

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. E145 OF 2022

BANK OF INDIA
KENYA.....PLAINTIFF

VERSUS

THE WE HOTEL AND SUITES LIMITED.....1ST
DEFENDANT

PIYUSH RATILAL SHAH.....2ND
DEFENDANT

DIPAK RATIILAL SHAH.....3RD
DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide the plaint dated 15th March 2022, seeking judgment against the Defendant for special damages in the sum of USD 2,500,000, general damages for loss of business, costs of the suit, and interest above the court rates.
2. The Plaintiff is a body corporate duly constituted under the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970, and is duly licensed by the Central Bank of Kenya to carry on business in Kenya. The 1st Defendant is a limited liability company incorporated under the Companies Act, it currently operates in the hospitality

industry, while the 2nd and 3rd Defendants are directors of the 1st Defendant.

3. The Plaintiff avers that on diverse dates in 2012, the 1st Defendant, through the 2nd and 3rd Defendants, approached the Plaintiff seeking banking facilities amounting to USD 1,800,000, the facility was secured by All Assets Debenture dated 31st May 2013 and a First Legal Charge of even date under the name Sunshine Supermarkets. The Plaintiff was issued with an additional facility by a letter of offer dated 17th March 2015, which was secured by a Supplementary Debenture and a Further Charge both dated 1st April 2015 under the name Westend Hotel Limited .
4. Under these arrangements, the 1st Defendant covenanted to pay the Plaintiff the principal sums together with interest accruing from time to time. The 2nd and 3rd Defendants jointly executed Guarantees and Indemnities dated 9th May 2013 and 17th March 2015 respectively. Despite these contractual arrangements, the 1st Defendant defaulted on its repayment obligations. In an attempt to assist the 1st Defendant in regularizing its account, the parties entered into a Supplementary Term Loan Agreement on 30th January 2017, restructuring the repayment schedule. However, the 1st Defendant continued to default, prompting the Plaintiff to issue statutory notices in exercise of its statutory power of sale.
5. Consequently, the 1st Defendant instituted **HCCC No. 60 of 2019** against the Plaintiff, challenging the statutory notices as irregular. That suit was later settled by a **Deed of**

Settlement and a Consent, both dated 10th March 2021, under which the 1st Defendant agreed to pay the Plaintiff **USD 2,500,000**, representing the principal sums and accrued interest. Despite this settlement, the 1st Defendant again defaulted, thereby crippling the Plaintiff's operations.

6. The Defendants filed a joint statement of defence dated 12th July 2022, denying the Plaintiff's averments. The 2nd and 3rd Defendants deny executing any enforceable joint and several guarantees, asserting that the guarantees, if any, were varied without their consent, thereby discharging them from liability. They further contend that the Plaintiff lacked any legally accrued right to issue statutory demands under Section 90 of the Land Act, and that the issues raised herein are *res judicata*, having been fully determined in HCCC No. 60 of 2019. They argue that the consent judgment in that suit was **final and self-executing**, providing no basis for further recovery. They also assert that the Plaintiff has not demonstrated that it pursued recovery from the 1st Defendant before instituting claims against them as guarantors.
7. At the hearing, each side called one witness.
8. Eter Akwach Riany, testifying as PW1, stated that he is employed by the Plaintiff at its Industrial Area Branch, where his responsibilities include processing and monitoring loans. He adopted his witness statement and list of documents dated 15th March 2022.
9. In cross-examination, PW1 confirmed that the 1st Defendant obtained a loan facility of USD 1.8 million, secured by L.R.

No. 1870/11/499 and the 1st Defendant's assets under the debentures. He testified that the Plaintiff attempted to exercise its statutory power of sale on three occasions, but the auctions were unsuccessful. His oral testimony aligned with the pleadings. He stated that the settlement agreement was intended to be in full and final settlement, and that Order 7 of the consent provided that failure by the 1st Defendant to pay would entitle the Plaintiff to sell the suit property and recover the outstanding amounts. He confirmed that the Plaintiff proceeded with execution under the consent by advertising the property for sale. He was unaware of any application to set aside the consent. He testified that the USD 2.5 million claimed in this suit corresponds to the amount agreed upon in HCCC No. 60 of 2019. He denied that granting the same amount in the present suit would result in the Plaintiff holding two judgments for the same cause of action. He explained that because the auction had not succeeded, the Plaintiff turned to the guarantors for recovery.

