

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HCCOM NO. 547 OF 2006

EABS BANK LIMITED.....
PLAINTIFF

VERSUS

NIKUNJ S. PATEL & 4 OTHERS.....
DEFENDANTS

RULING

1. On 26th January 2026, when this matter came up for hearing, the Plaintiff called PW1, John Wambugu, who adopted his witness statement dated 26th January 2026. During his testimony, counsel for the 4th +and 5th Defendants raised an objection to the production of certain documents contained at pages 99-110 and 138-153 of the Plaintiff's list of documents dated 28th August 2012. The documents are titled **Guarantee/Indemnity**.
2. Mr. Gichaba, Defendants' Counsel, asserted that the objection is grounded on the fact that the Guarantee/Indemnity documents are instruments required in law to be attested, and that in the absence of attestation, they are invalid and inadmissible for being in violation of Section 71 of the Evidence Act, Cap. 80 Laws of Kenya.
3. The Plaintiff's Counsel, Ms. Anyango, for the defendant bank opposed the application, arguing that the documents in question were

referenced in the defendants' own documents, and had been signed by the defendant's own witness, who was then present in Court. According to the Counsel, the documents in question were authored by the Bank, and the Plaintiff has the power to produce them

4. The Court directed the parties to file brief submissions. While the Plaintiff did not file any submissions, the defence filed their submissions dated 26th January 2026, which this Court had duly considered.

Issues for Determination

5. From the objection and submissions filed, the Court finds the following as requiring determination:
 - i. Whether the Guarantee/Indemnity documents at pages 99-110 and 138-153 required attestation under the applicable law.
 - ii. If so, whether the documents meet the requirements of Section 71 of the Evidence Act for admissibility.
6. The 4th and 5th Defendants submitted that a guarantee or indemnity is a formal contract whose execution must comply with mandatory statutory requirements, including attestation. Reliance was placed on **Section 3(1), (3) of the Law of Contract Act**, and **Section 58(1) of the Registration of Titles Act (now repealed)** (then applicable).
7. The Defendants also cited **Paul Singh Bhachu v Equatorial Commercial Bank Ltd [2007] KEHC 1789**, where the court held that an instrument requiring attestation (a memorandum of charge) was invalid in law where attestation was improper or done by an unqualified person, notwithstanding registration. Section 58(1) was interpreted as **mandatory**.

8. Section 3(1), (3) of the Law of Contract Act, provides that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

- (i) is in writing;
- (ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

9. **Section 58(1) of the Registration of Titles Act (now repealed)**

(then applicable) provides that every signature to an instrument requiring to be registered and to a power of attorney whereof a duplicate or an attested copy is required to be deposited with the registrar, within Kenya, shall be attested by one of the following persons—

- i) a judge or magistrate; (ii) a registrar of titles; (iii) a notary public;
- (iv) an advocate; (v) a justice of the peace; (vi) the Registrar or Deputy Registrar of the High Court; (vii) an administrative officer.

10. In the ***Bhachu case (supra)***, the court held that an instrument requiring attestation—there, a memorandum of charge—was **invalid in law where attestation was improper or done by an unqualified person**, notwithstanding registration. Section 58(1) was interpreted as **mandatory**.

11. Applying the above legal provisions and reasoning to the present case, it is common ground that the documents before this Court are guarantees and indemnities purporting to create enforceable obligations related to a financial facility. They were intended to give rise to legally binding commitments. Such documents, therefore, fall within instruments whose execution the law requires to be attested.
12. It therefore follows that the Guarantee/Indemnity documents **required attestation** to be valid and capable of admission.

Whether Section 71 of the Evidence Act was complied with

13. Section 71 of the Evidence Act governs **proof of execution of documents required by law to be attested**. The Plaintiff bears the burden to produce evidence from **an attesting witness**, or to demonstrate circumstances under which secondary proof is permissible.
14. In this case, the documents are **not attested at all**. The Plaintiff does not contend otherwise.
15. Where a document requiring attestation is *not attested*, the issue is not merely failure to call the attesting witness—it is **a fundamental defect going to the validity of the instrument itself**.
16. The courts have consistently held that unauthenticated or unattested agreements are inadmissible: **Mwirebua v Mutonga [2025] KEELC 2965**; Kamau (Legal Representative of the Estate of the Late Alexander Kamau Githinji) v Gitonga [2023] KEHC 1391.

17. In **Mwirebua**, the court held that even where a document had been admitted as an exhibit, its validity is not established unless attesting witnesses are called, as required by Section 71.
18. In the current matter, the documents were neither attested nor accompanied by any evidence explaining or curing the absence of attestation. Registration alone cannot substitute for attestation.
19. In the premises, the documents do not meet the threshold of Section 71 and therefore cannot be admitted.
20. Accordingly, the objection by the 4th and 5th Defendants is hereby upheld. The impugned documents shall not be admitted into evidence.
21. It is so ordered.

**SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS
19TH FEBRUARY 2026**

**ADO MOSES
JUDGE**

In the presence of: -

C/A - Moses

Donald Kipkorir.....for the Plaintiff

Gichaba.....for the Defendant

ORIGINAL FILE COPY