



**Kenya Orient Insurance Company Limited & another v Akiba Bank Limited  
(Civil Appeal 203 of 2019) [2024] KECA 936 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KECA 936 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 203 OF 2019  
DK MUSINGA, PO KIAGE & M NGUGI, JJA  
AUGUST 2, 2024**

**BETWEEN**

**KENYA ORIENT INSURANCE COMPANY LIMITED ..... 1<sup>ST</sup> APPELLANT**

**IDDYA CHANDERAPRAKASH - SYRVANA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**AKIBA BANK LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya  
at Nairobi (Olga Sewe, J.) dated 11th May 2018 in HCCC No. 552 of 1998)*

**JUDGMENT**

1. This is an appeal arising from the judgment and decree of the High Court in Nairobi (Sewe, J.) delivered on 11<sup>th</sup> May 2018 in HCCC No. 552 of 1998.
2. A precis of the relevant facts leading to this appeal is that sometime in December 1996, the respondent, a banking institution, issued a Packing Credit Facility of USD 500,000 to one of its customers known as Meghji Kanji & Company Limited (hereinafter referred to as “Meghji”), which was in the coffee export business. Part of the security for the facility was a performance bond which the respondent averred in its pleadings was duly issued by the 1<sup>st</sup> appellant in its favour. The performance bond was issued in consideration of the respondent having agreed to grant or granting or continuing to grant facilities for export of coffee by Meghji. It was limited to a maximum sum of Kshs.30,000,000 inclusive of interest and incidental charges, and payment thereon was to be made by the 1<sup>st</sup> appellant within 30 days from the date of demand by the respondent in writing.
3. The respondent contended that relying on the said performance bond, it granted and continued to grant credit facilities to Meghji to finance its coffee exports, and as at 1<sup>st</sup> July 1998, the amount owing by Meghji to it in respect of the credit facilities stood at USD461,468.90, attracting interest



- on the said amount at the rate of 12.5% per annum calculated at monthly rests. Meghji defaulted in servicing the facility, as a result whereof the respondent through its advocates wrote to the 1<sup>st</sup> appellant demanding payment of the said amount together with interest. This demand was not acceded to by the 1<sup>st</sup> appellant, despite having executed a performance bond in the respondent's favour, necessitating the filing of suit before the trial court.
4. Among the prayers sought in the plaint dated 5<sup>th</sup> October 1998 which was subsequently amended on 16<sup>th</sup> February 1999, was payment of the said sum of USD 461,468.90 together with interest at the rate of 12.5% from 1<sup>st</sup> July 1998 up to 4<sup>th</sup> October 1998, which amounted to USD 15,353.93; general damages against the 1<sup>st</sup> appellant for breach of contract; general damages against the 2<sup>nd</sup> appellant for breach of warranty of authority; costs of the suit and interest.
  5. In opposing the suit, the 1<sup>st</sup> appellant averred that the performance bond allegedly issued by it was void and therefore unenforceable as it was not under the company's common seal. It further contended that the performance bond was not properly executed as required under the relevant provisions of the Companies Act applicable at the time the bond was allegedly issued. For these reasons, it was averred that the performance bond could not constitute a legally binding guarantee. In any case, the said bond was bad in law for want of consideration.
  6. The gist of the defence by the 2<sup>nd</sup> respondent, who is a director of the 1<sup>st</sup> appellant, and who was alleged to have signed the bond in question, was that the 1<sup>st</sup> appellant could only be bound by a valid bond and that the bond in question was given to the respondent by the said Meghji without any representations or warranties as alleged. He further averred that the bond lacked efficacy for want of consideration.
  7. At the hearing before the trial court, Noah Nyachae, Head of Consumer Banking at Ecobank Kenya Limited, testified on behalf of the respondent. He stated that Akiba Bank Limited changed its name to EABS Bank and was, as at the time of the hearing, registered and carrying on banking activities under the name Ecobank Kenya Limited. He further testified as to how the respondent had issued a Packing Credit Facility to Meghji on the strength of the performance bond issued by the 1<sup>st</sup> appellant, and which the latter had failed to honour.
  8. On its part, the 1<sup>st</sup> appellant presented Ishamel Muchiri, its Legal Officer as its sole witness. The 2<sup>nd</sup> appellant did not testify and/or present any witnesses at the hearing.
  9. After a full hearing, the trial court delivered its judgment on 11<sup>th</sup> May 2018. The salient findings by the court were that the performance bond issued by the 1<sup>st</sup> appellant was enforceable against it, notwithstanding absence of the 1<sup>st</sup> appellant's seal thereon. In any case, as per the provisions of section 38 of the repealed Companies Act, it was not mandatory for the bond to be under the 1<sup>st</sup> appellant's seal for it to be valid. The court further held that upon issuance of the said bond, the 1<sup>st</sup> appellant confirmed in writing to the respondent that it had issued the said bond. As to the allegation by the 1<sup>st</sup> appellant that the 2<sup>nd</sup> appellant did not have the authority to sign the said bond, the court applied the Turquand Principle propounded in *Royal British Bank vs. Turquand* [1856] 1996 ER 886, and held that the respondent, as a third party, was not required to concern itself with whether or not the 1<sup>st</sup> appellant complied with its internal management rules and procedures in the issuance of the said bond. It was the court's finding that the 1<sup>st</sup> appellant, having issued the bond, it was bound by the terms thereof, and that it had breached the said terms by failing to make payments to the respondent upon demand.
  10. The trial court did not find merit in the allegation that the 2<sup>nd</sup> appellant had acted fraudulently in signing the bond, holding that fraud was not specifically pleaded and/or proved as required by law. As regards the issue whether the bond could operate retrospectively to cover exports that were made prior to its issuance, the trial court considered the wording of the said bond and arrived at the conclusion



