF THE COURT

[1] The subject matter of this appeal is a dispute involving the sale and purchase of all shares of Guilders International Bank Limited, (**"Guilders"**).

[2] In a further amended plaint dated 25th January, 2017, Shivali Investment Limited, Naval Holdings Limited, Ketty Investments Limited, and Saaf Holdings Limited (jointly "**the respondents"** or **"the sellers"**), pleaded that they entered into a Memorandum of Understanding (MoU), subject to contract, for the sale of 200,000 ordinary shares they held in Guilders at a consideration of Kshs. 196,000,000 to Maganlal Motichand Chandaria, Dinesh Maganlal Chandaria, Mahesh Maganlal Chandaria, Conifers Trading Limited, Chandaria Holdings Limited, Dima Limited, Goldera Limited, Kevis Investments Limited ("**the purchasers"**). The sellers referred to the MoU as a complete agreement setting out all rights and liabilities of the parties. In it, the purchasers were afforded opportunity of carrying out due diligence and to examine the books of Guilders, including the loan portfolio and securities held by the bank; the consideration of Kshs.196,000,000 was the net asset value of the bank based on the audited balance sheet of Guilders as at 31st December 1998; the consideration was payable in ten (10) equal

annual instalments payable on the very last day of each successive year commencing 31st December 2001; there was a sum of Kshs.829,543,000 as the total loan portfolio of Guilders as at 31st December 1998 and the sum of Kshs.678,074,000 as the recoverable and performing and estimated realizable value of the total loan portfolio; due adjustments would be made to the purchase price should some loans prove irrecoverable after all avenues have been exhausted, 31st December 2001 being the cut-off date for the establishment of this position; the four sellers would provide tangible securities worth at least Kshs.380,000,000 plus personal guarantees of directors of Guilders to cover deterioration in the value of assets, increase in any existing liabilities, contingent liabilities, undisclosed liabilities; the purchasers were entitled to recovery of any losses arising from the said liabilities from the proceeds of sale of the tangible securities in case the sellers would not make good such loss within the time-frame agreed by the parties; the purchasers were required to maintain a Memorandum Account in its books to work out the deficit in net worth of the bank as at the completion date being 31st October 1999; such deficit in the net worth was recoverable from the sale proceeds of the tangible securities and if not made good within the agreed time, they would be

subject to

interest worked out on monthly basis at the rate of 22% per annum or 7% above the average treasury bill rate of the month, whichever is higher, determined and compounded on monthly basis; the purchasers agreed to pay interest at the rate of 12% per annum on the credit balance in the Memorandum Account; the purchasers would allow the sellers to follow up debt recovery and have access to all information and liaise with lawyers if need be; and the MoU was to remain in force and binding upon both parties and become a forming part of a sale agreement to be entered between the parties.

[3] Subsequently, on 30th December, 1999, the parties executed an agreement for sale and purchase of the shares which substantially mirrored the terms of the MoU. However, an important feature of the sale agreement was that Guardian Bank Limited was the purchaser of the shares and the purchasers named in the MoU were obligors. More will be said of this. Further, on 31st December, 1999, Guardian and Guilders entered into an agreement in which Guardian took over the assets and business of Guilders.

[4] The sellers sought to rely on clause 7 of the agreement of sale contending that the purchasers were not entitled to deduct from or debit their account by way of deductions from the agreed

consideration after the cut-off date which was 31st January, 2001. In

any event, the purchasers would not be so entitled, not having complied with sub-clause 7 (1) (iii) of the said agreement.

[5] The sellers contended that the MoU was fully or very substantially complied with, making it a binding and complete contract between the parties, which in any event resulted in an agreement incorporating all essentials. It is asserted that on or about 12th June, 2000, the purchasers agreed to pay them a sum of Kshs.180,000,000.00 and caused them to sign a money receipt but did not do so.

[6] The sellers contend breach of contract by the sellers which includes: failure to pay the consideration; failure to render proper accounts or at all; failure to discharge and to release security instruments belonging to the sellers; failing to exercise all due diligence and/or to exhaust all reasonable means to recover debts owed to the bank; refusing to give access to the sellers to books of accounts and information necessary to optimize debt recovery; and disposing of some assets valued at Kshs.332,000,000 and failing to account for them.

[7] In the end the sellers sought the following orders against the obligors and Guardian:

"a) The sum of Kshs. 196,000,000/- being the consideration price for the sale of 200,000 shares in Guilders International Bank by the Plaintiffs to the Defendants.

b) An order and/or directions that the defendants do render, under oath, true, accurate and comprehensive accounts of the amounts collected and/or comprehensive accounts of the amounts collected and/or received by the defendants from the debtors of Guilders International Bank Limited and/or from proceeds of the sale of tangible securities given by the plaintiffs to the defendants under the agreements herein.

c) An order and/or directions that a forensic audit of the said accounts as well as the appurtenant documents held by the defendants relating to the amounts collected and/or received by the defendants from the debtors of Guilders International Bank Limited and/or from the proceeds of the sale of tangible securities be conducted by a reputable forensic auditor to be agreed upon by the parties and in default to be appointed by this Honourable Court within such duration as this Honourable Court deems just and appropriate.

d) The amount found payable by the defendants to the plaintiffs on account of recoveries made in loans in excess of "Deficit in Net Worth" and/or from the proceeds of the sale of the tangible securities given by the plaintiffs to the defendants under the agreements herein.

e) An inquiry into the amount collected by the defendants from the debtors of Guilders International Bank Limited in respect of the collection made by Guardian Bank Limited for which purpose this Honourable court be pleased to appoint a receiver to inquire into such collection, and after ascertainment thereof by the receiver for payment thereof to the plaintiffs.

f) Interest on Kshs.196,000,000/- as per the Memorandum of Understanding from 31st December

2001 until payment in full.

g) Interest of amount recovered and recoverable by Guardian Bank Limited on behalf of Guilders International Bank Limited.

h) Discharge and return of the securities specified in the Memorandum of Understanding.

i) Costs of this suit.

j) Any other further or alternative relief that this Honourable Court may deem just to grant."

[8] The obligors together with Guardian responded by contending that the MoU was "subject to contract" and that the sellers failed to provide warranties and tangible security worth Kshs.380,000,000 together with personal guarantees as agreed in the sale agreement. It was averred that the sellers transferred their shares in Guilders to Guardian and Guilders became a wholly owned subsidiary of Guardian and thereafter the four had no interest in the business of Guilders and no right to receive any money recovered by Guilders.

[9] Upon conducting an audit of the account of Guilders, it was established that the sellers had misrepresented to the purchasers the true net value of Guilders as at 31st December, 1998 and that as of the cut-off date of 31st December, 2001, the total value of the recoverable and performing loan portfolio warranted by the sellers of Kshs.678,074,000 only Kshs.201,069,887 was realized; recovery expenses until that date was Kshs.7,319,809;

undisclosed liabilities by Guilders after the cut-off date was Kshs.10,623,414; the realized

value as at the cut-off date was Kshs.434,947,335 and after deducting the consideration as per sub-clause 7 (1) (iii) of the sale agreement from the shortfall, Guardian Bank debited the sellers' Memorandum Account with Kshs.238,947,335; the interest calculated and debited to the account as per sub-clause 7 (1) (viii) was Kshs. 856,902,988; total value realized from the sums in the Memorandum Account until 31st December, 2013 assessed from the individual statement of costs of the total loan portfolio was Kshs.221,161,886/=; expenses incurred by Guardian to recover the above sums from the debtors of Guilders from 1st January, 2002 until 31st December, 2013 was Kshs.15,494,626; and there existed an undischarged liability of Kshs.3,294,113/=.

[10] The purchasers contended that the sellers' claim for special damages was caught by limitation under the Limitation of Actions Act Cap 22 Laws of Kenya.

[11] In a counterclaim, Guardian Bank sought judgment against the sellers for:

i) The sum of Kshs.827,395,388 being the debit balance in the Defendants' Memorandum Account

ii) Interest on (i) above at 22% p.a. compounded monthly

iii) Costs of the main suit and counterclaim

[12] The hearing of the suit comprised five (5) witnesses; three (3) for the sellers (plaintiffs) and two (2) for the purchaser and obligors (defendants). The evidence of these witnesses shall be reevaluated as shall be relevant in determining the issues that fall for our resolution in this appeal.

