Golden Services Organization & 4 others v Sidian Bank Limited (Civil Appeal E002 of 2020) [2024] KECA 119 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 119 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E002 OF 2020

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

FEBRUARY 9, 2024

BETWEEN

GOLDEN SERVICES ORGANIZATION ..... 1ST APPELLANT

KANG'ALIKYA MALUKI ..... 2ND APPELLANT

PAUL JESSE MUNGATIA ..... 3RD APPELLANT

IBRAHIM MURITHI MAGIRI ..... 4TH APPELLANT

PAUL JESSE MUNGATIA ..... 5TH APPELLANT

AND

SIDIAN BANK LIMITED ..... RESPONDENT

(An appeal from the Judgment of the Environment and Land Court at Mombasa (A. Omollo, J.) delivered on 9th June 2020inMombasa ELC Case No. 315 of 2017)

JUDGMENT

1. By way of a plaint as subsequently amended and dated 28th August 2017, the appellants brought this suit against Sidian Bank Limited (formally K-Rep Bank), the respondent, seeking:

    1. An order of permanent injunction to restrain the respondent, their servants, auctioneers, licensees, agents or any other persons acting on their behalf from howsoever advertising for sale, selling, auctioning, alienating, transferring, disposing, dispossessing or in any way interfering with the right of ownership and proprietorships to LR. No. Mombasa/Shanzu Squatter/1464, Title Number Gaturi/Githimu/5556, Title Number Kilifi/Kijipwa/369 and CR. 21195/1 a sub-division of MN/111/1512;

    2. An order for the immediate release of all Title security documents in respect of LR. No. Mombasa/Shanzu Squatter/1464, Title Number Gaturi/Githimu/5556, Title Number

Kilifi/Kijipwa/369 and CR. 21195/1 a subdivision of MN/III/1512 as well appropriate documents of discharge for each title;

3. An order directed to the respondent to pay the 1st appellant Kshs.142, 806, 841.00 being the value of lost income and business consequent to the material breach of contractual obligations together with interests at commercial rates with effect from 28th July, 2017;

4. General damages; and

5. Costs of the suit plus interests.

2. The appellants' case was that from 2005, they operated table banking services for women and youth within the Coastal region through the 1st appellant. They stated that the 1st appellant would borrow money from the respondent as working capital, which it would repay. It was further stated that the 1st appellant borrowed various sums against title Nos. Gaturi/Gathimu/5556 registered in the name of Ibrahim Murithi Magiri, the 3rd appellant; title No. Mombasa/Shanzu Squatter/1464 registered in the name of Kang'alikya Maluki, the 2nd appellant; and title No. Kilifi/Kijipwa/369 and charge over CR 21195/1, both registered in the name of Paul Jesse Mungatia, the 4th respondent.

3. Sometime in November, 2015, the 1st appellant applied for a loan facility of Kshs. 50 million premised on the condition that the respondent would convert the existing overdraft facility of Kshs. 2 Million into a loan and further that all the existing securities would be replaced by one security and charge over title No. Kwale/Msambweni A/2910 (the Msambweni property).

4. The appellants claimed that the respondent approved the loan, whereupon a letter of offer was executed on 25th January, 2016 and a charge registered over the Msambweni property on 2nd February, 2016. They complained that, 9 months later, and without reason, the respondent reneged on the agreement to loan Kshs.50 million to the 1st appellant; and that, in addition, it refused to release the initial securities or the newly charged security and the guarantees obtained in its favour. The 1st appellant claimed that the promised funds were to be extended to its clientele, and that it made elaborate business plans in anticipation of the further capital injection. As a consequence of the refusal to release the funds for the first time since 2007, the 1st appellant was unable to service the existing facilities. The appellants asserted that, thereafter, the respondent embarked on intimidating and threatening them on foreclosure of their loans. They alleged that failure to advance the facility caused the 1st appellant to suffer losses, which its auditors projected would amount to Kshs.142, 806,841 for the entire period of default up to December 2021.