- that the bond would not only apply retrospectively to cover the advances made prior to its issuance, but was also futuristic in outlook and therefore covered loans that would be granted after its issuance.
11. As regards the general and aggravated damages claimed by the respondent, the court declined to award them as the respondent had not adduced any evidence to support the said claims. In the end, the trial court held that the respondent was entitled to the claim for USD 461,468.90 or its equivalent in Kenya Shillings as at 2<sup>nd</sup> July 1998 together with interest at 12.5% per annum from 2<sup>nd</sup> July 1998 until payment in full. The respondent was also awarded costs of the suit.
  12. Aggrieved by the above findings, the appellants proffered the instant appeal by filing the memorandum of appeal lodged before this Court on 16<sup>th</sup> May 2018. The appeal is premised on grounds, inter alia, that the trial judge erred in law in: failing to consider, appreciate and take into account the 1<sup>st</sup> appellant's defence and written submissions together with the supporting authorities in determining the matter; failing to consider that there existed a guarantee issued by Kenindia Assurance Co. Ltd for the earlier period of 1994 to 26<sup>th</sup> August 1996 against which the respondent's claim lay; failing to appreciate that the loan availed by the respondent to Meghji was on the strength of the Kenindia performance bond; failing to consider and apply all the facts of the case, and more particularly ignoring the fact that the 1<sup>st</sup> appellant could not be liable under the bond in issue simply because the borrower was already in breach long before the performance bond was issued; finding that the bond in question could be applied retrospectively, which amounted to the court rewriting the contract for the parties; failing to appreciate the difference between a replacement bond and a fresh bond and thus erroneously treating the bond issued by the 1<sup>st</sup> appellant as a replacement bond; failing to find that the bond issued by the 1<sup>st</sup> appellant was to guarantee the grant for export facilities of coffee by Meghji and that there was no coffee export in the period of the said bond; finding that the performance bond was binding on the 1<sup>st</sup> appellant regardless of it not being legally executed by the 1<sup>st</sup> appellant; finding that fraudulent, illegal and improper acts by a director through collusion were binding on the 1<sup>st</sup> appellant; failing to find that the bond was unenforceable for want of consideration; and in awarding punitive interest to the respondent.
  13. At the hearing hereof, learned counsel Mr. Kemigishia appeared for the 1<sup>st</sup> appellant, while learned counsel Mr. Kipkorir was present for the respondent. There was no appearance for the 2<sup>nd</sup> appellant, though served with a hearing notice. The Court was, however, informed that the 2<sup>nd</sup> appellant has never participated in the proceedings either before this Court or before the trial court.
  14. Highlighting the 1<sup>st</sup> appellant's written submissions dated 6<sup>th</sup> August 2020, Mr. Kemigishia contended that the trial court failed to consider that there existed a guarantee issued by Kenindia Assurance Co. Ltd to cover the period of 1994 to 1996 against whom the respondent's case, if any, lay. It was submitted that the guarantee issued by Kenindia Assurance Co. Ltd was exhibited at page 41 of the record of appeal which the trial court completely ignored. Counsel contended that the amount claimed by the respondent against the 1<sup>st</sup> appellant was for a period between 1996 and 1997 when the Kenindia Assurance Co. Ltd performance bond was in existence and before 10<sup>th</sup> November 1997 when the subject performance bond by the 1<sup>st</sup> appellant had taken effect.
  15. Counsel cited the decision of the High Court in *Republic vs. Commissioner of Customs Services Ex parte Imperial Bank Limited* [2015] eKLR, where it was held that to expect a person who has expressly limited his/her liability to a certain period of time to be held liable way after the said period would not only be unreasonable and irrational, but would go against that person's legitimate expectation that his or her liability would only apply to the said period.