[13] In a judgment delivered on 17th February, 2023, the High Court (**Mabeya, J.)** curved out four issues for determination and returned the following findings. Although the plaint filed in December 2005 was later amended, the amendment did not introduce any new cause of action and in any event, such amendment dated back to the date of the suit. While clause 2 made the MoU subject to contract, it formed part of the final Agreement between the parties and was binding on them. The purchaser and obligors had breached the terms of the MoU and the Sale Agreement and were liable to pay the sellers the sum of Kshs. 196,000,000.00 as consideration for the shares they received. The counterclaim failed as there was no evidence that there were any recoverable loans that became unrecoverable as at the cut-off date, and even if there were, it was not communicated to the sellers as required by the MoU and the Sale Agreement for purposes of debiting the Memorandum Account.

[14] Eventually the trial court held in favour of the sellers and made the following orders:

> ***a. The sum of Kshs.196,000,000/- being the consideration price for the sale of 200,000 shares in Guilders International Bank together with interest at 12%pa thereon as per the MoU as follows:-***
>
> ***i. Kshs. 19.6 Million from 1/1/2002***
> ***ii. Kshs. 39.2 Million from 1/1/2003***
> ***iii. Kshs. 58.8 Million from 1/1/2004***
> ***iv. Kshs. 78.4 Million from 1/1/2005***
> ***v. Kshs. 98 Million from 1/1/2006***
> ***vi. Kshs. 117.6 Million from 1/1/2007***
> ***vii. Kshs. 137.2 Million from 1/1/2008***
> ***viii. Kshs. 156.8 Million from 1/1/2009***
> ***ix. Kshs. 176.4 Million from 1/1/2010***
> ***x. Kshs. 196 Million from 1/1/2011 to date***
>
> ***b. Discharge and return of the securities specified in the MoU to the plaintiffs in default pay their value at the time they were submitted.***
>
> ***c. Costs of the suit.***

[15] For purposes of this decision, the purchaser is the 1st appellant, the obligors are the 2nd to 9th appellants, while the sellers are the respondents herein.

[16] The decision is impugned through the memorandum of appeal dated 9th March, 2023 inviting this Court to consider thirty eight (38) grounds but which were, wisely and thankfully, reduced to and rallied around eleven (11) issues:

"i. Whether the 1st appellant was bound to pay the consideration price of Kshs.196 Million to the respondents herein (Ground 5 and 6).

ii. Whether the Superior Court erred in upholding the Memorandum of Understanding dated 13th October 1999 as a forming part of the Final Agreement dated 30th December 1999 (Grounds 1, 2, 3, and 4).

iii. Whether the appellants proved that there were unrecovered loans, the efforts undertaken to recover the debt before the cut-off date, and whether the respondents were aware of these as of the cut-off date.

iv. Whether the appellants proved that there were undisclosed liabilities and recovery expenses as of the cut-off date which the appellants were entitled to deduct from the Memorandum Account.

v. Whether the respondents were aware, were notified, and/or involved in debt recovery process, in dealing with undisclosed liabilities, and in the sale and/or disposal of securities provided by them pursuant to Clause 7 of the Agreement.

vi. Whether the appellants availed evidence of the status of and the realization of the blanket securities and whether the Superior Court erred in nullifying the sale of blanket securities after the cut-off date.

vii. Whether the appellants breached their obligation to pay the purchase price of Kshs. 196 Million to the Respondents herein?

viii. Whether the Superior Court erred in awarding interest at the rate of 12% as per the MoU dated 13th October 1999 (Grounds 24, 25, 27).

ix. Whether the Superior Court erred in holding that the appellants conduct was both unjust and unconscionable?

x. Whether the appellants' counterclaim is merited and should be allowed?

xi. Whether the respondents' claim was caught by limitation under the Limitation of Actions Act (Ground 30)?"

[17] The role of the Court in a first appeal such as this is to re-evaluate the evidence afresh and to draw its own conclusion as expressed in **Selle & Another vs. Associated Motor Boat Company Ltd. & Others [1968] EA 123** as follows:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled.***
>
> ***Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 EACA***

210).”

[18] At the plenary hearing, learned senior counsel **Mr. Ahmednasir**

represented the 2nd to 9th appellants, learned counsel **Mr. Ouma**

appeared for the 1st appellant, while the respondents were jointly represented by learned senior counsel **Ms. Jan Mohamed** and learned counsel **Mr. Kago.**

[19] There was immediately an impasse as to whether learned senior counsel Mr. Ahmednasir should be permitted to argue the written submissions dated 22nd September, 2023 filed on behalf of 2nd to 9th appellants. The controversy essentially stemmed from the fact that in those submissions, the 2nd to 9th appellants declared that they would be seeking leave of this Court, pursuant to rule 104 (a) of the Court of Appeal Rules, to argue four additional grounds of appeal. After lengthy back and forth consultation between the Court and counsel, and upon assurance by learned senior counsel Mr. Ahmednasir that the submissions were mischaracterized as raising new grounds when they in fact did not, it was agreed that the submissions would be argued. This was on the rider that we would, in this judgment, make a preliminary determination whether those arguments went beyond the four corners of the memorandum of appeal dated 9th March, 2023 and if so, we would not consider them.

[20] The four issues raised in those submissions are:

i) That the learned Judge erred in law in failing to appreciate that the respondents in their re-amended further plaint pegged their cause of action solely on

the

Memorandum of Understanding dated 13.10.1999 and not on the Sale Agreement of 30.12.1999.

ii) The learned Judge erred in law in holding that the Memorandum of Understanding was a valid and binding contract because it formed part of the sale agreement of 30.12.1999 and failed to appreciate that the Memorandum of Understanding was an agreement "subject to contract" or "agreement to reach an agreement".

iii) The learned Judge erred in law in holding that the Memorandum of Understanding was a valid and binding agreement between the parties when he failed to appreciate that the Memorandum of Understanding was too vague and uncertain, incomplete in form and in substance, wholly unsupported by any consideration and was conditional upon the Central Bank of Kenya and other governmental agencies approving and/or authorizing the sale of shares of Guilders Bank International Limited to the appellants.

iv) The learned Judge erred in law and in fact in failing to appreciate that the execution of the agreement for sale of shares of Guilders Bank International between the appellants and the respondents on 30.12.1999 and the meaning and tenor of clauses 2, 4 and 15 of that agreement rendered mute, irrelevant and academic the question as to the validity of the Memorandum of Understanding dated 13.10.1999.

[21] We have formed the view that the last three are intertwined with the matters condensed from the memorandum of appeal as truly belonging to the appeal. We, however, have come to a decision that the first does not pass muster. In that issue the 2nd to 9th appellants contend that the substratum of the claim pleaded by the respondents in their amended plaint dated 25th January,

2017 rests entirely on

the MoU even though occasionally making vague references to the agreement of sale dated 30th December, 1999. We are unable to see where this matter arose in the memorandum of appeal. The nearest it comes to is ground 4 in which the appellants impugn the judgment for giving primacy and importance to the MoU as opposed to the agreement of sale. This however is not the same thing as asserting that the respondents' entire claim was based only on the MoU.

[22] Even if we were to hold that the issue now raised is not new, still we would answer this argument in favour of the respondents. In the further amended plaint, which is the operating pleading of the respondents, it is pleaded at paragraph 6B:

> ***"Subsequently on 30th December 1999 the plaintiffs and the defendants finally executed an Agreement for Sale and purchase of shares from Guilders International Limited which agreement was a progeny of the Memorandum of Understanding."***

[23] The respondents then set out what they see as the salient features of the agreement. In addition, it is pleaded at paragraph 10A:

> ***"In any event, the Memorandum of Understanding resulted into final agreement dated 30th December, 1999 between the same parties which agreement of 30.12.1999 incorporated therein all essentials of the said Memorandum of Understanding."***

[24] At the heart of what constituted the respondents' cause of action

is paragraph 12B in which they complain of breach of the contract by

the appellants and set out particulars thereof. Of significance is that neither the MoU nor the agreement is explicitly mentioned. To our minds, both documents constituted the cause of action, with the more decisive question being whether the contract said to be breached was comprised of the MoU alone or of the agreement alone or both.

[25] With that preliminary matter out of the way, we now frame the issues that emerge for our determination:

i) What constituted the contract between the parties herein?
ii) Was the claim by the respondents' time barred?
iii) Which party if any, breached the contract?
iv) What remedies if any, are due to the parties?