5. The appellants further claimed that the respondent did not discharge the Msambweni property until March 2017, and also failed to refund the loan processing fee of over Kshs.750,000 and the legal charges of Kshs.691,150 for charging the Msambweni property; and that they were not served with the statutory notices for 90 days or 40 days, but that, on 26th July 2017, the respondent purported to issue a 45 days' redemption notice, whichwas served on them on 27th July 2017 and delivered on 10th August 2017. They further contended that no valuation was undertaken on the charged properties or notice provided to the guarantors' spouses. They prayed for judgment against the respondent for breach of the agreement, and in respect of the sums claimed.

6. On its part, the respondent denied the claims and asserted that, by an offer letter dated 1st November 2007, it made available an overdraft facility of Kshs. 500,000 to the appellants; that by an offer letter dated 30th October 2009, a second facility of Kshs.3,000,000, being a term loan, was extended to the appellants; that another loan secured by a legal charge over Mombasa/Shanzu Squatter/1464 for Kshs.2 million was granted; that, on 15th October 2011 and 7th October 2013 additional facilities were

granted to the 1st appellant that were secured by an existing legal charge dated 6th January 2010 over Mombasa/Shanzu Squatter/1464 registered in the name of the 2nd appellant to secure Kshs.2,000,000; that an existing further legal charge dated 19th December, 2011 for Kshs.800,000 was registered over the same property, and a personal guarantee and indemnity was provided by the 2nd appellant; that, in addition, a Legal charge was registered over Shanzu Settlement Scheme/1321 belonging to one, Garama Randu Mkazi to secure Kshs.2,800,000 together with a personal guarantee and indemnity; and that a Legal charge to secure Kshs.4,400,000 was also registered over Gaturi/Githimu/5556 belonging to Ibrahim Murithi Magiri the 3rd appellant, who also provided a personal guarantee and indemnity.

7. The respondent further stated that, in April 2014, the 1st appellant applied to substitute the securities provided by Garama Rangu Mkazi and Ibrahim Murithi Magiri for a security furnished by a board of trustee member, Mr. Paul Jesse Mungatia, the 4th appellant. The respondent accepted the proposal through a supplementary letter of offer dated 24th April 2014 and, as a result, a charge was created over title No. Kilifi/Kijipwa/369 for Kshs.4, 400, 000.

8. Subsequently thereto, the respondent contended that the 1st appellant applied for an additional term loan on 25th August 2014, which was approved and disbursed on 5th March 2015 following registration of a legal charge for Kshs.14, 000,000 over CR No. 21195 registered in the name of the 4th appellant; a further charge of Kshs. 1,800,000 over title No. Kilifi/Kijipwa/369 also registered in the 4th appellant's name, bringing the aggregate amount secured to Kshs.6,200,000; a further charge of Kshs.1,800,000 over Gaturi/Githimu/5556 was registered in the 3rd appellant's name bringing the aggregate amount secured thereunder to Kshs.4,600,000; a second further charge for Kshs.1,800,000 created over title No. Mombasa/Shanzu Squatter/1464 registered in the 2nd appellant's name, bringing the aggregate amount secured thereunder to Kshs.4,600,000. Personal guarantees and indemnities were provided by the 2nd, 3rd and 4th appellants against their respective properties, and a board of trustee's personal guarantee jointly and severally for Kshs. 23,835,000.

9. According to the respondent, on 8th July 2015, the 1st appellant applied for further accommodation of an overdraft facility of Kshs.2 million, which the bank approved by a letter of 12th September 2015. On 10th November 2015, the 1st appellant requested the overdraft facility to be converted into a term loan and thereafter, on 28th December 2015, requested to substitute the existing securities for one of higher value, which request was approved on 25th January 2016 following which, all the securities held were substituted with a legal charge over the Msambweni property registered in the 4th appellant's name. The 4th appellant also provided a personal guarantee.