16. It was further submitted that the learned Judge failed to distinguish between a replacement bond and a fresh bond, and that the 1<sup>st</sup> appellant's bond and Kenindia's were totally different instruments and contracts which involved different parties; covered different specified periods of time; and that the 1<sup>st</sup> appellant's bond was not issued to cover a remainder period of the earlier Kenindia bond as by the time it was issued the validity period of one year of the Kenindia bond had since lapsed on 26<sup>th</sup> August 1997.
17. As regards the trial court's finding on the retrospective application of the 1<sup>st</sup> appellant's performance bond, it was contended that the learned Judge erred in erroneously arriving at the conclusion that the guarantee issued by the 1<sup>st</sup> appellant was applicable in retrospect, and further by finding that the 1<sup>st</sup> appellant was liable for debts incurred prior to the issuing of its performance bond. In this connection, it was contended that the 1<sup>st</sup> appellant could not be held liable to meet liabilities that arose long before the bond was negotiated. The decision of Republic vs. Commissioner of Customs Services Ex parte Imperial Bank Limited (supra) was cited in support of that submission.
18. The learned judge's interpretation of the words "In consideration of Akiba Bank Limited...having agreed to grant or granting or continuing to grant facilities for export of coffee..." to mean that the performance bond not only applied retrospectively to cover the advances made prior to its issuance but was also futuristic in outlook was, according to the 1<sup>st</sup> appellant, flawed and amounted to the court rewriting the contract for the parties, which the court cannot do as per the holding of this Court in National Bank of Kenya vs. Pipeplastic Samkolit (K) Limited, [2001] KLR 112.
19. Regarding the issue whether the trial court failed to consider that there was no consideration given by the respondent, counsel contended that the bond issued by the 1<sup>st</sup> appellant was to guarantee the grant for export facilities of coffee by Meghji or such debts arising out of the coffee exports made within the pendency of the bond, which was between 10<sup>th</sup> November 1997 to 10<sup>th</sup> November 1998. It was contended that there were no coffee exports within the period of the said bond and therefore there was no consideration at all for the facility. It was further contended that during trial, the respondent did not produce any contract, letter of credit, a confirmed irrevocable order for the coffee export or indeed any evidence of an order for export having been placed by Meghji for the period the performance bond issued by the 1<sup>st</sup> appellant would have been in existence, and that this was a condition precedent to liability. Therefore, without any consideration, the respondent had no proper claim against the 1<sup>st</sup> appellant.
20. On the issue of the legality of the performance bond, it was contended that the performance bond was not properly executed by the 1<sup>st</sup> appellant and was also not attested, and it did not bear the seal of the 1<sup>st</sup> respondent for it to be termed as valid. Further, that the 2<sup>nd</sup> appellant who allegedly executed the performance bond acted without the authority and the knowledge of the other directors and therefore he should have been held personally liable for his acts, which were said to have been fraudulent, illegal and improper by a director.
21. In sum, it was contended that the 2<sup>nd</sup> appellant, having acted illegally and/or fraudulently, should have been held personally liable for his illegal acts, and the trial court should have separated him from the 1<sup>st</sup> appellant. This was the holding by Mabeya, J. in Multichoice Kenya Limited vs. Mainkam Limited & Another [2013] eKLR. Counsel submitted that it was therefore erroneous for the trial court to find that fraudulent, illegal and improper acts of the 2<sup>nd</sup> appellant were binding on the 1<sup>st</sup> appellant.
22. On the issue of the interest awarded to the respondent by the trial court, counsel submitted that it was punitive and that the learned Judge unfairly punished the 1<sup>st</sup> appellant. In this connection, it was contended that it took the respondent 20 years between 1998 and 2018 to prosecute its case for no justifiable reason, and that the respondent's failure to prosecute its case timeously within a reasonable