[26] After citing clauses 2, 17, 12 (i) and 12 (iii) of the MoU, the learned trial judge held:

> ***"33. From the foregoing, it is clear that although clause 2 made the MoU subject to contract, it formed part of the final Agreement between the parties that was executed on 31/12/1999 and was binding on the parties. That issue is answered in the affirmative."***

[27] The appellants fault this holding. The 1st appellant cites the decision of UK Supreme Court in **RTS Flexible Systems Ltd v Molkerei Alois**

Muller Gmbh & Company KG (UK Production) [2010] UKSC 14 for

the proposition that whether there is a binding contract between

parties depends not upon them but on an appraisal of their words

and conduct. The 1st appellant contended that the MoU explicitly stated it was "subject to contract" under clause 2, signifying that it was a preliminary agreement that was not intended to be legally binding until a formal contract was executed. The 1st appellant refers to various court decisions (**Eldo City Limited v Corn Products Kenya Ltd & Another [2013] eKLR**, **Corn Products Kenya Limited v Corn Products Kenya Limited & another [2014] eKLR**, **Masters v Cameron (1954) 91 CLR 353; (1954) 28 ALJR 438** and **Joanne Properties Ltd v Moneything Capital Ltd [2020] EWCA Civ 1541**

(citing **Tiverton Estates Ltd v Wearwell [1975] Ch 146, 159** and

Generator Developments Ltd v Lidl UK GmbH [2018] EWCA Civ 396 [2018] 2 P & CR 7)) to underscore that the "subject to contract" phrase implies ongoing negotiations and no binding obligation until formal execution of contract. Further, the 1st appellant highlighted sub-clause 15.2 of the Agreement, as unequivocally stating that it constituted the "whole agreement" and "supersedes any previous agreements or arrangements". This “entire agreements” clause meant that the provisions of the

MoU became otiose and could not be admitted to contradict, vary, or add to the terms of the formal Agreement, a position supported by **Chitty on Contract 29th Edition Vol. General Principles** cited with approval in **George**

Mushindi & 2 others v Small Enterprise Finance Co. Ltd [2007]

KEHC 3207 (KLR), **Halsbury's Laws of England 4th Edition Vol.12**

adopted in **John Onyancha Zurwe v Oreti Atinda [2009] eKLR** and

Inntrepreneur Pub Co Ltd v East Crown Ltd. [2000] 2 Lloyd's Rep.

611.

[28] Adding their voice of support, the 2nd to 9thappellants argue that the inclusion of the phrase "subject to contract" within the MoU unequivocally signified that it was a preliminary agreement, not intended to be immediately legally binding until a formal, comprehensive contract was subsequently executed. The MoU was, in essence, an "agreement to reach an agreement". Referring to clauses 1, 2, 4.1 and 17 of the MoU, the appellants submit that the said clauses lay to rest any notion as to the legal efficacy of the MoU. We were referred to legal precedents and scholarly works to reinforce the non-binding nature of "subject to contract" clauses in preliminary agreements, including **Joanne Properties v**

Moneything Capital & Another [2020] EWCA Civ 1541, Lord

Denning MR in **Storer v Manchester City Council [1974] 1 W.L.R,**

1403 at 1408 H, **RTS Flexible Systems Limited v Molkerei Alois**

Muller Gmbh & Company KG (UK Production) **[2009] EWCA Civ**

26, **Trentham Ltd v Archital Luxfer** **[1993] Vol 1 Lloyd's Law**

Report, **Maple Leaf v Rouvroy** **[2010] 2 All ER (Comm)**, **Dhanani**

v Crasntansk **[2011] 2 ALL ER (Comm)**, and **Baird Textiles v Mark**

& Spencer **[2002] 1 ALL ER (Comm) 737** and **Megarry & Wade,**

The Law of Real Property, 5th Edition p.468 quoted in **J Jarvis &**

Sons Plc v Galliard Homes Ltd **[1999] ABC. L.R 11/12**. The

decision in **J Jarvis & Sons Plc v Galliard Homes Ltd** specifically

supports the position that a document expressed as "subject to contract" will not be binding if there are further terms to be agreed upon.

[29] The 2nd to 9th appellants sought to persuade us that a number of features of the MoU negate any notion that it was an enforceable contract: the uncertainty and vagueness of the terms; it was incapable of performance because of the conditions precedent that were to be fulfilled; and that it failed for want of consideration flowing from the 2nd to 9th appellants to the respondents. Elaborating, it was contended that the MoU failed to stipulate crucial particulars, such as the precise number of shares sold by each of the four respondents or the exact price per share. This inherent and material uncertainty, it was suggested,

rendered the MoU legally unenforceable, citing the case of **Scammell v Ouston 14,1 ALL ER 1941**. Regarding consideration, it was asserted to be a fundamental and

indispensable element for contract validity. On conditions to be fulfilled, this included the approval of the sale of shares by the Central Bank of Kenya and other governmental agencies, identified as significant roadblocks preventing the MoU from being a binding agreement at that nascent stage.

[30] Not unrelated is the submission that the subsequent execution of the formal agreement, particularly clauses 2, 4, and 15, rendered the prior question of the MoU's validity mute, irrelevant and academic. So as not to repeat the arguments made on behalf of the 1st appellant, we single out two. The contention that in the agreement, the purchaser of the shares is the 1st appellant, while the 2nd to 9th appellants were described as “obligors,” with the obligations to pay the purchase price, making this new arrangement fundamentally different from what was originally envisaged in the MoU where it was the 2nd to 9th appellants who were the purchasers of the shares. Second, is the assertion that the specific and detailed clauses within the formal Agreement conclusively demonstrate that it effectively extinguished and replaced the preliminary MoU, thereby rendering any inquiry into the MoU's original validity entirely superfluous and irrelevant to the current dispute.

[31] The respondents countered the argument that the MoU, being "subject to contract," was merely a preliminary agreement superseded by the formal Agreement. They supported the court's decision in affirming that although clause 2 of the MoU made the MoU subject to contract, it eventually formed part of the final Agreement between the parties and was binding. The respondents maintained that the two documents, the MoU and the Agreement, should be read and interpreted together as forming a single binding contract, with the terms flowing from both. They pointed to the parties' conduct, including the signing of the Agreement, as evidence that they intended to create legal obligations from the MoU. To support this, they cited several cases, including **Eldo City Limited v Corn Products Kenya Ltd & Another [2013] eKLR**, **RTS Flexible Systems Limited v Molkerrei Alois Muller GMBH & Company KG (UK Production) [2010] UKSC 14** and **Masters v Cameron (1954) 91 CLR 353**, to argue that the phrase "subject to contract" does not always prevent a binding contract if the parties' subsequent conduct indicates a clear intention to be bound. They referred to the decisions in **Five Forty Aviation Limited v Erwan Lanoe**

[2019] eKLR and

National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd &

another [2001] eKLR, in support of the assertion that a court

cannot rewrite a contract and that parties are bound by the terms of their contract unless coercion, fraud, or undue influence is pleaded and proved.

[32] Clause 2 of the MoU read:

> ***"Subject to contract, the purchasers have agreed to purchase and the sellers have agreed to sell all the 200,000 ordinary shares held by the said shareholders for an amount of Kshs. 196,000,000 (Kenya Shillings One Hundred Ninety Six Million only) being the net asset value of the Bank as on 31st December, 1998 as per the audited balance sheet of the Bank hereinafter referred to as the "purchase price" or "consideration" …"***

[33] On the face of it, the parties to the MoU entered an arrangement that was declared to be "subject to contract". We do not perceive a disagreement as between the parties as to what the phrase ***"subject to contract"*** means. It is not unusual for parties to engage in negotiations, some of which may be prolonged or even complex, before entering into a contract. The negotiating parties may choose to append the phrase ***"subject to contract"*** on documents that contain ongoing negotiations or tentative agreements reached in the course of discussion. The phrase simply and ordinarily means that a matter remains in negotiations until firmed up through a formally executed contract.

