



REPUBLIC OF KENYA



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**Shah & 3 others v I&M Bank (Civil Appeal 133 of 2019)
[2025] KECA 298 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 298 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 133 OF 2019
P NYAMWEYA, LA ACHODE & WK KORIR, JJA
FEBRUARY 21, 2025**

BETWEEN

**SUNIL CHANDULAL SHAH 1ST APPELLANT
HASMUKHLAL VIRCHAND SHAH 2ND APPELLANT
ATUL CHANDULAL SHAH 3RD APPELLANT
CHANDULAL VIRCHAND SHAH 4TH APPELLANT**

AND

I&M BANK RESPONDENT

*(An appeal from the judgment and decree of the High Court at
Nairobi (F. Tuiyott, J.) delivered on 7th November 2018 in HCCC
No. 101 of 2010 as consolidated with 102 of 2010 and 103 of 2010)*

JUDGMENT

1. The four appellants, Sunil Chandulal Shah, Hasmukhlal Virchand Shah, Atul Chandulal Shah, and Chandulal Virchand Shah have challenged the judgment delivered by the High Court (F. Tuiyott, J. (as he then was)) on 7th November 2018 on eight grounds, which we reproduce verbatim as follows:
 - i. The learned Judge, by holding "the Bank could" in his interpretation of Clause 9(d) of the contract between the appellants and the respondent, gravely erred as in so doing, the learned Judge gave the respondent a discretion to choose to sell the shares at breach, a discretion that the respondent never had contractually.
 - ii. The learned Judge erred by holding that because the appellants had the first obligation to right the breach, the respondent had no right to sell the securities upon breach.



- iii. The learned Judge fundamentally erred in holding that the respondent was not under obligation to sell the pledged shares immediately the margin was breached.
 - iv. In seeking to qualify the respondent's responsibility under the proviso of recklessness, bad faith or foreseeability, the learned Judge erred in the strict interpretation of the express contract between the parties.
 - v. In seeking to qualify the respondent's liability and/or responsibility under the contract, the learned Judge essentially embarked on re-writing the contract between the parties, contrary to law.
 - vi. The Learned Judge erred by condemning the appellants and/or assigning liability on the Appellants on account of the appellants' request to the Respondent to delay the sale of shares. To assign such liability is to tacitly suggest that a contract signed between parties and reduced into writing, can be varied by correspondence and without a proper deed of variation or a new contract.
 - vii. The learned Judge erred in refusing to allow the appellants' claim and dismissing the same.
2. The dispute between the parties was laid bare before the trial court through a plaint dated 23rd February 2010, lodged by the appellants. The gist of the appellants' complaint was that since 2004, they had joint and individual customer-banker relationship between them and the respondent, I & M Bank. That sometime in 2006, the 1st appellant approached the respondent through a letter dated 16th January 2006 to finance his trade in shares at the Nairobi Stock Exchange. This request was approved on 6th February 2006 when the bank extended the 1st appellant an overdraft facility of Kshs. 23,701,000/00 which was later enhanced to Kshs.38,501,000/00 on 4th April 2006 and finally, Kshs.73,501,000/00 on 13th December 2007. The 2nd, 3rd, and 4th appellants individually and jointly guaranteed the overdraft. Among the terms of the contract, was that the balance on the outstanding overdraft was not to exceed 70% of the value of the pledged shares. Any breach of the 70% would trigger certain actions.
 3. The exposure margin was breached on 31st August 2008 but the respondent only raised the issue with the 1st appellant in a letter dated 9th December 2008. Through the letter, the 1st appellant was asked to regularize the situation by either making payment to reduce the outstanding balance or by pledging additional security that would be acceptable to the respondent within 14 days of the letter. According to the appellants, under clause 9 of the letter of offer, the respondent was obliged to immediately enforce the security by disposing the shares pledged once the margin was breached. In this manner, he would not suffer any loss. In addition to asserting that the contract obligated such prompt action, the 1st appellant also argued that such action was in tandem with conventional prudent banking. It was the 1st appellant's averment that the delay by the respondent in initiating the disposal of the shares until on or about 10th June 2009, had caused him loss and damage of Kshs. 26,337,200.56 being the loss in the value of the shares between 31st August 2008 when the 70% margin was breached and 23rd February 2010 when the suit was filed. On their part, the 2nd, 3rd, and 4th appellants as guarantors sought to be discharged from their obligations on the basis that the delay in enforcing the security constituted a clear variation of the terms of the contract between the principal debtor and the respondent for which the guarantors could not be held liable.
 4. In response to the claim, the respondent asserted that the only duty it owed the 1st appellant was to act in good faith and to sell the pledged shares for the best price reasonably available, which duty it diligently discharged. The respondent averred that according to the contract, once the share margin was breached, it would make a demand to the 1st appellant who would then be required to pay such money