time should not be at the expense of the 1<sup>st</sup> appellant. Counsel cited the decision of *Sedgwick Kenya Insurance Brokers Limited vs. Kenol Kobil Petroleum Limited & another* [2018] eKLR which cited with approval the case of *Kawoko Estate Coffee Factory Limited vs. Zassa*, Civil Appeal No. 32 of 1969 (UR) where it was held that undue delay in bringing an action may be a good ground for refusing interest on money withheld, and that failure to prosecute a suit with diligence might well have the same result; and therefore, that the trial court would be best placed to consider all these matters in exercising its discretion in respect of the interest payable.

23. In sum, it was contended that the trial court misapprehended the facts presented in the suit before it as well as the evidence by the parties and therefore arrived at an erroneous decision, which this Court was urged to set aside with costs.

24. On his part, Mr. Kipkorir submitted that the issue of the Kenindia Assurance Co. Ltd guarantee was not pleaded by the 1<sup>st</sup> appellant in its pleadings. It was contended that parties are at all times bound by their pleadings. On the importance of pleadings, counsel cited the decision of this Court in *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited* [2015] eKLR, where this Court cited with approval *Bullen and Leake and Jacobs Precedents*, 12<sup>th</sup> Edition, London, Sweet and Maxwell (The Common Law Library No.5) where the learned authors stated thus:

“...the system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial court and which the court will have to determine at the trial.”

25. Counsel therefore contended that this issue having not been pleaded cannot be a ground on appeal.

26. As regards the issue whether the performance bond issued by the 1<sup>st</sup> appellant was applicable in retrospect, it was submitted that the issue whether the 1<sup>st</sup> appellant gave a replacement bond or a fresh bond was not pleaded and the trial court could not therefore make a finding on it. It was contended that by raising the issue of replacement or fresh bond, the 1<sup>st</sup> appellant was attempting to introduce a new cause of action in the appellate court. Counsel cited the decision of this Court in *Independent Electoral and Boundaries Commission & Anor vs. Stephen Mutinda Mule & 3 others* [2014] eKLR.

27. Regarding the issue whether the learned judge failed to consider that there was no consideration given by the respondent, it was submitted that contrary to the assertion by the 1<sup>st</sup> appellant that this issue was not considered at all, the learned judge expressed her mind on the issue and delivered a well-reasoned decision on it. It was contended that the issue whether or not there were coffee exports by Meghji during the period of the performance bond issued by the 1<sup>st</sup> appellant would have been a matter between Meghji and the 1<sup>st</sup> appellant and not between the 1<sup>st</sup> appellant and the respondent.

28. As regards the legality of the performance bond, counsel submitted that the Turquand Principle estops the 2<sup>nd</sup> appellant from denying that he had no authority to commit the 1<sup>st</sup> appellant, and that a third party dealing with a company is not required to concern itself with whether or not the company (such as the 1<sup>st</sup> appellant) complied with its internal management rules and procedures. It was contended that the 1<sup>st</sup> appellant confirmed having issued the bond in the respondent's favour, and the argument that the performance bond was not valid for want of proper attestation and/or company seal does not hold water in view of the provisions of Section 38 of the repealed *Companies Act*. As regards the



argument that the 2<sup>nd</sup> appellant acted fraudulently and/or illegally by signing the performance bond, it was contended that the issue of fraud or collusion did not come up at the hearing, nor was it pleaded by the appellants in their pleadings. In a nutshell, the learned judge did not err by finding that the performance bond was valid and legally binding upon the 1<sup>st</sup> appellant.