[34] Many decisions have discussed this phrase and we are content to

cite the English decision of **Joanne Properties Limited vs.**

<u>Moneything Capital & Another</u> [2020] EWCA Civ 1541 in which

Lord Lewison stated :

“Once negotiations have begun "subject to contract", in the ordinary way that condition is carried all the way through the negotiations: Sherbrooke v Dipple (1981) 41 P & CR 173. As Lord Denning MR explained:

> "*But there is this overwhelming point: Everything in the opening letter was "subject to contract." All the subsequent negotiations were subject to that overriding initial condition.*"

In the course of the judgments both Lord Denning MR and Templeman LJ approved the proposition formulated by Brightman J in Tevanan v Norman Brett (Builders) Ltd (1972) 223 EG 1945 that:

> "*parties could get rid of the qualification of 'subject to contract' only if they both expressly agreed that it should be expunged or if such an agreement was to be necessarily implied.*"

empleman LJ also approved a further passage of Brightman J's judgment in which he said:

> "*... when parties started their negotiations under the umbrella of the "subject to contract" formula, or some similar expression of intention, it was really hopeless for one side or the other to say that a contract came into existence because the parties became of one mind notwithstanding that no formal contracts had been exchanged. Where formal contracts were exchanged, it was true that the parties were inevitably of one mind at the moment before the exchange was made. But they were only of one mind on the footing that all the terms and conditions of the sale and purchase had been settled between them, and even then the original intention still remained intact that there should be no formal contract in existence until the written contracts had been exchanged.*"

[35] And then the learned judge proceeds to hold:

> ***"As the cases show, where negotiations are carried out "subject to contract", the mere fact that the parties are of one mind is not enough. There must be a formal contract, or a clear factual basis for inferring that the parties must have intended to expunge the qualification. In this case there was neither."***

[36] Where parties negotiate on an express basis of "subject to contract" then it is taken that what has been agreed is that the negotiations shall not be binding until a contract is formally entered. In **RTS**

Flexible Systems Ltd vs. Molkerei Alois Muler Gmbh & Company

KG (UK Production) [2010] UKSC 14, Lord Clarke delivering the

judgment on behalf of the court observed:

> ***"45. The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement…..***

47. We agree with Mr. Catchpole's submission that, in a case where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or

even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances. This can be seen from a contrast between the approach of Steyn LJ in the Percy Trentham case, which was relied upon by the judge, and that of Robert Goff J in British Steel Corporation v Cleveland Bridge and Engineering Co Ltd [1984] 1 All ER 504, to which the judge was not referred but which was relied upon in and by the Court of Appeal."

[37] The Judge later held:

"55. We note in passing that the Percy Trentham case was not a 'subject to contract' or 'subject to written contract' type of case. Nor was Pagnan, whereas part of the reasoning in the British Steel case in the passage quoted above was that the negotiations were throughout conducted on the basis that, when reached, the agreement would be incorporated in a formal contract. So too was the reasoning of the Court of Appeal in Galliard Homes Ltd v J Jarvis & Sons Ltd (1999) 71 Con LR 219. In our judgment, in such a case, the question is whether the parties have nevertheless agreed to enter into contractual relations on particular terms notwithstanding their earlier understanding or agreement. Thus, in the Galliard Homes case Lindsay J, giving the only substantive judgment in the Court of Appeal, which also comprised Evans and Schiemann LJJ, at page 236 quoted with approval the statement in Megarry & Wade, The Law of Real Property, 5th ed (1984) at pages 568-9 that it is possible for an agreement 'subject to contract' or 'subject to written contract' to become legally binding if the parties later agree to waive that condition, for they are in effect making a firm contract by reference to the terms of the earlier agreement. Put another way, they are waiving the 'subject to [written] contract' term or

understanding.

56. Whether in such a case the parties agreed to enter into a binding contract, waiving reliance on the 'subject to [written] contract' term or understanding will again depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold."

[38] To be drawn from these decisions, which we endorse, is that an arrangement that is "subject to contract" should ordinarily be accepted to be just that. It is not intended to be legally binding until a formal contract is entered into. Courts should not read any other intention save where the parties waive or expunge the "subject to contract" term. The waiver may be express or through the conduct of the parties. Where it is the latter, then the conduct of the parties must unerringly point to an intention to be bound by the "subject to contract" understanding. To accede to a less yielding yardstick could weaken "subject to contract" negotiations as a facilitator of contract making as parties would be apprehensive that they will be bound by concessions and bargains made in the course of attempting to arrive at an agreeable and firm commitment. There is much to be gained by safeguarding the "subject to contract" arrangement.

[39] Before concluding on this aspect, we must make some comments on the decision in ***Eldo City Limited*** **(supra)** referred to us by the

respondents. In that decision, Mabeya J. stated, citing the English

decision of **Investec Bank (UK) Ltd v Zulman and another [2010]**

EWCA Civ 536 that:

> ***"….the Court cautioned against putting too much weight behind the phrase 'subject to contract' and held that it is the parties' intention that matters. The presence or absence of the phrase will not of itself determine whether or not a contract exists. It is the intention of the parties that matters."***

[40] We have carefully read the decision in ***Investec*** and, in short, these

are the facts. It was an appeal by Investec Bank (UK) Ltd against Mr. Arnold Zulman and Mr. David Zulman regarding a personal guarantee. The Zulmans, owners of Ashbury Confectionary Ltd, secured initial finance of £2,500,000 from Investec in 2004. The Heads of Terms that were sent to Ashbury and Arnold provided that they were "subject to contract" and would only be binding when incorporated in a final facility letter, which was finally agreed and executed by the parties. Under the terms of the facility letter Mr. Arnold Zulman provided a £1,000,000 cash deposit to be charged to the bank. Subsequently, variations were made to the arrangement which led to the preparation of a draft Variation Letter dated 24th January, 2007 which varied the initial Facility Letter. The Variation Letter was duly executed by Ashbury. Although a draft amended guarantee was drafted to

reflect the change of circumstances, it was never signed by Arnold. A central issue at trial was whether an oral

agreement to vary the guarantee was binding without being signed. The trial court held that the whole arrangement was “subject to contract” and therefore unenforceable until any relevant document was signed.

[41] At appeal, the judgement of the court was written by Longmore LJ, who held;

> ***“In our judgment it is important not to over-emphasise the actual phrase "subject to contract". It is a question, in every case where a written agreement is contemplated, whether the parties intend not to be bound until the relevant document is actually signed or merely intend that the relevant document is to be the record of an agreement made orally and intended to be binding when made.”***

[42] The decision of the court must be understood from the facts of the case. The specific negotiations that were the subject of the decision were not the initial ones that ended up in the bank issuing a Heads of Terms that were “subject to contract”. When the appellate court held that it was important not to over emphasize the phrase “subject to contract”, it did so because the matter turned on the intention of parties regarding the varied arrangement and not the phrase which was only in respect to the first set of negotiations which were not in contention. This becomes clearer in the following short passage by the court;

> ***"The surest guides to the parties' intentions are usually the terms of the draft documents passing between them. The use of the phrase "subject to contract" is, of course, lawyer's short-hand intending to indicate an absence of intention to be bound until the relevant document is signed but its absence does not necessarily mean an intention to be bound once oral agreement is reached. In the present case it is necessary to consider the terms of both the draft variation letter and the amended guarantee."***

[43] We do not accept that ***Investec*** is authority that even where negotiations are "subject to contract" due deference should not be given to that phrase and that the court should, instead, engage in a supposed search for the intention of parties. The phrase, it bears repeating, should never be shunted aside readily at the altar of the notion of "intention of parties" unless the parties have unequivocally waived or expunged the "subject to contract" term.

[44] The circumstances here are that the 2nd to 9th appellants entered into an MoU with the respondents which was "subject to contract", acted on certain terms of the MoU, and then later signed a sale agreement which then included the 1st appellant as a substantive party. We think that whether or not the MoU became a binding contract or was incorporated into the terms of the sale agreement will depend on whether the "subject to contract" understanding was expressly or by conduct of the

parties unequivocally waived. The answer cannot, as proposed by the respondents, be found in the MoU itself. For that

reason, no premium should be given to clause 17 of the MoU, however forceful it is worded. The clause reads:

> ***"This MoU will remain in force and binding upon both the parties and shall become a forming part to the final sale agreement."***

This is because the entire MoU was "subject to contract" and, naturally, so would its entire terms and conditions. The understanding in clause 17 that *"the MoU would remain in force and binding upon the parties and shall become a forming part to the final sale agreement''* would have to be subject to the final sale agreement, either expressly or by unmistakable implication saving it as forming part of its terms and conditions.

[45] In the Sale Agreement, our attention is drawn to sub-clauses 15.1 and 15.2 which the parties have given conflicting interpretation:

> ***"15.1: This Agreement shall be binding upon and ensure for the benefit of the successors of the parties.***
>
> ***15.2: This Agreement (<u>together with any documents referred to herein</u>) constitutes the whole agreement between the parties hereto and supersedes any previous agreements or arrangements between them relating to the subject matter hereof, it is expressly declared that no variations hereof shall be effective unless made in writing."***
> *(Emphasis added)*

[46] We do not think that sub-clause 15.1 helps to resolve the vexing issue, whether the MoU survived the Sale Agreement. The sub-

clause

simply means what it says; that the successors of the parties shall be bound by the terms and conditions of the agreement as they, too, are deemed to benefit therefrom.