as would be required to make up or restore the agreed margin. Alternatively, the 1st appellant would deposit with or transfer to it acceptable additional securities sufficient to restore the agreed margin. The respondent further asserted that it was entitled to sell all or any of the pledged shares through forced sale or otherwise at any time once the breach occurred. Regarding the delay in disposing the pledged shares, the respondent maintained that the option to sell and the timing of the sale was at its discretion. It also contended that none other than the 1st appellant had requested it hold off the sale until the first quarter of the year 2009.

5. When the matter came up for hearing before the trial court, the appellants called two witnesses. The 1st appellant, Sunil Shah testified as PW1 adopting his written statement dated 19th March 2012. Winfred Obincha Onono testified as PW2 and adopted his statement dated 13th September 2017. L. A. Sivaramkrishnan testified as DW1 for the respondent. He adopted his written statement dated 27th September 2016 and a bundle of documents dated 21st March 2012. We will rehash the evidence tendered in our analysis later in this judgment.
6. In the impugned judgment, the learned Judge found that the 70% margin was breached as at 31st August 2008 and proceeded to hold as follows:

“ 40. The result I reach is that the relationship between Sunil and the Bank was that of a typical Lender and Borrower and whose relationship would have to be inferred from the terms of the Contract between them. The Bank was under no obligation to sell the pledged Shares immediately after the Margin was breached. In the circumstances, the timing by the Bank can only receive censure if it was so reckless or motivated by bad faith that it led to substantial erosion of the value of Shares in circumstances which were foreseeable or ought to have been foreseeable.

49. Given the evidence that Sunil had on several occasions asked the Bank to hold off the sale of Shares and did not complain when they were eventually sold, the Claim that the Bank was responsible for any loss suffered because of the delay in the Sales is not viable and is without merit. I so hold.”

7. When this appeal came up for hearing before us, learned counsel Mr. Odera appeared for the appellants while learned counsel Ms. Weru appeared for the respondent. Having filed their respective written submissions, counsel sought to rely on them while undertaking a brief oral highlight of the same.
8. Submitting in support of the appeal, learned counsel Mr. Odera referred to the case of *Selle vs. Associated Motor Boat Co. Ltd.* (1968) EA 123, to point out that on the first appeal, the Court’s jurisdiction is akin to a retrial. Counsel proceeded to delve into the merits of the appeal and referred to *Damondar Jihabhai & Co. Ltd. & Another vs. Eustace Sisal Estates Ltd.* [1967] EA 153 to urge that the role of the court is to enforce the intention of the parties in a contract and not to rewrite it. Mr. Odera submitted that the learned Judge erred in his interpretation of clauses 9 (c) and (d) of the contract, thereby not finding the bank at fault. According to counsel, the contract did not give the bank the discretion on when to sell the pledged shares as the sale was to happen immediately there was a breach. Counsel further submitted that by conducting the sale over one year after the breach, the bank violated the terms of the contract and this amounted to reckless action. Counsel urged that the bank was at fault and should have been censured.
9. Counsel for the appellants additionally submitted that the learned Judge erred in holding that the appellants had the first right to correct the breach. According to counsel, both parties to the contract had equal rights in making right the wrong and that the learned Judge erred in interpreting the rights



sequentially, thereby finding that the appellants were first obliged to right the wrong before the bank could exercise its right of sale.

10. Finally, counsel faulted the learned Judge for rewriting the contract between the parties. Counsel relied on *National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR to urge that courts cannot rewrite the contract terms and that the said terms bind parties. Mr. Odera submitted that the trial court relied on various letters exchanged by the parties, thereby arriving at a conclusion that essentially amounted to rewriting the contract between them. It was learned counsel's ultimate submission that we allow the appeal.

11. When it was learned counsel Ms. Weru's turn to urge the respondent's case, reliance was placed on the submissions dated 1st October 2024. Counsel equally relied on *Selle vs. Associated Motor Boat Co. Ltd* (supra) to underscore our duty on a first appeal. In urging us to exercise our jurisdiction to review the record cautiously, counsel referred to the holding in *Peters vs Sunday Post Ltd.* [1958] EA 424 that whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution. Responding to grounds 1 and 4 of the memorandum of appeal touching on the interpretation of the contract, counsel asserted that the learned Judge properly construed the terms of the contract as they were and arrived at the proper conclusion. Counsel relied on *Sun Sand Dunes Ltd. vs. Raiya Construction Ltd* [2018] eKLR to underscore the principle that in construing a contract the intention of the court is to ascertain reasonably and objectively the common intention.