29. On the issue of the interest awarded by the trial court and whether it was punitive, it was submitted that the issue whether the respondent timeously filed and/or prosecuted its suit was neither here nor there, and that in any case, nothing stopped the appellants from applying for the suit to be dismissed for want of prosecution if indeed there was any delay in its prosecution.
30. It was further submitted that if the 1<sup>st</sup> appellant indeed wanted to avoid payment of interest and accruals thereof, it would have paid the respondent the guaranteed amount when it became due, and cannot be heard to cry foul when the suit has been determined in the respondent's favour and when interest has already accrued.
31. In sum, counsel submitted that the appeal was brought in bad faith, has no merit and ought to be dismissed with costs so as to allow the respondent to enjoy the fruits of its judgment.
32. We have considered the record, submissions by counsel and the law. As this is a first appeal, we are enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and arrive at our own independent conclusion, but always bearing in mind and making allowance for the fact that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour. See the case of *Selle vs. Associated Motor Boat Company Ltd.* [1968] EA 123.
33. The following four issues commend themselves to us for determination in this appeal:
  - i. Whether the learned Judge erred in her finding on the legality and enforceability of the Performance Bond issued by the 1<sup>st</sup> appellant;
  - ii. Whether the trial court failed to consider that there existed a guarantee issued by Kenindia Assurance Co. Ltd to cover the period 1994 to 1996 against whom the respondent's case lay;
  - iii. Whether the trial court failed to consider that there was no consideration given by the respondent;
  - iv. Whether the trial court erred by granting punitive interest to the respondent.
34. It is an undisputed fact that Meghji vide their letter dated 6<sup>th</sup> December 1996 requested for a Packing Credit Facility of USD 500,000 (or its equivalent in Kshs.) from the respondent. Vide a letter of offer dated 17<sup>th</sup> December 1996, the respondent granted the request by Meghji for the facility of USD 500,000. The purpose of the facility as per the said letter was to finance Meghji's exports and for working capital. The facility was to expire on 10<sup>th</sup> January 1997. As per Clause no. 4 of the said letter, Meghji was to provide the following security for the facility: Credit Agreement; Directors Guarantee & Indemnity; Letter of Lien & Set-off; Performance Bond by Insurance Company aggregating to Kshs.30 million; and Board Resolution to borrow USD 500,000.
35. It is based on the above clause on security for the facility that the 1<sup>st</sup> appellant issued a performance bond under Policy No. 116970365 in favour of the respondent. The performance bond provided in part as follows:

“In consideration of Akiba Bank Limited P.O. Box 49584 Nairobi, having agreed to grant or granting or continuing to grant facilities for export of Coffee to M/s Meghji Kanji & Company Limited of P.O. Box 43579 Nairobi, we Kenya Orient Insurance Company



Limited of P.O. Box 34530 Nairobi hereby guarantee of such debts arising of the coffee exports made by them amounting up to Kshs. 30 million inclusive of interest and incidental charges, together not exceeding Kshs. 30 million. In the event that M/s Meghji Kanji & Company Limited should fail to fulfil their obligation to Akiba Bank Limited on those exports aggregating to Kshs. 30 million, we shall undertake to pay to Akiba Bank Limited within 30 days from the date of demand made by the Bank in writing.

The guarantee will remain in force till 10/11/1998. We have no liability in respect of any claim under this Bond made after that date. This Bond shall be governed by and construed in accordance with the Laws of Kenya.”

36. On 13<sup>th</sup> November 1997, the respondent wrote to the 1<sup>st</sup> appellant acknowledging receipt of the performance bond and requested the latter to confirm issuance thereof. The 1<sup>st</sup> appellant replied to this letter vide theirs dated 18<sup>th</sup> November 1997. The said letter which was addressed to the respondent read in part as follows:

“We are in receipt of your letter dated KNB/FX/0055432 dated 13<sup>th</sup> November 1997, and confirm that we had issued the above Bond for Kshs. 30,000,000/= in your favour and on behalf of M/s Meghji Kanji & Company Limited.”

37. The above written confirmation from the 1<sup>st</sup> appellant to the respondent is, in our view, sufficient to demonstrate that the 1<sup>st</sup> appellant issued the performance bond, and that it was at all times willing to be bound by the terms thereof. It is based on, inter alia, the said performance bond and the confirmation that it had been legitimately issued by the 1<sup>st</sup> appellant that the respondent proceeded to issue the Packing Credit Facility to Meghji from time to time. In *Serah Njeri Mwobi vs. John Kimani Njoroge* (2013) eKLR, this Court held thus:

“It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot

afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced.”

38. The 1<sup>st</sup> appellant challenges the legality of the performance bond on grounds, inter alia, that it was not properly executed nor was it attested and did not bear the 1<sup>st</sup> appellant’s seal. The trial court considered this argument in its decision and most specifically the provisions of section 34 and 38 of the *Companies Act*, Cap 48 Laws of Kenya (now repealed) which was the law applicable in the year 1997 when the performance bond was issued. Section 38 is in our view, worth reproducing. The said provision stipulates as follows:

“A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorized officer of the company, and need not be under its common seal.” [Emphasis added]

39. The argument therefore that the performance bond was not properly executed and that it did not bear the seal of the 1<sup>st</sup> appellant and was therefore not valid as to legally bind the 1<sup>st</sup> appellant is, by virtue of the provisions of section 34 and 38 of the repealed *Companies Act*, without any basis. The performance



bond was signed by a director of the 1<sup>st</sup> appellant and it was not mandatory in law for it to be under the common seal of the 1<sup>st</sup> appellant.