[47] Regarding sub-clause 15.2, it is suggested for the respondents that the MoU is one of the documents contemplated by the sub-clause as constituting the agreement. On the other hand, the appellants take the very opposite view that the MoU is in fact a previous agreement or arrangement which is expressly excluded by dint of that provision.

[48] So what are the documents referred to in the agreement? Towards the end of the sale agreement is a list of annexes with 10 annexes which include the Due Diligence Report and the Net Worth Computation as at 31st July 1999. It is then declared that *"these annexures form part and parcel of this agreement."* Notably, the list does not include the MoU.

[49] Of course it is also true, as pointed out by counsel for the respondents, that the MoU is referred to in the Definition and Interpretation section of the Agreement, in which it is defined as:

> ***"a Memorandum of Understanding executed by the vendors and the purchaser dated 13th October 1999."***

In construing whether the MoU is one of the documents referred to in sub-clause 15.2, we give regard to the entire Agreement and

sub- clause 15.2. We have combed the entire Agreement and are only able

to find one other place where the MoU is mentioned. Sub-clause 8.1(C)(xviii) provides;

> ***"The information and warranties given in the Memorandum of Understanding is complete true and accurate of the date hereof and will remain so as of completion."***

[50] We are of the view, and so hold, that had the intention of the parties been that the entire MoU would form part of the Sale Agreement, then it would have been needless to cite just a portion thereof in the agreement as done in sub-clause 8.1(C)(xviii). This, taken in conjunction with the fact that the MoU is not one of the annexures listed as forming part of the Agreement, leads us to emphatically conclude that it was not the intention of the parties that the MoU was one of the documents which constituted the whole agreement between them. On the contrary, it was *"a previous agreement or arrangement that was superseded by the sale agreement."*

[51] The 1st appellant contended that the claim by the respondents was time-barred under section 4(1)(a) of the Limitation of Actions Act; that the cause of action for breach of contract, specifically regarding instalment payments, accrued from 31st December, 2001 when the first instalment was due. Given the six-year limitation period for contract claims under section 4(1)(a) of the

Limitation of Actions Act, the suit should have been filed by 1st January, 2007 for the first

instalment, or by 1st January, 2017 for the last instalment due on 31st December, 2011. It is pointed out that the particulars of breach were introduced for the first time in the further amended plaint on 25th January, 2017, making the claim time-barred. The 1st appellant cited the decisions in **Alba Petroleum Limited v Total Marketing Kenya Limited [2019] eKLR** and **Joseph Odira Ombok v South Nyanza Sugar Company Ltd [2018] eKLR**. Further argued was that

the prayer for rendering accounts was time-barred under section 4(3) of the Act as it was filed six (6) years from the commencement of the action.

[52] In answer, the respondents referred to paragraph 27 of the impugned decision, stating that the cause of action accrued in December 2005, and the suit was filed within the six-year limitation period. Furthermore, that the amendment to the plaint, which the appellants argued introduced time-barred particulars, was consented to by the appellants, and leave for the amendment was granted on 24th January, 2016. We were asked to note that the appellants' counterclaim was premised on fictitious reports filed in 2014 and prepared by a private accountant who at the time was not the official auditor of the bank and it was the

first time that the respondents were encountering them.

[53] On this question the trial court returned the following view;

> ***"From the evidence on record, the cause of action in this suit arose on 31/12/1999. The suit was filed in December, 2005 well within the 6 years limit in the Limitations of Actions Act. Although the plaint was later amended, it did not introduce any new cause of action and in any event, such amendment dated back to the date of the suit. That issue is determined in the negative."***

[54] As early as 26th March, 2007 when the respondents filed the amended plaint, they had complained that the appellants had failed to pay the purchase price of Kshs.180,000,000.00 and further failed to account for their securities and at the end sought judgment as follows:

"(a) Shs.180,000,000.00 referred to in paragraph 12 hereof.

(b) An inquiry as to amounts collected and or collected by the defendants from the debtors of Guilders International Bank Limited in respect of the collection made by Guardian Bank Limited on behalf of Guilders International Bank Limited for which purposes this Honourable Court be pleased to appoint a Receiver to inquire into such collection, and after ascertainment thereof by the Receiver for payment thereof to the Plaintiffs.

(c) Interest on Shs. 180,000,000.00 at bank rates from 12th June, 2000 until date of payment in full.

(d) Interest on amount recovered and recoverable by Guardian Bank Limited on behalf of Guilders International Bank Limited.

(e) Discharge and return of the securities specified in the M.O.U.

(f) Costs of this suit.

(g) Any other further or alternative relief that this Honourable Court may deem just to grant."

[55] While it is true that the particulars of breach of contract were only set out on 25th January, 2017, the pleadings filed on 26th March, 2007 had without doubt alluded to a breach of contract in failing to pay the consideration and to account for securities held. In addition, the pleading specifically sought an inquiry, ascertainment and payment of the amounts collected by the appellants from the debtors of Guilders.

[56] We cannot accept that: by clarifying that the consideration payable was Kshs.196,000,000 and not Kshs.180,000,000; seeking the review of accounts in respect of the securities; clarifying the applicable interest to be charged and when interest was due; and particularizing the breach of contract, the respondents were introducing new claims that were time-barred. Each of the matters in the further amended plaint dated 25th January, 2017 related back to claims already pleaded in the amended plaint filed within the limitation period of six years when the 1st instalment of the purchase price was due, to wit 31st December, 2001. For this reason, the learned judge cannot be faulted in rejecting that preliminary matter.

[57] The 1st appellant also vigorously asserted that, contrary to

findings of the trial court, it had proved the existence of unrecovered loans

and undisclosed liabilities. It relied on sub-clause 7(1)(iii) of the Agreement, which deals with the question of the Total Loan Portfolio (TLP) and which mandated deducting non-performing and irrecoverable loans (after exhausting recovery efforts) from the consideration by a cut-off date of 31st December, 2001. It is asserted that the provision addressed the consideration of Kshs. 196 million for the purchase of the shares and provided that the said sum was based on the net worth of the Bank as of 31st December, 1998 and this amount also considered the estimated recoverable and performing loan portfolio of Kshs. 678,074,000.00. We were asked to deduce three essential limbs of sub-clause 7(1)(iii): that it provided a road map to deal with the TLP warranted by the respondents as recoverable and performing where it turned out that the same were not recoverable and performing; it provided for exhaustion of all avenues to recover the same; and lastly, it imposed a cut-off date, being 31st December, 2001 for determining the issue.

[58] In compliance with sub-clause 7(1), due diligence of the financial position of Guilders Bank was carried out by the respondents' witness Mr. Vimlesh Kumar Shukla,(PW2). However, the respondents' other witness, Mr. Raju Sanghani (PW1), conceded that only a fraction of the warranted loans had been recovered by

the cut-

off date. The 1st appellant makes reference to the evidence from its expert, Mr. J.V. Bhatt, (an auditor), who examined all the relevant and original documents, including all the statements of individual account holders, and compiled a Report dated January 2014, which report gave details of the loan portfolio, sums recovered by the cut- off being Kshs.261,069,887 out of Kshs.678,074,000 warranted to be performing and recoverable and the extensive recovery efforts it made. Regarding recovery effort, two examples are given: the accounts of Mutinda Kalika & Co. Ltd and Kavaki Construction Company Ltd in which long and arduous efforts were made including demand letters, institution of legal suits, offers of settlement agreements and even follow up after the cut-off date. The 1st appellant emphasised that the cut-off date bore a significance in the sale agreement and added that sub-clause 7(1)(iv) obligated the parties to work out the deficit net worth of the bank as of the completion date on 30th December, 2001 noting that any deficit in net worth would be recoverable from the sale proceeds of the blanket securities provided by the respondents if not made good within the agreed time. Citing **Thrift Homes Limited v Kays Investment Limited [2015] eKLR** where the Court held that the conduct of the

parties, totality of facts and circumstances pertaining to a

transaction were factors to be considered when determining whether time was of the essence, the 1st appellant submitted that the effect of the cut-off date in so far as the TLP was concerned was that all the sums in the TLP warranted as performing and recoverable should have been recovered as at the cut-off date.