10. The respondent asserted that it was unable to accommodate the 1st appellant's request for a loan of Kshs.50 million made through letters dated 14th December 2015 and 5th January 2016, and communicated its decision to the 1st appellant on 17th June 2016. It stated that the reason for refusal was because of the 1st appellant's over-reliance on external borrowed funds for onward lending rather than from its internally generated funds. In July 2016, the 1st appellant requested for discharge of the Msambweni property, which request was granted on 21st July 2016.

11. By this time, the 1st appellant had begun defaulting on the existing facilities and, in a letter dated 23rd December 2016, the 1st appellant was duly notified. Subsequently, on 25th April 2017, a 40 days' notice was issued to the appellants. The respondent contended that the 1st appellant did not remedy the default nor redeem the charged properties, which gave rise to the respondent's right to sell them. It instructed Adept Realtors to provide a valuation report for title Nos. Shanzu Squatter/1464, Gaturi/Githimu/5556 and CR 21195. Copies of the valuation were made available to the 1st appellant. When

the default persisted unabated for 462 days as at 5th September 2017, Antique Auctions was instructed on 19th June 2017 to sell the charged properties.

12. Upon further review of the appellants' application letters of 20th November 2015 and 14th December 2015, the Bank's Credit Committee, declined to grant the additional sums. The determination was communicated to the 1st appellant on 11th June 2016 and, by a letter of 29th July 2016, the 1st appellant confirmed receipt of the respondent's communication declining to extend the additional facility. The respondent denied intimidating the appellants and maintained that it was entitled to recover the outstanding facilities.

13. At the trial, the appellants called two witnesses. Triphosa Ncororo Jesse (PW1), a director and Chief Executive Officer of the 1st appellant, testified that the 1st appellant's engagement with the respondent commenced in 2005 when she opened an account; that due to limited cash flow from 2007, they increased their financial facilities from Kshs. 50,000 to Kshs.15 million; and that in September 2015, they applied for an increase of the financial accommodation to Kshs.50 million. She stated that they were advised to provide a collateral of higher value to cover the existing facility, and for an advance of Kshs.50 million; that, on that basis, they made a formal application on 20th November 2015; that, instead of receiving the loan facility of Kshs. 50 million, they were offered an overdraft facility, which was not conducive to their business; and that, on 18th January 2016, this was later changed to a term loan.

14. On the issue of replacement of the existing 4 securities, she stated that the bank refused to extend the sum of Kshs.50 million to them or to release the other securities. She claimed that they found a buyer for title No. Kilifi/Kijipwa/369 but that, in a letter dated 29th July 2016, the respondent refused to release the title; and that, thereafter, they received the respondent's letters dated 17th June 2016 and 28th July 2016 declining to grant the enhanced loan facility. What followed were demands for repayment of the outstanding amounts. The witness complained that the refusal to extend the additional loan facility resulted in increased default from the 1st appellant's customers.

15. She further complained that, despite the cap on interests by the Central Bank of Kenya, they were not provided with any reprieve from the respondent. However, she confirmed that the Msambweni property was discharged in January 2017.

16. PW1 went on to complain that, sometimes, the respondent stole their clients; that it had sabotaged their business by listing them with the Credit Reference Bureau; and that it undervalued the Mtwapa plot from Kshs.22 million to Kshs.9 million and failed to reconcile their accounts.

17. During cross examination, she confirmed that they owed the respondent about Kshs.20 million at the time they requested for the loan, and had disbursed the Kshs. 2 million provided as an overdraft; and that the total outstanding amount was Kshs. 13,343,000 in addition to the Kshs. 2 million overdraft facility. She stated that they refused to sign offers to restructure the loans because the terms were harsh. She nevertheless acknowledged receipt of the letter dated 25th July 2016. She reiterated that the letter of 25th January 2016 and the charge document clearly expressed that the respondent had agreed to disburse a loan of Kshs.50 million on which they had relied.