40. The legality of the performance bond is also challenged on the basis that the 2<sup>nd</sup> appellant, a director of the 1<sup>st</sup> appellant, did not have the authority of the 1<sup>st</sup> appellant and his co-directors to sign the performance bond, and that therefore he engaged himself in fraudulent, illegal and improper acts which should not bind the 1<sup>st</sup> appellant. This argument, in our view, cannot hold water. Whether or not the 2<sup>nd</sup> appellant had the authority of the 1<sup>st</sup> appellant or if consent was given to him to sign the performance bond is, in our view, an internal management issue and cannot afford a defence to the 1<sup>st</sup> appellant.
41. In *East African Safari Air Limited vs. Anthony Ambaka Kegode & another* [2011] eKLR, this Court had occasion to consider the Turquand rule as propounded in *Royal British Bank vs. Turquand* (1856) 119 E.R. 886. The Court stated as follows about the rule and its applicability:

“While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called “the indoor management” and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained.” (emphasis added).

Gower’s Principles of Modern Company Law has summarized the rule in Turquand’s case as follows: -

“This rule was manifestly based on business convenience, for business could not be carried out if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt with had actual authority. Not only is it convenient, it is also just. The lot of creditors of a limited liability company is not a particularly happy one; it would be unhappier still if the company could escape liability by denying the authority of the officers to act on its behalf.” (emphasis added).

42. Similarly, in *Industrial & Commercial Development Corporation (ICDC) vs. Patheon Limited* [2015] eKLR, this Court, while considering the Turquand principle, held thus:

“...Whether or not consent was given is an internal management issue and cannot afford a defence to the appellant. The respondent was entitled to assume that the appellant had complied with its internal rules and regulations before entering into consent, taking accounts and making the offer it did in its letter dated 4th September, 1997. We find that the respondent had no actual knowledge of these internal rules or of any suspicious circumstances putting him on inquiry.” [Emphasis added]

43. The attempt by the 1<sup>st</sup> appellant to impute fraud on the 2<sup>nd</sup> appellant’s signing of the performance bond is, in our view, devoid of any basis. The 1<sup>st</sup> appellant did not plead fraud against the 2<sup>nd</sup> appellant or against the respondent. The law on fraud is clear as enunciated in the case of *Vijay Morjaria vs.*



Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added]

44. Having taken the totality of all the above into consideration, we can only arrive at the inescapable conclusion that the performance bond issued by the 1<sup>st</sup> appellant to the respondent was valid and was at all times binding upon the 1<sup>st</sup> appellant in terms thereof. This ground of appeal is therefore without any merit and must fail.

45. Turning to the issue whether the trial court failed to consider that there existed a guarantee issue by Kenindia Assurance Co. Ltd to cover the period of 1994 to 1996, the general principle is that issues are raised before the trial or appellate court by pleadings and the rule of thumb has always been that parties must be bound by their pleadings. See Raila Amollo Odinga & Another vs. Independent Electoral & Boundaries Commission & 2 Others [2017] eKLR.

46. This Court in Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others (supra) cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) Ltd vs. Nigeria Breweries PLC S.C. 91/2002 wherein Judge Pius Aderemi J.S.C expressed himself thus:

“It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

47. Although the guarantee issued by Kenindia Assurance Co. Ltd appears at page 41 of the record of appeal, we have perused the defence filed by the 1<sup>st</sup> appellant before the trial court and agree wholly with the views expressed by the respondent that the issue of the guarantee issued by Kenindia Assurance Co. Ltd to cover the period 1994 to 1996 was never pleaded. The appellant cannot therefore seek to introduce the said issue in this appeal as this would be akin to an attempt at stealing a match on the respondent. This Court in Galaxy Paints Company Ltd vs. Falcon Guards Ltd [2000] eKLR held that issues for determination in a suit generally flow from the pleadings and a court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court’s determination. The issue of the guarantee issued by Kenindia having not been pleaded by the 1<sup>st</sup> appellant, the trial court could not have made a determination as that would be inimical to the general rule that parties are bound by their pleadings.