[59] Regarding undisclosed liabilities and recovery expenses, the 1st appellant argued that it presented a list of such liabilities. Further, that sub-clause 7(1)(x) provided for recovery costs which were to be borne by the respondents without requiring notice. The 1st appellant contended that the respondents were aware and notified of these issues through the Debt Recovery Committee, whose composition included the directors of the respondents and whose minutes confirmed discussions on outstanding loans, recoveries and undisclosed liabilities. In addition, the 1st appellant referred to notices of meetings of the Committee issued by it inviting the directors of Guilders Bank to those meetings. Further, that there was compliance with sub-clause 7(1)(v)(c) and (vi), pointing to the respondents' consent to the sale of blanket securities as clear evidence of their awareness and acknowledgement of outstanding debts. The 1st appellant invoked the decisions in **Feba Radio (Kenya) Limited t/a Feba Radio v Ikiyu Enterprises Limited [2017]**

eKLR

and **Benjamin Ayiro Shiraku v Fozia Mohammed [2012] eKLR**

(citing **Combe v Combe (1951) 2 KB 215**) to urge that the

respondents having consented to the sale of the blanket securities, were aware of the status of the recovery, recovery expenses and undisclosed liabilities before granting consent to the sale of Blanket securities, and the unconditional utilization of the purchase price to settle all the outstanding debit balance in the Vendors' Memorandum Account. That demonstrated that they were aware or had been notified of the sale and/or disposal of the blanket securities provided by them and they should be estopped from denying awareness.

[60] The 1st appellant contended, further, that the High Court's nullification of blanket securities sales, without hearing the third-party buyers, violated the fundamental principle of natural justice, "*audi alteram partem*", that no man/woman should be condemned unheard, as restated in **Equity Bank Kenya Limited v Thiongo &**

4 others (Civil Appeal 168 of 2019) [2023] KECA 558 (KLR).

[61] In concluding on this aspect, the 1st appellant submitted that it did not breach its obligation to pay the purchase price of Kshs.196 million. Pursuant to sub-clauses 1.1 and 3, this price

was explicitly subject to adjustments under clauses 7 and 8 of the Agreement. It is

submitted that considering the provisions of sub-clause 7(1)(iii), the outstanding sum together with undisclosed liabilities and recovery expenses was to be deducted from the consideration of Kshs. 196 million leaving an outstanding balance of Kshs.238,947,355 in the negative as of the cut-off date to be debited in the Memorandum Account. Given that the respondents did not impeach the report of January 2014 by Mr. Bhatt, the 1st appellant argued that the same was accurate and verifiable. In effect, the total outstanding sum after considering all recoveries, proceeds from sale of the blanket securities as of 31st December, 2013 was Kshs.827,395,388/= which was the basis for the counterclaim for breach of contract (later amended to Kshs.799,895,388 in the amended counterclaim). This amount represented the debit balance in the Memorandum Account arising from the respondents' misrepresentation of Guilders Bank's true net value and loan portfolio recoverability. They referred to **Halsbury's Law of England Volume 42 paragraph 57** to assert that such misrepresentation allowed for remedies for breach of contract.

[62] On the matter of payment of the consideration, the respondents contended that three things were clear from the transaction of the sale of the shares: the consideration was not agreed *in vacuo*

but was premised on the net asset value of Guilders as at 31st December,

1998 derived from the audited balance sheet; that it can therefore be deduced that any changes in the net worth of Guilders would easily be reflected and derived from the subsequent audited balance sheets; and it is common ground that the appellants did not pay them a single coin, not even the 1st instalment due on 31st December, 2001 as provided in clause 6 of the Agreement. The respondents argue that the appellants sought to circumvent their obligations by introducing a report prepared by Mr. Bhatt in 2014 which was 13 years after the cut-off date and more than 9 years after the suit had been filed. Referring us to sub-clause 3.3.2 of the MoU as read together with clause 7 of the Agreement, they contend that the appellants or their appointed agent were allowed to take over the charge of all the assets, documents, securities and management of Guilders Bank so as to allow them first hand access to the bank for purposes of due diligence, a fact not disputed by the appellants. Referring to the said clauses, the respondents contend that: the appellants conducted due diligence and agreed to purchase 200,000 shares owned by the respondents at Guilders Bank for Kshs. 196 million; the appellants took control of the Bank and had an opportunity for a whole year to assess the financial health of the newly acquired bank and raise queries (if at all) with the respondents;

the appellants, without any colour of rights, simply refused to pay the respondents; the appellants manufactured fictitious reports 14 years later so as to defeat the respondents' claim; during trial, the appellants did not adduce evidence in support of the assertions that indeed there were unrecovered liabilities which offset the respondent's claim; and the appellants, with an opportunity under sub-clause 16.1 of the Agreement to give notice to the respondents, did not issue any notice to the respondents.

[63] On whether the securities provided by the respondents were rightfully recoverable as determined by the trial court, the respondents argue that at the time of taking over Guilders Bank it was agreed that Kshs. 829,543,000 was the TLP and that Kshs. 678,074,000 was recoverable and performing. Thereafter, at the request of the appellants, the respondents were to provide securities worth Kshs. 380,000,000 and personal guarantees for the performance of the outstanding loans that were running at the time of the purchase. Thus, it was the contractual responsibility of the appellants to undertake banking procedures and take over the recovery process for all loans that were outstanding, render accounts of all sums recovered and release the securities to the respondents once the outstanding loans had

been offset. The respondents

contend that the appellants never rendered accounts despite requests, with the only attempt being the report filed in 2014. Similarly, notwithstanding a period of two years from the signing of the contract to the cut-off date, the appellants never rendered any reports, accounts or queries on challenges encountered in realizing the outstanding loan amounts.

[64] The respondents laud the trial court's finding that the appellants had an obligation to notify the respondents of any undisclosed liabilities and debit those amounts to the Memorandum Account. The respondents submitted that the appellants failed to tender sufficient evidence regarding the status of these securities or to show that they notified the respondents about any undisclosed liabilities. They disputed the appellants' allegations that there were unrecovered loans and undisclosed liabilities as ill-advised and malicious, given that the appellants never tendered accounts despite requests. They emphatically contend that it would be unfair and unjust enrichment for the appellants to retain the securities (valued at Kshs.380,000,000 in 30th December, 1999) without rendering accounts on the loan portfolios and without paying the consideration.

[65] At the heart of this dispute is whether there was a failure by the appellants to pay the agreed consideration, the consideration being provided by Clause 3 of the Agreement to be as follows:

> ***"Subject to the provisions of Clauses 7 and 8, the Total Purchase Price payable for the shares shall be Kenya Shillings One Hundred and Ninety-Six Million (Kshs. 196,000,000/-) ("the Consideration") being the net asset value of the Bank as at 31st December 1998 as per the audited balance sheet of the Bank as at that date. The balance sheet is attached hereto as Annex 5. The Consideration shall be subject to set off of the certain amounts referred to in Clause 7."***

[66] Clause 7 (1) is on undisclosed liabilities. Of relevance is sub-clauses 7 (1)(i), 7 (1)(ii) and 7 (1)(iii):

> ***"i) The Vendors represent and warrant the total loan portfolio of the Bank as at 31st December 1998 is Kshs. 829,543,000 (Kenya Shillings Eight Hundred Twenty Nine Million Five Hundred Forty Three Thousand only) ("Total Loan Portfolio") and further represent and warrant that out of this Total Loan Portfolio Kshs.678,074,000 (Kenya Shillings Six Hundred Seventy Eight Million Seventy Four Thousand) is the recoverable and performing and estimated realizable value of the above Total Loan Portfolio. The particulars of the Total Loan Portfolio including the securities therefore is set out in Annex 5.***
>
> ***ii) The consideration of Kshs. 196,000,000/= (Kenya Shillings One Hundred Ninety Six Million) for all the shares is based on the net worth of the Bank based on the Audited Balance Sheet of the Bank as at 31st December 1998 and taking into consideration the estimated recoverable and performing loan portfolio and the Vendors' representations and warranty in respect thereof.***

iii) In the event that it is determined that any part of the loan portfolio classified as recoverable and performing is in fact non-performing and not recoverable after all reasonable avenues to recover the same have been exhausted, then in such event sums found to be irrecoverable by the cut-off date shall be deducted from the Consideration. The cut-off date of establishing this position will be 31st December 2001."

[67] A substantial complaint by the appellants is that of the total loan portfolio of Guilders warranted by the vendor as recoverable turned out to be much less. Not Kshs. 678,074,000.00 but only Kshs. 261,069,887.00. It is common cause that the cut-off date of 31st December, 2001 was crucial. Any warranted sums found to be irrecoverable by this date would be deducted from the consideration.