Counsel submitted that the interpretation adopted by the learned Judge in relation to clauses 9(c) and (d) of the contract was the correct approach and that we should uphold it. Additionally, counsel referred to *Kenya Revenue Authority vs. Mohamed Saleh & Co. Ltd* (2019) eKLR to submit that parties should be bound by their pleadings, and argued that the question of interpretation of clauses 9(c) and (d) of the contract was not amongst the grounds of appeal hence should not be addressed in this appeal.

12. Contending that the action of the respondent was in the best interest of the appellants, counsel relied on *Federal Deposit Insurance Corporation vs. Air Atlantic & Another* 452 N.E. 2d 1t 1147 (Mass. 1983) to urge that considering the trade of the appellants, it would have been punitive to the appellants were the respondent to exercise its right of sale every time there was a breach. Counsel, therefore, urged that in that case, the interpretation of the learned Judge was objective and reasonable, and that the alternative interpretation proposed by the respondents was against the acceptable best practice. Reliance was placed on *Charles E. Johnson Jr. vs. Bank One Securities Corporation Layne* (2005) USCA 611 to buttress the submission.

13. Submitting on grounds 2 and 3 of the appeal touching on the parties' obligations under the contract, Ms. Weru submitted that the duty to maintain the margin of 70% was bestowed on the appellants and that they had the duty to first right the breach because the respondent was not under any obligation to sell the shares immediately a breach occurred. Counsel referred to the cases of *ACC Bank PLC vs. McEllin & 7 Others* [2013] IEHC 454, *Silven Properties Ltd. vs. Royal Bank of Scotland PLC* [2004] 1 WLR 997 and *China and South Sea Bank Ltd vs. Tan Soon Gin* [1990] 1 AC 536 to buttress this argument.

14. Turning to the 5th and 6th grounds of appeal, Ms. Weru submitted that the appellants had not pointed out any instance where the learned Judge resorted to rewriting the contract as alleged. Counsel submitted that the letters alluded to were written by the appellants seeking time to regularize their account; hence, they are barred from complaining about them. Counsel consequently urged us to dismiss the appeal with costs.



15. This being a first appeal, our duty as enshrined under Rule 31 (1)
- a. of the Court of Appeal Rules, 2022 was explained in *Abok James Odera T/A A. J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR thus:
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re- assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
16. We have duly reviewed the record and the submissions by counsel for the parties. There is no dispute between the parties as to when the breach occurred. As found by the trial court, we also affirm that it happened on 31st August 2008. The issue at the centre of this appeal relates to whether the respondent was under obligation to sell the pledged shares immediately the breach occurred; and if so, whether by selling the shares in May 2009, the respondent breached its contractual obligation.
17. At the heart of this dispute were clauses 9 (c), (d), (e), (f) and (g) of the Facility Letter which provided as follows:
- “(c) If any time the prevailing market value of Pledged Securities does not exceed by at least 70% per cent the amount of the moneys and liabilities under the Facility the Borrower hereby undertakes to pay to the Bank such sum of money as shall be required to make up the required margin or undertakes on demand and at the option of the Bank either to deposit with or transfer to the Bank or to trustees for or nominees of the Bank (as the Bank may require) additional securities approved by the Bank to make up the required margin.
- d. The Borrower hereby agree and authorize the Bank to sell all or part of the Pledged Securities through Forced Sale or otherwise, at the Bank’s discretion, in order to regularize the Facility upon failure, after due notice by the Bank to the Borrower, to regularize the Facility. Such proceeds arising from such sales shall be net of all charges and commissions as specified under the existing regulatory guidelines, rules and procedures.
- e. The Borrower further agrees not to dispute or question the Bank’s mode of Selection, amount and choice of securities (shares) among the Pledged Securities or the price at which such shares are sold as long as such transactions are carried out in accordance with the regulator’s guidelines, rules and procedures.
- f. The Borrower further agrees to pay to the Bank any resulting shortfall after such sales, as specified above, of all the Pledged Securities and all amounts due and owing to the Bank under the Letter of Offer.
- d. In the event of Forced Sale or any such sales as permissible under the existing law to clear the Facility with a resultant credit in favour of the Borrower, such amount in excess of the Facility.”
18. The parties to this appeal have underscored the tenets of contract interpretation. The most important and relevant aspect, as can be gleaned from the authorities cited by both sides, is that courts must approach the construction of contracts objectively and that the intention of the parties must be ascertained from a reasonable person’s point of view. This view was expressed in *Sun Sand Dunes Ltd vs. Raiya Construction Ltd* (supra) thus:

“The object of construction of terms of a contract is to ascertain its meaning or in other words, the common intention of the parties thereto. Such construction must be objective,



that is, the question is not what one or the other parties meant or understood by the words used. Rather, what a reasonable person in the position of the parties would have understood the words to mean. See *Investors Compensation Scheme Ltd. vs. West Bromwich Building Society* [1998] 1 W.L.R 896.”