10. In re-examination, PW1 clarified that the reliefs sought in this suit differ from those sought in HCCC No. 60 of 2019. He also noted that the parties are not identical, since HCCC No. 60 of 2019 involved the Bank and the Hotel, whereas the present suit involves the 2nd and 3rd Defendants in their personal capacities as guarantors. He further testified that the current claim is anchored on the Deed of Settlement at page 203 of the Plaintiff's bundle and reaffirmed that the sum of USD 2.5 million remains unpaid to date.

11. The 2nd Defendant testified as DW1. He confirmed that the 1st Defendant has been a longstanding client of the Plaintiff and had taken a loan facility secured by the suit property. He adopted his witness statement and list of documents dated 28th March 2023. He confirmed his awareness of HCCC No. 60 of 2018, which was compromised by a consent requiring the 1st Defendant to pay USD 2.5 million by 31st March 2021, failing which the suit property would be auctioned. He testified that the 1st Defendant paid an initial USD 80,000, but no further execution has taken place on the outstanding balance. He urged the Court to dismiss the present suit.
12. In cross-examination, DW1 denied personally obtaining any loan facility on behalf of the company. He asserted that he only became involved if the company was unable to fulfil its repayment obligations. He maintained that the company is not unable to pay the loan. He confirmed that the company instituted HCCC No. 60 of 2018 to halt the auction of the suit property.

Analysis and determination

13. I have considered the plaint, the defence, the evidence presented by the parties, as well as the submissions. The following issues arise for determination:
 - a) *Whether the suit is barred by res judicata under Section 7 of the Civil Procedure Act;*

- b) *Whether the 2nd and 3rd Defendants executed valid and enforceable guarantees in favour of the Plaintiff;*
- c) *Whether the Defendants are in breach of the Deed settlement of 10th March 2021;*
- d) *Whether the 2nd and 3rd Defendants as guarantors are currently liable for settlement of the suit sum;*
- e) *Whether the Plaintiff is entitled costs of the suit.*

Whether the suit is res judicata

14. The Defendants contend that the consent entered in HCCC No. 60 of 2019 finally determined all issues between the parties and, consequently, the present suit is *res judicata*.
15. Section 7 of the Civil Procedure Act codifies the doctrine of *res judicata* and bars courts from trying issues that were directly and substantially in issue in a former suit between the same parties, litigating under the same title and determined by a competent court.
16. The elements were restated in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR**. In the present case, HCCC 60 of 2019 was between the 1st Defendant and the Plaintiff only. The 2nd and 3rd Defendants, who are sued herein in their capacities as guarantors, were not parties to that former suit.
17. The Court of Appeal in **Uhuru Highway Development Ltd v Central Bank of Kenya [1996] eKLR** held that *res*

judicata cannot be raised against persons who were not parties to the earlier suit or who did not have the opportunity to be heard.

18. Moreover, the cause of action in the present suit concerns the enforcement of a Deed of Settlement and Guarantees, whereas HCCC No. 60 of 2019 challenged the validity of statutory notices and sought injunctive relief against the exercise of the statutory power of sale. The subject matter and reliefs are therefore distinct.
19. The consent decree in HCCC No. 60 of 2019 imposed an obligation upon the 1st Defendant to pay USD 2,500,000, failing which the Plaintiff would be free to proceed with the realization of securities. The 1st Defendant defaulted, and the Plaintiff's efforts to sell the charged property were unsuccessful.
20. In my view, the consent did not extinguish or compromise the Plaintiff's right to enforce the guarantees. The liability of a guarantor survives settlements or restructuring arrangements with the principal debtor unless expressly discharged. None was proved here.
21. Accordingly, the plea of *res judicata* is without merit and is hereby dismissed.

Whether the 2nd and 3rd Defendants executed valid and enforceable guarantees in favour of the Plaintiff

22. The Plaintiff relies on the Guarantees and Indemnities dated 9th May 2013 and 17th March 2015, allegedly executed

by the 2nd and 3rd Defendants. The Defendants, in their defence, denied liability, alleging that the guarantees were unenforceable and discharged due to variation without consent. However, during cross-examination, DW1 admitted executing the guarantees, though he asserted that he would only be liable if the company was unable to pay.

23. The Court of Appeal in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2001] eKLR** held that a guarantee is a binding contract enforceable according to its terms unless vitiated by fraud, duress, misrepresentation, or material alteration.

24. Further, the law is settled that a guarantee is a collateral contract, and obligations thereunder crystallize once the principal debtor defaults. Though variation can discharge a guarantor only where it is material and prejudicial, as held in **Co-operative Bank of Kenya Ltd v Morris W. Chege & Another [2021] eKLR**.