[68] An issue arising is whether this cut-off date was cast in stone. On the face of it, the date was not extendable because there was no provision to extend it. It was the cut-off date of establishing that any part of the loan portion classified as recoverable and performing was in fact non-performing and non-recoverable after all reasonable avenues to recover had been exhausted. We have no doubt that this date is intimately connected with the date when payment of the consideration was fixed by sub-clause 6.1 which reads:

"Subject to the provisions of Clause 7 and to all the

Conditions Precedent being fully complied with and following completion of the matters referred to in Clause 5, the obligors shall pay the Total Purchase

Price on behalf of the Purchaser in ten (10) equal instalments on the last day of each successive calendar year starting from 31st December 2001 or at such other dates ("Due Payment Dates") as my be agreed by all the parties in writing."

[69] A cut-off date for establishing the true value of the warranted recoverable and performing loans was important so as to make certain what needed to be paid as consideration starting from 31st December 2001 as the parties had agreed that the consideration was adjustable depending on the recoverability of the warranted loan portfolios. Each of the parties needed to be certain of the amount due on that date. The parties must have anticipated that two years from the date of the agreement to the due date would be sufficient to establish the true value of the warranted recoverable and performing loans.

[70] Sub-clause 6.1 importantly provides that the due date for payment of the consideration could be changed by all the parties in writing. No similar provision is to be found regarding the cut-off date. However, under the provisions of sub-clause 15.2, variations of the terms of the agreement could be made, but only in writing. Undoubtedly the cut-off date could be varied as long as it was done in writing.

[71] There being no evidence that the cut-off date had been extended, either in writing or by conduct of the parties, and there being no formal determination on that date regarding status of the loans, then there is merit in the contention by the respondents that the appellants could not deploy accounts taken after that date to insist on reducing the consideration to be paid. The horse had left the barn! To that extent we uphold the finding of the judge that:

> ***"48. The view the Court takes is that since the first instalment of Kshs. 19.6 million was due by the end of one year after 31/12/2001, the defendants were obligated to have raised all these alleged claims about the non-recoverable loans and show the effort taken to recover the same before the cut- off date. They should have also shown how undisclosed liabilities arose and demanded the making good of the same within 7 days. None of this happened. This was a time bound contract. The unrecoverable loans should have been raised, notified the plaintiffs and debited the Memorandum Account by the cut-off date.***
>
> ***49. It would be re-writing the contract between the parties to allow one of them extend obligations of the others and benefits for itself beyond the agreed time. The cut-off date was supposed to be extended in writing by both parties. It was not. Any purported sale or disposal of the securities offered by the plaintiff at any time after the cut- off date was outside the terms of the contract irregular, null and void."***

[72] And as we shall demonstrate shortly, the outcome would remain unchanged even if it was conceded by the respondents that of

the

warranted sum of Kshs.678,074,000.00, only the sum of Kshs.261,069,887.00 had been recovered by the cut-off date. Our conclusion that the proposition by the appellants would still run into headwinds is drawn from a true reading of the intent and purport of sub-clause 7 (1)(iii) which for its importance bears repeating:

> ***"iii) In the event that it is determined that any part of the loan portfolio classified as recoverable and performing is in fact non-performing and not recoverable after all reasonable avenues to recover the same have been exhausted, then in such event sums found to be irrecoverable by the cut-off date shall be deducted from the Consideration. The cut-off date of establishing this position will be 31st December 2001."***

[73] A critical facet of this provision was that it imposed on the purchaser an obligation to exhaust all avenues of recovery of the warranted loans by the cut-off date before those loans could be determined to be irrecoverable at that date. The appellants contend the recovery efforts set out in annexure G of Mr. Bhatt's report acquits them. We drill down on the report.

[74] Lorimar Apartments was indebted in the sum of Kshs. 56,040,000,00 as at 1st August, 1999. The report stated that the amount recovered from 1st January, 2002 to 31st December, 2013 was Kshs.40,034,968.00. Clearly the loan, or at least part of it, was recoverable and recovered after the cut-off date.

[75] Mr. Surjit Singh Hunjan had an outstanding balance of Kshs. 43,775,000.00 as at 1st August, 1999. Although it is reported that the debtor had been declared bankrupt, it was not clear why three properties charged in favour of the bank could not be sold towards recovery of the loan.

[76] Shanti Textiles Limited was indebted to the sum of Kshs. 24,618,000 as at 1st August, 1999. The report stated *"No monies were recovered from this account and it was closed on 26th September, 2005."* There is no evidence of any recovery effort made between the date of the Sale Agreement and the cut-off date.

[77] Regarding Tourist Paradise Investments Limited, an outstanding balance of Kshs.22,930,000 was due as at 1st August, 1999 whereas a sum of Kshs.18,567,731.00 was recovered by 31st December, 2001. There were efforts after this but the debtor was placed under receivership and the court was shown a dissolution notice issued on 28th April, 2010. Nothing is said about the prospects of recovery after 31st December, 2001.

[78] Marsman and Company Limited which had an outstanding balance of Kshs. 22,265,000 as at 1st August, 1999 owned one property (LR 1870/X/70) valued at Kshs.15,000,000 on 18th December, 2000. The total amount recovered as at 31st

December, 2001 was Kshs.

2,277,118 although nothing was said about exhaustive attempts to dispose of the charged property.

[79] Regarding Delaco Limited, Kshs.6,670,000 was recovered from 1st January 2002 to 31st December, 2013. Clearly it was a recoverable loan and a portion of it was recovered by the cut-off date.

[80] Kavaki Construction Company Limited had an outstanding balance of Kshs.13,482,000 as at 1st August, 1999. On 19th January, 2001 Guilders instructed Hamilton Harrison & Matthews advocates to file a court case against it for Kshs.20,500,000.00. The outcome of these proceedings was not reported.

[81] We have interrogated the reports of the other debtors, Mr. Ashok Mediratta, Naju Textiles Limited, Mr. Leonard M. Onyancha, Betterprice Supermarket Limited, Campos Industries Limited and, Miramar Enterprises Limited. We are satisfied that they fail to establish that the debts were either not recoverable or all avenues to recover the same had been exhausted.

[82] The evidence that emerges is that the 1st appellant had not demonstrated that it had exhausted all avenues in making full recovery of the loans by the cut-off date. Another is that some portions of the loans were indeed recovered after the cut-off date. For

these two reasons, even an interpretation of the objective of the cut- off date that is charitable to the appellants is unavailing to them.

[83] In closing on this part, it is clear to us that had the parties taken the trouble of establishing the state of the loans as of 31st December, 2001, then this controversy would not have arisen. The 1st appellant only has itself to blame for failing to utilize the provision of sub- clause 7 (1) (iii) if indeed any of the warranted loans were impossible to recover. It may very well be that the 1st appellant was confident about the prospects of recovery after the cut-off date and did not think it necessary to take advantage of this provision.

[84] Under sub-clause 7 (1) (iv) the vendors acknowledge that at the time of the Sale Agreement, there could be some undisclosed liabilities. These could include any deterioration of the value of assets of the bank, increase in any of the existing liabilities, tax liability, or claims arising out of any litigation against the bank. So as to cushion the appellants from the indeterminate liabilities, sub-clause 7(1)(v)(a) enjoined the respondents to provide securities in the sum of Kshs.380,000,000. The securities, christened “blanket securities”, were indeed listed as annexure 9 to the Agreement. There was evidence, however, that the

respondents only provided 10 blanket securities valued at Kshs.252 million.

[85] Regarding undisclosed liabilities and how they would be dealt with is sub-clause 7(1)(v)(c) which reads:

> ***"Upon the discovery of occurrence of any Undisclosed Liability, the Purchaser shall first notify the Vendors giving the Vendors seven days within which to make good the liability. If within the seven days the Vendors do not make good the liability, then the Purchaser may forthwith set off the liability against the Vendors' Memorandum Account opened pursuant to clause 7(1)(v)(a) hereof."***

[86] It was the case of the appellants that they had before the cut-off date discovered undisclosed liabilities of Kshs.10,623,414.00 and a further sum of Kshs.3,294,113.00 post that date, making a total of Kshs.13,917,527.00.