19. Similarly, in *Damondar Jihabhai & Co. Ltd. & Another vs. Eustace Sisal Estates Ltd* (supra), the Court held that in interpreting a contract, the Court is required to give effect to the intention of the parties. And, in *Development Finance Company of Kenya Limited & 2 Others vs. Wino Industries Limited* [1995] KECA 122 (KLR), the Court quoted with approval the holding by the House of Lords in *Prenn vs. Simmonds* [1971] 3 All ER 237 1971 where it was held that:

“Although in construing a written agreement the Court is entitled to take account of the surrounding circumstance with reference to which the words of the agreement were used and the object, appearing from those circumstances, which the person using them had in view, the Court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract resulting from those negotiations. Evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the ‘genesis’ and, objectively, the ‘aim’ of the transaction”

20. The foregoing authorities clearly demarcate the coordinates within which this Court ought to approach the contract between the appellants and the respondent and, specifically, in relation to clauses in contention.
21. In this appeal, the appellants contend that upon the breach occurring on 31st August 2008, the respondent was required by clause 9 (c) of the offer letter to sell the pledged shares. On the other hand, the respondent argues that under the same provision, they had the discretion to decide when to initiate the sale of the pledged shares. The appellants are also aggrieved by the learned Judge’s finding that under the said provision, they had a priority responsibility to restore the margins before the respondent could exercise its right of sale. They argue that this finding was informed by relying on letters and not the contract between the parties.
22. Two alternatives emerge from the literal wordings of clauses 9 (c) and (d) of the offer letter. First, the appellants were to pay the respondent the sum of money required to make up the required margin or pledge additional securities approved by the respondent to restore the margin. The second alternative was for the respondent to sell all or part of the pledged securities through forced sale or otherwise, at the bank’s discretion, in order to regularize the facility. It also evident that these options were to be preceded by the bank notifying the appellants of the default and asking them to regularize the defect. In our view, the sequence would be informed by the duty placed upon the respondent to notify the appellants of the breach and asking them to regularize the facility. It is only after the borrower fails to regularize the facility that the bank can sell the pledged shares. This sequence accords with the best practices in the field of stock loans and margins.
23. Before we proceed to analyze the facts of this case, it is necessary to point out some of the good practices in relation to the trade upon which the contract between the parties herein was hinged. In an Article titled “Controlling Shareholder’s Share Pledging and Accounting Manipulations” by Douglas DeJong, Ke Liao and Deren Xie (Available at SSRN 3274388, 2020•papers. ssrn.com), it is posited that:

“In other words, in the case of a margin call triggered by substantial price drop, the pledgor is required to pay down hisher debt or pledge more shares to the lender. If the pledgor fails to meet the margin call, the lender is entitled to sell the pledged shares.” (Emphasis ours)



24. Similarly, discussing the subject of stock-based loans, T.A. McWalter and P.H. Ritchken in a paper titled “On Stock-Based Loans” published on 3rd March 2022 (Available at <https://ssrn.com/abstract=4059138>) advance the view that:

“A margin stock loan provides the bank with some protection in bad states of nature. Specifically, if the collateral drops below a predetermined threshold, the bank demands the client provide a specified fraction of the loan balance or else the bank can gain full access to the collateral. The margin call provides some protection for the bank from a drop in the value of the collateral.”