18. Cleophas Okoth (PW2), a Certified Public Accountant with Ogot & Associates, testified that their firm audited the 1st appellant and established that the loss incurred by the appellants due to the respondent's refusal to extend the loan facility included loss on sale of properties, the loan processing fee as well as loss on interest on old loans; that the total loss was Kshs.140,000,563; and that an additional Kshs.2,257,278 arose from unauthorised bank overdraft. He further stated that the 1st

appellant's clients lost trust in it, causing them to default in their loan repayments, which resulted in the loss of Kshs.1.2 million.

19. On cross-examination, PW2 stated that the report was conducted between 3rd and 14th August 2017 and covered a period of 6 years; that the documents examined were not annexed to their report; that they relied on the respondent's bank statements for the period between 2015 and 2017; and that the members' statements were prepared by the 1st appellant. PW2 stated that he did not see the letter of offer, but saw the appellants' acceptance letter of 21st January 2016, although the letter was dated 25th January 2016.

20. PW2 further stated that the offer of Kshs.50 million was indicated under the clauses on securities, although, the offer of Kshs.50 million was not expressly provided in the letter. He conceded that the letter referred to an existing offer letter and substitution of the securities, but did not agree that what the respondent agreed to make available was a limit on term loan, an overdraft of Kshs. 2 million and and a term loan of Kshs.13,412,229.55. In his view, clause No. 5 could be construed to mean that the bank would disburse the entire Kshs.50 million to the 1st appellant.

21. PW2 went on to state that he did not see any agreements by interested buyers to purchase the charged properties, but confirmed that a letter dated 1st August 2016 from the respondent gave the appellants authority to sell the properties, provided that their interests were taken into account.

22. In support of the respondent's case, Collins Sabatia (DW1), the respondent's Nairobi Branch Manager in charge of credit and recoveries, referred to the offer letter dated 30th October 2009 for a facility of Kshs.3 million and title No. Mombasa/Shanzu Squatter/1464 and a motor vehicle provided as security, a letter requesting for an additional loan, and a Board resolution for an aggregate of Kshs 2.8 million; a further charge; a letter requesting for Kshs.15 million and the respondent's letter approving Kshs.10 million. The witness also referred to the additional securities, namely Gaturi/Gathimu /5556 and plot 1321. He then produced the Board resolution for aggregate sum of Kshs.25 million and charge over L.R. No. 1512 CR. 21195 for Kshs.15 million; and a deed of guarantee and indemnity provided by Paul Jesse for existing liabilities of Kshs.23,835,000 as at 23rd February 2015. He also referred to an application for overdraft facility and the offer letter dated 12th September 2015 for an overdraft of Kshs.2 million.

23. According to DW1, the offer letter had nothing to do with any new lending arrangements. The Kshs.50 million was to enhance the limit of the customer's borrowing subject to approval by the respondent; that, since the existing loans stood at Kshs.23 million, the ceiling for any new borrowing would be Kshs.25 million. He stated that the offer letter dated 18th January 2016 did not exist, and denied that the bank tampered with this letter; that the offer letter was acted upon, and the respondent declined to grant the loan facility; that consideration of the request had only taken 5 months and that, on average, the bank takes 3 to 6 months to approve loans; and that the customer has a critical role to play in the approval process. It was asserted that the respondent continued to accommodate the appellants as it awaited sale of the properties to offset the outstanding liabilities.

24. On cross-examination, he confirmed that he was not aware that the respondent breached customer confidentiality; that the first request for Kshs.50 million was made on 14th December 2015 and another letter of request on 28th December 2015; that there is no obligation to lend the sums requested unless the client qualifies; and that it was open for the board of the respondent to approve or decline the loan.

25. Kenneth Muchiri, a Certified Public Accountant No. 9187 working with Ndubi Mugambi & Associates, testified as DW2. He stated that they were requested by the respondent to review the report by Ogot & Associates and submit a report. According to DW2, Ogot's report contained

inconsistencies, and the interest claimed on the new loans was not supported by the loans disbursed; that, for the appellants to earn interest of Kshs.43 million, they would have had to have disbursed Kshs.30 million every year from 2016 – 2021; that, further, there was a difference between the loans disbursed and the loan processing fee; that, for the 1st appellant to collect Kshs.11,716,000 in processing fee, they would have had to disburse Kshs.585,800,000.