25. The Defendants did not rebut the authenticity of their signatures nor did they demonstrate that any variation to the loan agreements materially and prejudicially affected them.

26. The Supplementary Term Loan Agreement of 2017 merely restructured repayment timelines to accommodate the borrower and did not increase or otherwise prejudice the guarantors' obligations.

27. The Plaintiff further demonstrated that it attempted realization of the security through auction on three occasions without success. The law is clear that a chargee

need not exhaust securities before proceeding against a guarantor. (See **Gimalu Estates Ltd & 4 Others v I&M Bank Ltd [2016] eKLR**).

28. In light of the foregoing, I find that the guarantees are valid and enforceable and that the 2nd and 3rd Defendants are jointly and severally liable for the outstanding debt.

Whether the Defendants breached the Deed of Settlement (10th March 2021)

29. The Deed of Settlement required the 1st Defendant to settle the outstanding loan at USD 2,500,000 by the agreed timelines, failing which the Plaintiff was at liberty to pursue recovery, including sale of the charged property.

30. DW1 admitted under cross-examination that the 1st Defendant did not pay the agreed sum and that the consent had not been set aside.

31. A consent judgment has the binding force of a contract between the parties: **Flora Wasike v Destimo Wamboko [1988] eKLR**. The 1st Defendant's continued non-payment constitutes a clear breach of the Deed of Settlement.

Whether the Plaintiff is entitled to reliefs sought

29. The Plaintiff seeks USD 2,500,000 being the amount acknowledged in the Deed of Settlement.

30. Evidence demonstrates that the sum remains unpaid. The Plaintiff's witness testified that the settlement sum was

never honoured, save for an initial payment of USD 80,000. The Defendants did not demonstrate repayment, nor did they adduce evidence showing satisfaction of the debt. Their primary defence is procedural (*res judicata* and discharge), both of which the Court has rejected.

31. I find that the Plaintiff has proved its case on a balance of probabilities. The Plaintiff is therefore entitled to the outstanding USD 2,500,000, pursuant to the restructuring agreement and the guarantees.
32. The claim for general damages for loss of business is not available in contract. Courts have consistently held that general damages are not recoverable for breach of contract. (See **Kenya Tourist Development Corporation v Sundowner Lodge Ltd [2018] eKLR**). That prayer is declined.
33. On the issue of interest, Section 26 of the Civil Procedure Act grants the Court discretion to award interest at such rate as it deems reasonable, both for the period prior to filing suit and from the date of judgment until payment in full. The guiding principle is that interest must serve to compensate a claimant for the time-value of money withheld and should not operate punitively. Where parties have expressly provided for a contractual rate of interest, the Court is ordinarily bound to give effect to that agreement unless the rate is illegal, unconscionable, or was not properly pleaded and proved.

34. In the present case, the Plaintiff pleaded the contractual basis for interest. However, no contractual rate was specifically demonstrated as forming part of the Deed of Settlement or as binding upon the guarantors. In the circumstances, and to avoid imposing terms not expressly agreed upon by the parties, the Court awards interest at court rates as provided under Section 26, from the date of filing suit until payment in full.
35. On costs, Section 27 of the Civil Procedure Act provides that costs follow the event unless the Court, for good reason, orders otherwise. The general rule is that a successful litigant should not be deprived of costs without just cause. I find no reason to depart from this established principle. Accordingly, the Plaintiff, having succeeded in its claim, is entitled to the costs of the suit.
32. For the reasons aforesaid, judgment is entered for the Plaintiff against the Defendants jointly and severally as follows:
- i. A declaration that the 2nd and 3rd Defendants are jointly and severally liable under the guarantees dated 9th May 2013 and 17th March 2015.*
 - ii. Judgment be and is hereby entered for the Plaintiff in the sum of USD 2,500,000, being the outstanding amount under the Deed of Settlement dated 10th March 2021.*

- iii. The said sum shall attract interest at court rates from the date of filing suit until payment in full.***
- iv. Costs of the suit to be borne by the Defendants.***
- v. The Plaintiff is at liberty to proceed with execution in accordance with the law.***
- vi. The prayer for general damages is declined.***

Orders accordingly.

JUDGMENT delivered virtually, dated and signed at **NAIROBI**

This **11th** day of **December** 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Tanui for Plaintiff

Mr. Masese for Defendants

Court Assistant: *Carlos*