[Emphasis ours]

25. From the foregoing scholarly sources, what emerges is that the exercise of the power of sale by the bank is regarded as a tool of last resort by practitioners in this field of trade. The best practice is to first allow the borrower an opportunity to right the breach and restore the margin. On the other hand, the lender is required to demand restoration of the margin as and when the breach occurs.
26. In this case, despite the breach occurring on 31st August 2008, the respondent first demanded regularization through the letter dated 9th December 2008. The following day, on 10th December 2008, the 1st appellant asked the respondent to proffer an understanding and hold in abeyance any sale of the pledged shares, citing the market's volatility at the time, which had led to a drastic drop in share prices. In the process, the 1st appellant indicated they would reduce the exposure by selling the shares in the first quarter of 2009 when the prices would have improved because of payment of dividends. There is also a letter dated 14th January 2009 when the 1st appellant promised to deposit Kshs. 50,000,000 to reduce the exposure while also anticipating a sale of shares in February or March of 2009. The 1st appellant did not come through with that promise. The respondent indicated to the appellants vide a letter dated 30th January 2009 that it was not willing to delay any further the realization of the pledged shares to restore the margin. The 1st appellant made another plea seeking to delay the sale through his letter dated 8th February 2009. The respondent did not, however, yield to this request. The communication between the parties regarding the realization of identified shares is then exhibited in the letters dated 27th March 2009, 25th June 2009, 2nd May 2009, 17th June 2009, 18th June 2009, 19th June 2009, 27th June 2009, and 24th June 2009.
27. Considering this chain of events, the best practice we have identified above, and in the face of the alternatives available to the parties herein, we find no fault in the learned Judge finding that the respondent was not in breach of the contract. As we have already pointed out, even though the contract does not set out the sequence of invoking the alternatives for restoration of the margin, best practice would require that forced sale by the respondent be the last alternative. It would also emerge from the letters on record that it was the 1st appellant who sought to implement this best practice. He was the one who requested the bank to hold off the sale as he sought to top up the shortfall or provide additional security. He even conceded during cross-examination that “once the margin was breached then I had the first obligation to make amends, so that the margin would be restored or to provide addition(al) securities to bring up the margin to 70%.” He cannot, therefore, turn around late in the day and seek to fault the respondent for the delayed sale. We, thus, decline this invite from the appellants.
28. Another pertinent question is whether the respondent was in breach of its fiduciary duty to the appellants. According to the appellants, the bank was under an obligation to sell the shares immediately the breach occurred. On the other hand, the respondent holds the view that they held the discretion to decide when they could sell the pledged shares to restore the margin. In our respectful view, even in the absence of discretion as to when to sell the pledged shares, we cannot find that the respondent



was obligated to sell off the shares immediately the breach occurred. As we have already pointed out, under the letter of offer, the parties had two alternatives to pursue as and when a breach occurred. This would also be guided and subjected to the best practices governing the trade. When the breach was disclosed, it was the 1st appellant who sought to pursue the first alternative that did not involve the sale of the shares by the respondent. In other words, the actions of the 1st appellant as evidenced in the exhibited letters prioritized the restoration of the margin by themselves and relegated the sale option by the respondent. Consequently, the 1st appellant cannot now discard the option he took and seek to blame the respondent for not selling the shares at a particular time. Trading in shares is a volatile and risky business. In taking the option of top-up, the 1st appellant must have known the disadvantages that came with such a choice. He could as well have asked the respondent to dispose the shares straight away but he did not do so. The option he took was well within the contract and the two options could only be exercised one after the other. This particular argument by the appellants must also fail as we find that even though the respondent had the option to sell the shares, the actions of the 1st appellant deprioritized that option in pursuit of the restoration alternative.

29. Related to the above issue is whether the respondent ought to have moved immediately the breach occurred on 31st August 2008. According to the respondent, it only became aware of the breach in December 2008. This averment is found at paragraph 15 of the defence, paragraph 13 of the written statement of the respondent's only witness and the letter dated 9th December 2008 addressed to the 1st appellant by the respondent. This evidence was never controverted by the appellants and although the breach actually occurred on 31st August 2008, it was only noticed by the respondent and acted upon in December 2008. Indeed, DW1 testified that the margin would be breached from time to time and be rectified without any intervention as a result of fluctuation of the prices of the pledged shares at the stock market. We therefore find no merit in the appellants' attempt to blame the respondent for not acting earlier than December 2008.
30. The appellants also faulted the learned Judge for what they termed as reliance on letters to rewrite the contract between the parties. In our view, this was not the case herein. The letters alluded to were exchanged between the parties in compliance with clause 9(c) of the letter of offer. Only through the said letters would the intention of that clause be achieved. The letters were, therefore, relevant in not only ascertaining the intention of the parties but also realizing that intention. Consequently, it is our finding and we so hold that the learned Judge did not err in relying on the letters between the parties in reaching his decision.
31. In the end, this appeal must fail and is for dismissal, and we hereby dismiss it. As regard the costs, the principle that costs follow the event applies to this appeal as no reason has been advanced by the appellants for denying the respondent the costs of the appeal. The respondent will therefore have the costs of the appeal from the appellants.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2025.

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR



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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