48. The above notwithstanding and even if we were to assume, for argument’s sake, that the issue of the Kenindia guarantee was pleaded by the 1<sup>st</sup> appellant, we are not persuaded that it could have, in any way, altered the decision of the trial court. We say this for the reason that the learned Judge duly considered the wording of the performance bond issued by the 1<sup>st</sup> appellant in arriving at her judgment. The relevant wording in the performance bond is as follows:

“In consideration of Akiba Bank Limited P.O. Box 49584 Nairobi, having agreed to grant or granting or continuing to grant facilities for export of Coffee...” [Emphasis added]



49. It is clear to us beyond any peradventure that from the said wording, the performance bond covered the parties' past, present and future agreements as far as the grant of facilities for export of coffee was concerned, of course with the limitation as to the guaranteed amount and the date the bond was to lapse, being 10<sup>th</sup> November 1996. The trial court therefore did not overlook or fail to consider the issue of the Kenindia guarantee and therefore this ground of appeal is without merit and must fail.
50. On the issue of whether the trial court failed to consider that there was no consideration given by the respondent, the 1<sup>st</sup> appellant's contention is that the performance bond issued in favour of the respondent was to guarantee the grant for export facilities of coffee by Meghji or such debts arising out of the coffee exports made within the pendency of the bond which was between 10<sup>th</sup> November 1997 to 10<sup>th</sup> November 1998. The 1<sup>st</sup> appellant contends that there was no coffee export within the period of the performance bond and, therefore, no consideration at all for the facility. Contrary to the argument by the 1<sup>st</sup> appellant that the trial court failed to consider this issue, the trial court did in fact consider it at paragraph 32 of its judgment as follows:

“Whereas it was the submission of Counsel for the 1<sup>st</sup> Defendant that, since there was no proof by the Plaintiff that the Borrower did pack and export coffee in respect of which the funds were advanced, there would be no basis for enforcing the Bond from a plain reading of the Performance Bond, there is no indication that the Plaintiff was obliged to prove anything other than default by the Borrower; which, as has been pointed out herein above, has been sufficiently demonstrated. If indeed no such exports were made then that would be a separate matter of contention between the 1<sup>st</sup> Defendant and the Borrower. Hence it was not a condition precedent to the attachment of liability on the 1<sup>st</sup> Defendant under the instrument for the Plaintiff to establish that the Borrower in fact made the exports for which the facility had been granted...” [Emphasis added]

51. We associate ourselves with the views expressed by the learned Judge. The respondent was not required to prove coffee export by Meghji for liability under the performance bond to attach. In other word, proof of coffee export was not a condition precedent for liability to attach, and the only thing the respondent was supposed to prove was Meghji's default in servicing the facility. The trial court in our view sufficiently and correctly addressed its mind to this issue and thus this ground of appeal must therefore fail.
52. As regards the ground of appeal that the learned judge erred in granting punitive interest to the respondent, the trial court duly considered the provisions of section 26 (1) of the *Civil Procedure Act* which deals with the issue of interest in decrees for payment of money. The trial court at paragraph 38 of its judgment held thus:

“The Plaintiff was entitled to the proceeds of the Performance Bond in 1998 and has been kept out of the funds since then. Accordingly, I have no hesitation in holding that the Plaintiff is entitled to interest. Moreover, the Facility Letter is explicit that the loan would attract interest at the rate of 12.5% per annum on daily debit balances to be applied at monthly rests. That is justification enough for the Plaintiff's prayer for interest at the rate of 12.5% per annum on the principal sum.”

53. The trial court's award of interest at 12.5% is in our view, well anchored under the provisions of section 26(1) of the *Civil Procedure Act* and also under the Facility Letter. The trial court did not award such exorbitant interest rates as to warrant this Court's intervention. As regards the argument that the respondent was not timeous in prosecuting its suit and hence not entitled to the interest rate awarded



by the trial court, it is our view that the 1<sup>st</sup> appellant could have utilized all the devices at its disposal including and not limited to applying for the suit to be struck out for want of prosecution if indeed there was inordinate delay as alleged. In sum, the delay, if any, in prosecuting the suit has no bearing on the interest awarded by the trial court which was, in our view, reasonable.

54. Ultimately, we find no grounds on which we can fault the learned Judge. We come to the conclusion that the appeal lacks merit and accordingly dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF AUGUST, 2024.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