26. On interest from sale of the properties, DW2 stated that there was no evidence of the existence of an intending buyer to determine the amount claimed; and that, the 1st appellant not being a deposit receiving institution, they could not suffer loss of confidence. DW2 added that nothing stopped them from collecting the outstanding loans from their customers. In other words, according to DW2, the conclusion by Ogot & Associates were invalid.

27. Upon considering the dispute, the trial judge identified the following issues for determination:

    (a) Whether or not the letters of offer dated 18/1/2016 and 25/1/2016 were binding on the defendant to advance to the 1st plaintiff an additional loan of Kshs.50 million.

    b. Whether the refusal to advance the Kshs.50 million caused the 1st plaintiff to suffer loss in the sum of Kshs.142,806,841/=

    c. Whether the 1st plaintiff applied for and was granted an overdraft facility.

    d. Whether or not the 1st plaintiff is owing any monies to the defendant.

    e. Whether or not orders of permanent injunction restraining the defendant from realising the securities can issue.

    f. Who bears the costs of this suit?"

28. In a judgement dated 4th June 2020, the learned Judge held that:

> "I make an order that the plaintiff's case has not been proved under prayers (a), (b) & (d) and are hereby dismissed. Prayer (c) succeeds partially in terms of the sum of Kshs.31,140 awarded to the plaintiffs with interest at court rates from date of filing of the suit. The remainder amount of Kshs.142,775,701 (obtained by deducting 31,140 from142,806,841) is dismissed. The costs of the suit is awarded to the defendant."

29. The appellants were dissatisfied with the High Court's decision and filed an appeal on the grounds that the learned Judge erred: in failing to appreciate that the respondent had fundamentally breached the terms of the agreement contained in the offer letters of 18th January 2016 and 25th January 2016, as well as in the charge registered against the Msambweni property by declining to lend them the sum of Kshs 50 million; in failing to appreciate that the respondent's refusal to release the other securities after charging the Msambweni property was extremely prejudicial to the appellants; in failing to appreciate that there was a fundamental breach of contractual terms by the respondent, which entitled the appellants to special damages in the sum of Kshs 142,806,841.16, being the value of lost income and business; in failing to find that the doctrine of estoppel was applicable to the circumstances of the case; and in failing to find that the appellants had established a case for an award of special damages of Kshs 142,806,841.16, refund of Kshs 750,000 for loan processing fees, Kshs 691,150.0 for legal fees paid for charging the Msambweni 'property and Kshs 140,000 being valuation fees, and for rendering the equity of redemption unavailable to the appellants.

30. The appellants filed written submissions, which their learned counsel, Mr. Kiremi highlighted at the virtual hearing of the appeal. Counselsubmitted that the appellants were aggrieved by the trial court's

finding that there was no apparent agreement and refused to make inference from the documents and conduct of the parties, stating that it would amount to the court rewriting the contract between the parties; and that the learned Judge failed to find that, all the evidence and conduct of the parties pointed to the existence of an agreement to lend Kshs. 50 million to the appellants.

31. Counsel further submitted that the respondent's breach of the agreement was demonstrated by the respondent's admission that it did not lend the Kshs 50 million or any part thereof; that the appellant was clear that the amount was to go towards clearing the existing liabilities; and that it was wrong for the learned Judge to conclude that the existing documents did not create a contractual obligation between the parties.