[87] Agreeing with the respondents that the issue of undisclosed liabilities and sale of certain blanket securities should not have arisen, the learned trial judge held:

> ***"46. As for the undisclosed liabilities, the defendants had the obligation to notify the plaintiffs upon discovering them and the obligation to debit those amounts in the Memorandum Account. The plaintiffs provided securities to secure the undisclosed liabilities. There were allegations that the defendants realized or attempted to realize those securities. The defendants did not tender any sufficient evidence to show the status of those securities.***
>
> ***47. The defendants did not properly and transparently notify the plaintiffs of the undisclosed liabilities as stipulated in the agreement. They have also not proved to the court whether the securities were realized, if at all. Surely, if the defendants were***

indolent, neither the

law nor equity can aid them. No one party can reconstruct the contract to the exclusion of the other.

48. The view the court takes is that since the first instalment of Kshs. 19.6 Million was due by the end of one year after 31/12/2001, the defendants were obligated to have raised all these alleged claims about the non-recoverable loans and show the effort taken to recover the same before the cut-off date. They should have also shown how undisclosed liabilities arose and demanded the making good of the same within 7 days. None of this happened. This was a time bound contract. The unrecoverable loans should have been raised, notified the plaintiffs and debited the Memorandum Account by the cut-off date."

[88] It was conceded by the witnesses of the appellants that the notice contemplated by sub-clause 7(1)(v)(c) was never issued but we were nevertheless asked to find that actual notice could be inferred from two circumstances. The information of those liabilities was shared at the Debt Recovery Committee, and secondly, that the respondents approved the sale of some securities to settle the undisclosed liabilities.

[89] The Debt Recovery Committee was established under sub-clause 7(1)(x) drawing representation from both the respondents and the appellants. Under the provisions of that sub-clause, the purchaser would allow the vendors to follow up debt recovery and give the vendors access to information. Placed before the court were various notices inviting members of the committee (which

include representatives of the respondents) to committee meetings. There

are notices for meetings to be held on 18th July, 2001, 29th August, 2003, 7th November, 2003 and 18th February, 2004. A common agenda proposed for those meeting was a discussion of the advances portfolio of Guilders. The evidence by the appellants was that the directors of Guilders declined to attend some of those meetings. Yet in so far as the notices did not contain specific information regarding the undisclosed liabilities, it cannot be fairly inferred that the respondents had notice of those liabilities, at least in respect to the meetings their representatives did not attend.

[90] There are, however, those meetings of the committee attended by either Mr. Raju Sanghani or P. K. Shah, or both of them. The two were directors of Guilders. But even more importantly, Mr. Sanghani was a director of all the respondent companies. We have read the minutes of those meetings and make the following observations.

[91] The minutes of the meeting of 14th June, 2000 shows that claims against Guilders aggregating to Kshs.6,072,346.00 were reported. The meeting otherwise dedicated itself to discussing the progress of debt recovery as did the meeting of 12th July, 2000. It is our view, and holding, that the respondents had constructive notice of previously undisclosed liabilities of Kshs.6,072,346.00

disclosed in the meeting of 14th June, 2000, notwithstanding the absence of a

formal notice. It is only this amount of undisclosed liabilities that the respondents would be liable to shoulder.

[92] We turn to examine if notice could be inferred from the sale of LR 209/9832, LR 3734/549, LR 209/8000/150 and LR 1870/II/6 (in the category of blanket securities) as they were consented to by the directors of the respondents. The letters approving the sales are unequivocal that the sale proceeds are to be paid over to Guardian in partial payment of monies secured by the charge dated 19th February, 2001. This charge is not part of the record before us and we are not certain that it was part of the evidence before the trial court. It is therefore not clear to us that the four properties were sold so as to wholly or partly recover sums due on account of undisclosed liabilities. As the respondents deny that the sales were for purposes of settling undisclosed liabilities, we are unable to infer any notice to the respondents of undisclosed liabilities on account of the sale of the four properties. This, however, is not to say that the sales can be faulted, an issue that we shall return to shortly.

[93] In the end, we reach a different outcome from the trial court in respect of undisclosed liabilities. We have found that there was evidence that the respondents had constructive notice of undisclosed

liabilities of Kshs.6,072,346, and the appellants would be entitled to recover that from them.

[94] Before making a determination regarding the four properties sold, it is apt to first consider and determine the 1st appellant's counterclaim. It had sought the sum of Kshs.827,395,388 being an alleged debit balance in the respondents Memorandum Account. This amount was very substantially based on the apparent huge shortfall from the warranted loans portfolio of Kshs.678,074,000 which allegedly only yielded Kshs.201,009,887, leading to a black hole of Kshs.439,947,335. There was then the undisclosed liabilities which we have capped at Kshs.6,072,346. Nevertheless, for reasons earlier given, we have concluded there was no basis for the appellants to lay a claim on the shortfall of warranted loans. That being the substratum of the counterclaim, it becomes so distorted that it cannot be said to have been proved.

[95] One of the dispositive orders made by the trial court was as follows:

> ***"In the premise, I find that the plaintiffs have proved their case to the required standard. I enter judgment for the plaintiffs against the defendants, jointly and severally, for: -***
>
> ***(b) Discharge and return of the securities specified in the MoU to the plaintiffs in default, pay that value at the time they were***

submitted.”

[96] A construction of the order is that it would include the four properties sold with the approval of directors of the respondents. There can be no justification for the inclusion of the four securities because the respondents neither alleged nor proved that the approval they gave was obtained by misrepresentation, coercion, fraud, or mistake. In any event, the securities are now at the hands of third parties who were not parties to the proceedings and cannot be condemned unheard.

[97] So, is the 1st appellant also liable to pay the purchase price?

[98] It is the case of the 1st appellant that under the terms of the Agreement, the obligors (the 2nd to 9th appellants) were specifically tasked with paying the purchase price to the vendors (respondents) on its behalf and extending the obligation to it amounted to the High Court impermissibly rewriting the contract between the parties. Additionally, being a bank, the 1st appellant was an easy target for the respondents.

[99] The respondents' answer is that the 1st appellant is as liable as the 2nd to 9th appellants to pay the consideration, interest and securities. We are invited to find that a review of the MoU and the Sale Agreement demonstrates that its intent and purpose was for the comprehensive sale of Guilders International Bank Ltd in its entirety.

The 1st appellant took over Guilders International Bank Limited, together with its asset portfolio, customer and the goodwill as an entire bank and is unequivocally identified as the purchaser and the beneficial party in the entire transaction, explicitly stated in clause 2 of the Agreement. The respondents reiterate that under sub-clause 3(E), the purchaser (Guardian Bank Limited) undertook the obligation to acquire all shares from the vendors on the stipulated terms, and importantly, both the purchaser and the obligors agreed to undertake the responsibilities outlined in the agreement as an integral part of this transaction. The respondents posit that the 2nd to 9th appellants were designated as "obligors" simply because they were to guarantee performance through personal guarantees, thereby ensuring that the sellers would recover the full consideration.

[100] The arguments by the respondents are no doubt attractive, but crumble in the face of the express terms of the Sale Agreement. In recital F, it is provided that the obligors undertake to pay the purchase price on behalf of the purchaser. More decisive is clause 6 which contains provisions on payment of the consideration. Sub- clause 6.1 is unequivocal that *“the obligors shall pay the total purchase price on behalf of the purchaser”*. It is not an obligation to be shared between them and the purchaser. Neither

is it a secondary

responsibility to simply guarantee payment of the purchase price, it is the primary obligation to pay. Indubitably, it cannot fall on the 1st appellant (Guardian) to pay as no such obligation was placed on it by the contract.

[101] The trial court awarded the respondents 12% on the consideration in keeping with the terms of the MoU. This cannot now stand as we have found that the basis of the contract between the parties was the sale agreement and not the MoU. The sale agreement did not provide for a charge of interest on default of payment of the purchase price. Interest shall be at court rates.

[102] Ultimately, the appeal is partially successful. We hereby set aside the judgment of 17th February, 2023 and in its place enter judgment for the respondents as follows;

102.1. As against the 2nd to 9th the appellants, jointly and severally, for the sum of Kshs. 196,000,000.00 plus interest thereon at court rates from the date of filing suit in the High Court until payment in full.

102.2. As against the 1st appellant, for the discharge and return of the securities specified in the Sale Agreement to the respondents, save for LR numbers 209/9832, 3734/549,

209/8000/150 and 1870/II/6. In default, pay their value at the time they were submitted.

102.3. The 1st appellant shall bear one quarter of the respondents' entire costs, while the 2nd to 9th appellants shall bear three quarters of the respondents' costs of the appeal and in the court below.

Dated and delivered at Nairobi this 3rd day of October 2025.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

F. TUIYOTT

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

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

Signed

***DEPUTY REGISTRAR**.*