32. In addition to the foregoing, it was asserted that the learned Judge did not take into account the respondent's refusal to release the other securities after charging Title No. Kwale/Msambweni 'A'/2910, which prejudiced the appellants as this meant that they could not use them to access credit from elsewhere; and that the fundamental breach of the contractual terms entitled the appellants to special damages of Kshs 142,806,841.16, being the value of lost income and business. Counsel finally submitted that the learned Judge did not appreciate that the respondent had systematically plotted to sabotage the appellants' business by declining to advance the sum of Kshs. 50 million. Counsel cited the decisions in National Bank of Kenya Limited vs. Joel Kiema Mutinda & another [2019] eKLR for the proposition that the letter of offer executed by the parties form the foundation of the contract and intention of the parties, but that the charge is superior if there is any conflict between the offer and the charge. The case of Surya Holdings Limited & 4 others vs. NIC Bank Limited & another [2015] eKLR was cited to support the contention that in a loan agreement, the non-delegable duty on the part of the lender is to remit the sums borrowed, unless there is a variation of the terms of the letter of offer.

33. When requested by this Court to identify the documents relied upon to claim the existence of an agreement to lend Kshs 50 million, counsel for the appellants specifically referred to the letters dated 18th January 2016 and 25th January 2016.

34. In response, Mr. Muthama, learned counsel for the respondent, also highlighted their written submissions and submitted that there was no agreement to lend Kshs 50 million to the 1st appellant; that the first offer letter dated 18th January 2016 only agreed to the collateral swap requested by the 1st appellant, and to the panning out the existing overdraft facility; that the next letter of 25th January 2016 was in respect of a collateral swap and replacement of the securities with one of a higher value; and that it did not agree, that there was anything in the letters expressly offering to make additional financial advances of Kshs. 50 million. Counsel submitted that there was a misconception on the 1st appellant's part that the respondent had agreed to advance additional facilities when it had not. As a consequence, there was no meeting of minds between the parties, and the learned Judge was right in dismissing the suit.

35. As concerns the appellants' claims for general and special damages, counsel submitted that these were speculative and were not proved to the required standard, and that the learned Judge also rightly dismissed them.

36. In rebuttal, counsel for the respondent submitted that, in the offer letters dated 18th January 2016 and 25th January 2015, the respondent specifically sanctions three facilities: a term loan of Kshs.6,661,216 for 33 months, an overdraft of Kshs. 2 million, and the existing loan of Kshs.13,412,229; and that nowhere in the offer letters did the respondent agree to extend a facility of Kshs. 50 million to the appellants; that what was sanctioned was an exchange of the securities, where the 1st appellant offered to provide a security of a higher value of Kshs. 50 million to enable it access loan facilities from time to time.

37. This is a first appeal from the decision of the High Court in its original jurisdiction, and this Court's mandate as a first appellate court is as stipulated in rule 31(1) of the Court of Appeal Rules, namely to re-appraise, re-evaluate and re-analyze the record, consider it in light of the rival submissions and draw its own conclusions thereon and give reasons either way. See Selle & another vs. Associated Motor Boat Co. Ltd & others [1968] EA 123. Further, it was held in Jabane vs Olenja [1986] KLR 661 that this Court will only depart from the finding by the trial court if they were not based on evidence on record, or where the Court is shown to have acted on the wrong principles of law, or where its discretion was exercised injudiciously as held in Mbogo & Another vs. Shah[1968] EA 93.

38. With the foregoing guiding principles in mind, the issues falling for this Court's consideration are: i) whether there was a binding agreement by the respondent to advance the 1st appellant an additional loan of Kshs.50 million; and ii) whether refusal to advance the Kshs.50 million caused the 1st appellant to suffer loss.

39. On the first issue, the appellants' claim against the respondent is centred on breach of contract on the basis that the respondent reneged on an agreement to provide a loan facility of Kshs.50 million to the appellants and, thereafter, failed to release the securities or the newly charged security and its guarantors. The respondent denied that such an agreement had come into existence.

40. At the outset, it is necessary that we begin by discerning whether or not an agreement between the parties had come into existence. In this regard, by way of a letter dated 20th November 2015 referenced 'LOAN REQUEST,' the 1st appellant wrote to the respondent as hereunder:

> RE: Loan Request
>
> The board and management of Golden Services Organization wish to thank you most sincerely for the unfailing support you have continued to give Golden Services Organization since 2005.
>
> We are grateful, for business we have been getting from your staff who have been even sacrificing their time to come to our offices for guidance and support. As board we are obliged to continue furthering this relationship with your bank the more,
>
> The Organization has grown to high height and has become attractive to other partners as a result of your support. It is for this reason we still requesting for a facility worth Ksh 50,000,000 (fifty million) for our long term loan need. This will support our continuous growth and will ease the hustle of borrowing short term loans which are expensive and time consuming.
>
> Upon approval of the Ksh 50,000,000 loan, we are kindly request your esteem office to approve a loan up to Ksh. 25,000,000 (twenty-five million) to assist us rata the urgent loan demand we are experiencing currently as we finalize-the perfection of Ksh 50,000,000 loan.
>
> Last and not the least, we wish to submit one collateral which covers the Ksh 50,000,000 loan and then withdrawal all other small collaterals submitted to the bank as security for the loans we currently have with the bank.

By a letter entitled, "Supplemental Letter Of Offer" and referenced, "Banking Facility" dated 18th January 2016, the respondent replied as hereunder:

> Reference is made to our duly accepted letter of offer dated September 12th 2015 in respect of your Banking facilities. Further reference is made to your request to convert your OD limit of Kshs. 2,000,000/= into a term loan and consolidate the same with outstanding

principal loan balance of Kshs.12,435,129.18. Further reference is also made to your request to substitute your securities with Kwale Msambweni A/2910. In this connection, we are pleased & advise having sanctioned the following amendments on the terms andconditions set out in this Supplemental Letter of Offer, the existing letter of offer and the Bank's general terms and Conditions and normal bankers demand rights:

41. In this regard, the clause on facility/security in the existing letter of offer is hereby deleted and replaced to read as follows.

> "Limit: 1
>
> Name Of Borrower: Golden Servicesorgarnization
>
> Facility Amount: Ksh 6,054,208. (Principle balance) Limit Type: Loan Term
>
> Purpose: Paid down balance of principle loan for Ksh 10,000,000/= utilized for working capital.
>
> Lending Rate: The loan will be charged a variable rate of interest at KBRR + 5.13% per annum (Currently at 9.87%+5.13%=15% per annum). Review of interest chargeable shall be subject to prevailing economic environment. However the Bank reserves the right to vary the rate of interest at its sole discretion subject to compliance with any regulatory requirement at any time without reference to you.
>
> Default Interest: in the event of any default, all facilities outstanding will become due and payable immediately. The amount is arrears will attract default interest of 5% above the prevailing lending rate of 15% pa.
>
> Tenor: 33 Months
>
> Under Limit 2
>
> ii. The principal balance was Kshs. 13,435,129.18 and converted overdraft 2 million into a term loan giving a total sum of Kshs. 15,435,129.18.
>
> iii. On the part of security, this is what was stated:
>
> a. Existing security; Board of trustees personal guarantee jointly and severally for Kshs. 23,835,000 each.
>
> b. New security (i) legal charge over title No. Kwale/Msambweni 'A'/2910 to be registered to cover Kshs. 22,297,000.
>
> ii. Personal guarantee and indemnity by Paul Mungatia Jesse registered proprietor of the property ...."

42. This offer was executed by the 2nd, 3rd, and 4th appellants, the 1st appellant's directors.

43. In a subsequent letter dated 25th January 2016, the same information is replicated, and mainly addressed the approved conversion of the overdraft into a term loan. Of pertinence in the letter is the reference to the "Review Security" which stated that:

> "New Security:
>
> a. legal charge over property title Kwale/Msambweni 'A'/2910 in the name of Paul Mungatia Jesse to be stamped and registered to cover Ksh 50,000,000/=."

44. The question is: based on the letters of 18th and 25th January 2016, did an agreement or contract to lend Ksh 50 million to the 1st appellant come into existence?

45. The learned authors of the text book Chesire, Foot and Formstons, The Law of Contract, (14th Edition) at pages 34 and 35 stated thus:

> "The first task of the plaintiff is to prove the presence of a definite offer made.... Proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offer to accept that offer."

46. In the case of Rose and Frank Co. vs. J R Crompton & Bros Ltd [1923]2 KB 293, Atkin, LJ. stated that:

> "To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly."

47. In the celebrated decision of Carlill vs. Carbolic Smoke Ball Company [1892] EWCA it was held:

> "One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English Law – I say nothing about the laws of other countries – to make a contract."

48. And in the case of Rufate vs. Union Manufacturing Co. (Ramsbottom) [1918] L.R. I K.B. 592, Scrutton L.J. held:

> "The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract that is, if it is such a term that can comfortably be said that if at the time the contract was being negotiated someone had said to the parties, "what will happen in such a case" they would have replied "of course so and so will happen, we did not trouble to say that; it is too clear." Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

49. It is trite law that a contract can either be express or implied. And the afore-cited authorities are clear that it was incumbent upon the appellants to prove that there was a contract that created a common intention of the parties to enter into legal obligations that expressly or impliedly created an agreement, and demonstrated that there was a meeting of minds.

50. Counsel for the appellants was categorical that the agreement to extend a loan facility of Kshs. 50 million was expressed by the letters dated 18th January and 25th January 2016. But a consideration of the two letters does not disclose the respondent's offer to provide a loan of Kshs. 50 million to the 1st appellant. Although the appellants concede that there was no such express term in the letters, they argue that the registration of a charge over the Msambweni property should be construed to mean that there was an offer to advance a loan of Kshs.50 million. In rebuttal, the respondent contends that registration of the charge over the Msambweni property was undertaken in order to comply with the 1st appellant's letter of 28th December 2015 requesting for substitution of the existing securities for the Msambweni property, which was of a higher value, and which would enable the 1st appellant access additional facilities from time to time.

51. In view of the foregoing, it is clear that there was no common intention or mutual meeting of the minds of the parties to create a legal obligation as between them in that regard.

52. On the postal rule in the case of Household Fire and Carriage Accident Insurance Co. Ltd vs. Grant [1879] 4 Ex D 216, Thesiger L. J. stated:

> "Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment...[6] But on the other hand it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no binding acceptance."

53. In the case of Utica Builders, LLC, appellant, vs. William M. Collins 176 A.D.3d 897 [N.Y. App. Div. 2019] the Supreme Court of the State of New York Appellate Division, Second Judicial Department observed that:

> "[T]he existence of a binding contract is not dependent on the subjective intent of [the parties]. In determining whether the parties entered into a contractual agreement ..., it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds. To create a binding contract, "there must be a meeting of the minds, such that there is a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms Because the parties never came to a meeting of the minds regarding essential terms of the agreement, there was no binding and enforceable contract between the parties" (emphasis ours)

54. The correspondence between the parties does not point to the existence a valid and enforceable contract either express or implied between the parties or a meeting of their minds to advance the 1st appellant an additional loan of Kshs. 50 million. And in the absence of such agreement, the claim for breach of contractual obligations could not be sustained. By the same token, the claim for an award for special and general damages also falls by the wayside. We are satisfied that the learned Judge's finding that the appellants' claim was not by any means proved and that, as a consequence, the learned Judge was correct in dismissing the appellants' suit.

55. As concerns the appellants' assertion that the respondent was estopped from reneging on the undertaking and agreement to lend them Kshs 50 million, section 120 of the Evidence Act is of relevance. It provides:

> " When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

56. In the case of Sera Njeri Mwobi vs. John Kimani Njoroge [2013] eKLR, this Court explained:

> "The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person."

57. In the instant case, we find that no loan agreement existed either express or by implication. On this score, it would follow that no representation was made by the respondent either in words or by action or conduct to warrant invoking the doctrine of promissory estoppel. In effect, the claim on estoppel could not be held to have arisen, with the result that the claim for breach of agreement and for loss of business is baseless, and does not arise.

58. In sum, the appellants' appeal is without merit, and is accordingly dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY,2024.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR