



**Rupa Kenya Limited & 2 others v Kenya Commercial Bank Limited (Civil Appeal 330 of 2014) [2024] KECA 1140 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1140 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 330 OF 2014  
SG KAIRU, F TUIYOTT & JW LESSIT, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**RUPA KENYA LIMITED ..... 1<sup>ST</sup> APPELLANT**

**DAVID KARANJA KAMAU ..... 2<sup>ND</sup> APPELLANT**

**CYRUS MBUIMWE KAMAU ..... 3<sup>RD</sup> APPELLANT**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi – Milimani (Ogola, J.) dated 25th June 2014 in H.C. C. C. No. 53 of 2004)*

**JUDGMENT**

1. In a judgment dated 25<sup>th</sup> June 2014, Ogola J, observed,  
  
“The defendants mounted a good defence and counterclaim which has made an enormous difference in the outcome of this case, as I have understood it.”
2. The defendants referred to were defendants to HCCC No. 53 of 2004, Kenya Commercial Bank Limited vs Rupa (K) Limited, David Karanja Kamau, and Cyrus Mbuimwe Kamau, and are the appellants in this appeal. In that suit, Kenya Commercial Bank Ltd (the respondent or KCB) had sued Rupa (K) Limited (Rupa or the 1<sup>st</sup> appellant) for the sum of Kshs.3,197,396.96 together with interest thereon at the rate of 23% per annum from 30<sup>th</sup> September 2003 until payment in full. In the same breath KCB had sought the sum of Kshs.450,000.00 together with interest at 21% p.a. from 25<sup>th</sup> September 2003 from each of the other two respondents.
3. The case for the Bank was that it advanced to Rupa a sum of Kshs.450,000.00 together with interest thereon, a facility which was guaranteed by the 2<sup>nd</sup> and 3<sup>rd</sup> appellants solely and jointly through



guarantee and indemnities in writing dated 29<sup>th</sup> February 1996. There was default and so in a letter of 25<sup>th</sup> February 1997, the Bank called upon Rupa as principal debtor, to pay or cause to be paid the sum of Kshs.908,086.25 together with interest at 46.25% p.a. Then in a letter dated 26<sup>th</sup> October 1999, Rupa made a repayment proposal which was not honoured. As default persisted, KCB by a letter dated 6<sup>th</sup> September 2003 called upon the 2<sup>nd</sup> and 3<sup>rd</sup> appellants to pay or cause to be paid the sum due under the guarantee together with interest at 21% per annum.

4. In an amended statement of defence filed on 23<sup>rd</sup> February 2007, the appellants set up the following defence; certain sums were advanced by KCB to Rupa as overdraft; the overdraft was unilaterally converted into a term loan by KCB on 1<sup>st</sup> September 1997 for Kshs.770,000.00 under a loan account No. 313096951025; KCB charged usurious interest and penalty on both the overdraft and loan accounts; and KCB contravened section 39 of The Central Bank of Kenya Act by charging interest beyond the set maximum at 16.50% per annum and section 44 of The Banking Act which barred changing of banking rates by banks without prior ministerial approval. The appellants sought to rely on a report prepared by M/s Interest Rates Advisory Centre Limited (IRAC) to prove that, on account of the contravention in statute and miscalculations on the part of the Bank, it had overcharged Rupa. In a counterclaim filed together with the amended statement of defence, the appellants sought the following declarations;

- a. Declaration that the plaintiff charged the 1<sup>st</sup> defendant's overdraft account no. 240751571 illegal and unconscionable interest between 25<sup>th</sup> July, 1995 to 31<sup>st</sup> July, 2002;
- b. Declaration that the legal maximum rate of interest permitted by S.39 Central Bank of Kenya Act between 25<sup>th</sup> July, 1995 and 17<sup>th</sup> April, 1997 was 16.50% per annum and not 129.5% per annum.
- c. Declaration that subsequent thereto, vide the amendments introduced by Central Bank of Kenya (Amendment) Act, 2000, the legal maximum rate of interest permitted was the rate of monthly 91 day TB plus a margin of 4%.
- d. Declaration that contrary to S.44, Banking Act, the plaintiff herein charged the 1<sup>st</sup> defendants overdraft account illegal charges amounting to Kshs.171,573.00 up to 25<sup>th</sup> July, 1995 without the required prior ministerial approval.
- e. Declaration that there is a recalculation difference in the outstanding balance on accounts as at 31<sup>st</sup> July, 2002 between the plaintiffs claimed balance of 3,197,396.96 and the defendants admitted balance of Kshs.75,342.59 debit of Kshs.3,122,054.37 in favour of the 1<sup>st</sup> defendant.
- f. A declaration that the plaintiff failed, neglected or refused to credit the 1<sup>st</sup> defendant's account with deposits of Kshs.299,154.00 between 25<sup>th</sup> July, 1995 and 15<sup>th</sup> September, 1999 which would have liquidated the outstanding Dr balance of kshs.75,342.59 as at 31<sup>st</sup> July, 2002 leaving a credit balance of Kshs.223,811.41 on account.
- g. A declaration that due to the plaintiffs several variations of the balances on account without prior notification and consent of the guarantors, the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's liability under the said guarantees has been discharged.”



5. After taking the evidence of Francis Rotich (PW1) for the Bank and David Karanja Kamau (DW1) and Wilfred Abincha Onono (DW2) in defence, the learned trial judge set out six substantive issues for determination: -

- “(i) Whether the claim was admitted by the defendants as alleged by the plaintiff.
- ii. If the answer to above is yes, whether the said admission was unequivocal and binding upon the defendants.
- ii. Whether the plaintiff had a duty to the defendant to charge properly and lawful interest rates, levies and penalties.
- ii. Whether the plaintiff could lawfully convert the overdraft facility into a term loan with no known terms and without notice to the defendant.
- ii. The place of the evidence of IRAC expert in this matter.
- iii. Whether the plaintiff bank violated the law under section 39 of *Central Bank of Kenya Act* and Section 44 of the *Banking Act*.
- ii. Whether the suit or the counter-claim succeeds.

ii. Who pays the costs of the suit.”

6. Although the learned trial Judge found that the appellant had in various correspondence admitted owing KCB the amount claimed the admission was not binding. The learned trial judge reasoned:

“The second issue is whether the defendants are bound with the said admissions. My answer is that the defendants admitted the above sums as due, and went ahead and paid the same, they cannot be heard to come back and claim what they had already paid. However, in the present circumstances, the defendants simply admitted that they had secured certain financial facilities which were in arrears, and they bound themselves to pay the same as soon as they were able. The account, as long as it was not paid, remained active, and the defendants were always at liberty to change their minds if they chanced upon information which brought into doubt the legality of the claim, or which materially questioned the way their account was being managed, or the interests levies and charges being posted into the account. The admission of the claim by the defendants was always based on the good faith and trust that the plaintiff was the right thing, was honest in its dealings and that the plaintiff levied correct and lawful interests, charges and penalties. In fact the defendants, based on this faith and trust, initially never questioned the way and manner in which their account was managed by the plaintiff. It is my finding that once the defendants doubted the honesty of the plaintiff, once they doubted the faith they had placed on the plaintiff, and once they found that the management by the plaintiff of their account was haphazard, irregular and illegal, and suspected that illegal interests and levies and penalties were being charged into their account, and as long as they had not paid the sum admitted, the defendants were free to repudiate any consent or admission. In this matter, the defendants sought the view of the experts in interest rates, and arising from that the defendants alleged that the account was mismanaged and illegal interests levied, and that their alleged admission of the claim was always based on admitting the right thing, and not admitting illegalities. I agree. Once the defendants sought expert advice and found that their account was mismanaged, the defendants cannot be held to their admission because that admission was based on a wrong understanding, or even on unlawful account. Without making a conclusive finding of fact



on this issue at this stage, evidence show that the defendants' account was mismanaged, irregular interests were levied, cheque deposits paid by the 1<sup>st</sup> defendant to reduce the loan ended up being debited to increase the loan. There are also periods when it is not clear which interest rates were applied. Once the defendants established these facts, or even one of them, they became at liberty to repudiate any admissions which preceded before these discovery, and I so hold.”

7. An equally fundamental finding by the trial court was that Rupa's account was managed unprofessionally, unaccountably, haphazardly and in disregard of all the safeguards required under applicable banking practice, guides and regulations, whether in actual existent or whether “implied”.
8. Regarding contravention of statute, the trial court's finding was that whilst there was the breach alleged, the report by IRAC was unreliable and a guesswork and it was impossible to know exactly how much was unlawfully levied.
9. After a lengthy analysis, the learned trial judge found that a sum of Kshs.2,353,675.00 was due from Rupa with interest thereon at 14% per annum from the date of judgment till payment in full; the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were found to be separately liable for Kshs.450,000,00 each together with interest at 16.5% per annum from 30<sup>th</sup> September 2003 until payment in full with a rider that their indebtedness would not exceed the indebtedness of the 1<sup>st</sup> appellant. Costs of the suit was to the Bank.
10. In this first appeal, the appellants clustered their grievances under the following headlines:
  - i. The impugned judgment was illogical, contradictory and inconsistent.
  - ii. The learned judge descended into the arena of litigation by recalculating what was supposedly due to KCB.
  - iii. Joined to the preceding grievance, finding for KCB in the absence of specific proof.
  - iv. The learned judge erred in not finding that the guarantors' liability only arose when the primary borrower was unable to pay and discharge the debt.
  - v. The learned judge exhibited bias against the appellants' case.
11. Both parties made submissions in support of their respective cases with Mr. Masaviru learned counsel representing the appellants and Mr. Wafula learned counsel appearing for the Bank.
12. The appellants submit that the judgment was illogical, contradictory and inconsistent in that the same found that the 1<sup>st</sup> appellant's account was unprofessionally, unaccountably and haphazardly managed by the respondent and yet still found that the respondent's claim had been proved on a balance of probabilities. It is contended that the learned judge even found that the respondent's statements of accounts were sheer 'guesswork' and could not be relied upon by the court and that the appellants proved that several incorrect debits were made into the account. It is the appellants' submission that the account became so distorted that it cannot be an accurate record of the transactions in that account.
13. The appellants further submit that he who avers the affirmative of an issue must prove it. Relying on the House of Lords case in *Joseph Constantine Steamship Line v Imperial Smelting Co.* [1942] 2 ALL ER 165 AC 154 (HL) and this court's cases in *M' Mairanyi and others v Blue Shield Insurance Co. Ltd* [2005] 1 EA 280 (CAK) and *Margaret Njeri Muiruri v Bank of Baroda (K) Limited* [2014] eKLR, the appellants submit that the learned judge erred in inferring without evidence by the respondent that the respondent had converted the 1<sup>st</sup> appellant's overdraft into a term loan. Further, the learned judge proceeded to find that the appellants knew the possible terms of the term loan and if they did not, then



they could have asked the respondent for the same. It is their submission that this finding was made without an iota of evidence on the record.

14. In citing the case of Kimani -vs- R [2000] 2 EA 417, the appellants submit that the opinion evidence of an expert is not binding on a court of law but however ought to be given their due weight especially so where the basis for the expert's opinion is clear beyond peradventure. The appellants submit that the learned trial judge was biased against their expert witness testimony and went beyond the call of his duty to decimate and make the witness evidence and report look bad.
15. The appellants argue, further, that the learned judge constituted himself as an expert witness in recalculating the correct balance on the appellant's account and proceeding to enter judgment on behalf of the respondent for the recalculated Kshs. 2,535,675, an amount neither pleaded nor proved by the respondent. The appellants contend that a trial judge cannot arrogate himself the role of an expert witness then recalculate the account balance and arrive at his own sum as the correct balance, in effect descending into the arena of the action.

Instead, it is submitted, the trial judge ought to have dismissed the claim without engaging in the process of recalculating the account balance.

16. On the issue of special damages, the appellants submit that the respondent prayed for a sum of Kshs. 3,197,396.96 together with interest. The same was a specific prayer that was not specifically proved by the respondent as no evidence was adduced to demonstrate how the claimed amount was arrived at. If anything, the respondent relied on the statement of accounts provided by the appellants which the learned judge had already taken issue with.
17. On the issue of guarantors' liability, the appellants submit that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were the guarantors of the 1<sup>st</sup> appellant for the borrowing up to the sum of Kshs. 450,000. Relying on the book by Geraldine Andrews & Richard Millets entitled "The Law of Guarantees" 3<sup>rd</sup> edition, the appellants note that a guarantor's liability only arises when the primary borrower is unable to pay and discharge the debt and hence the guarantors cannot be jointly and severally liable to pay a debt together with the borrower. Furthermore, the trial court ignored the appellants' evidence on record that the two guarantors had put into a joint deposit account the sum of Kshs. 450,000.00 at NIC Masaba Road Nairobi which ought to be uplifted and refunded to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants.
18. Lastly, the appellants submit that the trial judge was biased. In appreciating the very high standard of proof set in the English case of Attorney General -vs- Times Newspaper [1974] 1 AC 273, the appellants submit that the trial judge exhibited bias against the appellants' case and that the said bias has been proved to the standard set by this Honourable Court. In further relying on the case of Peter -vs- Sunday Post Ltd [1958] EA 424, the appellants point out to the inconsistencies in the judgment of the trial judge already alluded to as sufficient to convince this Honourable Court to grant the prayers sought.
19. The respondent in response submits that on the issue of logic and consistency, contrary to the appellants' submissions, the respondent proved its claim on a balance of probabilities. Citing sections 107 and 108 of the *Evidence Act* Cap. 80 Laws of Kenya, the respondent submits that it discharged its burden of proof that the appellants were indebted to it. The overdraft facility letter forming the subject of this matter was duly tendered in evidence before the trial court together with all security documents securing payment of the facility advanced to the 1<sup>st</sup> appellant. In addition, there was overwhelming evidence that the 1<sup>st</sup> appellant had failed, refused and/or neglected to liquidate its indebtedness to the respondent in line with the overdraft facility letter or security documents and in fact admitted to the



same. The burden of proof therefore shifted to the appellants to prove that they were not indebted to the respondent and their evidence was insufficient to support the said averment.

20. Relying on section 3(3) of the *Evidence Act*, the respondent submits that the totality of evidence before the superior court established that indeed the appellants were indeed indebted to the respondent. The inconsistencies noted by the learned judge in the manner in which the 1<sup>st</sup> appellant's account was managed by the respondent did not affect the proven fact that the appellants were indebted to the respondent and only affected the amount due to the respondent. The respondent further submits that the appellants are disingenuous in trying to evade their obligation to the respondent by challenging the amounts due to the respondent and should have in fact provided evidence in support of proving the fact that they had liquidated their indebtedness which they failed to do.
21. The respondent further submits that the proposal to convert the overdraft facility to a term loan was put forward by the 2<sup>nd</sup> appellant as a director of the 1<sup>st</sup> appellant and therefore the appellants are estopped from claiming that they did not know the terms thereof. That even so, the appellants continued making payments of the said loan. In addition, the respondent submits that it is highly irregular for the appellants to deny their knowledge of the terms of the loan having raised the objection after over 7 years and during that time continuing to repay their indebtedness. It was charged that the appellants are guilty of laches.
22. On the issue of the expert evidence, the respondent in relying on the decision in Criminal Appeal No. 238 of 2010 Mpelesil v Republic [2013] eKLR cited with approval in Mathew Kangora v Maretee Kotha [2016] eKLR and Peter Wafula Juma & 2 others v Republic [2014] eKLR that a very high burden of proof is required when imputing impartiality of a trial judge, submits that the allegation that the learned judge was biased on the appellant's expert witness was utterly false. To the contrary, inferences drawn by the learned judge about the said witness was based on factual evidence from material provided by the appellants themselves and at no point was the input of the respondent sought in making the report and was therefore incomplete and lacked objectivity.
23. In citing the case of Odd Jobs v Mubia [1970] EA 476 where it was held that a Court may allow evidence to be called on an unpleaded issue if it appears that the unpleaded issue has been left to the court for its decision, the respondent further submits that the issue of the exact amount due from the appellants to the respondents was left to the court for its decision and the learned judge was therefore entitled to recalculate the amounts due. It is contended that the appellants' suggestion that the learned trial judge ought to have ordered an audit of the account before finding in favour of the respondent flies in the face of the overriding objective that mandates courts to expeditiously dispose their business.
24. As for the issue of guarantors' liability, the Bank submits that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants' liability arose when they failed to comply with the demand made to them by the respondent after the 1<sup>st</sup> appellant defaulted in repaying the facility advanced to it.
25. In confronting the issue of bias, the respondent submits that the learned judge's conclusion that the appellants had failed to prove their claim that they had fully liquidated the debt or that they were entitled to a counterclaim for amounts overpaid, was based on facts. With regard to evidence tendered by the appellants in support of their claim were four cheques made as follows:
  - a. A cheque of Kshs. 13,475 deposited on 2<sup>nd</sup> September 1997
  - b. A cheque of Kshs. 20,286.70 deposited on 3<sup>rd</sup> September 1998
  - c. A cheque of Kshs. 31,816.30 deposited on 30<sup>th</sup> September 1999
  - d. A cheque of Kshs. 52,675.95 made on 2<sup>nd</sup> September 2000.



26. It is argued that no evidence was furnished to support the claim that a further sum of Kshs. 150,000 was paid on behalf of the 1<sup>st</sup> appellant by M/s Crop Care Limited. In that regard therefore the sums paid totaled to Kshs. 268,253.95 which could not fully repay the Kshs. 770,000 as at 1<sup>st</sup> September 1997 with interest thereon or to justify the upholding of the appellants' counterclaim. Pursuant to section 27 of the *Civil Procedure Act* the respondent having been successful ought to be entitled to costs.
27. As a first appellate Court we are called upon to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that, unlike the trial court, we did not see or hear the witnesses testify. This position was famously stated in the case of *Selle & Another v Associated Motor Boat Company Ltd. & Others* [1968] EA 123 as follows:-
- “I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* [1955] 22 EACA 210).”
28. Whereas we are also invited to find that the learned judge was biased against the appellant's case, we take a view that settling three issues is dispositive of the appeal;
- a. Could the trial court enter judgment for a sum other than that specifically pleaded?
  - b. If the answer to (a) is in the affirmative, did the respondent prove that it was entitled to a sum of Kshs. 2,535,675.00 with interest at 14 % per annum from the date of judgment from the 1<sup>st</sup> defendant?
  - c. If the answer to (b) is in the affirmative, was the trial court in error in enforcing the guarantees against the 2<sup>nd</sup> and 3<sup>rd</sup> appellants?
29. In its plaint of 25<sup>th</sup> January 2004, the Bank had sought judgment against the 1<sup>st</sup> appellant for the sum of Kshs.3,197,396.96 together with interest thereon at 23% per annum from 30<sup>th</sup> September 2003 until payment in full. In the end however, the trial court awarded the Bank a lesser sum of Kshs. 2,535,675.00 and a reduced rate of interest of 14% per annum from the date of judgment till payment in full.
30. The plea by the respondent was one for specific damages and, as was required by law, was specifically pleaded. The argument fronted by the appellants is that once you plead a specific sum then you must prove that specific sum or are entitled to nothing. The Bank's retort to that contention is that on the basis of the principle in *Odd Jobs v Mubia* [1974] EA 476, the matter of the exact amount due from the 1<sup>st</sup> appellant to the respondent was left to the trial court's decision as it was apparent, in the course of trial, that the appellants were truly indebted to the Bank.
31. Our view is that once a party has pleaded for specific damages, the party is entitled to any amount it will have specifically proved as long as the sum found due does not exceed the sum pleaded. It is not



a matter of all or nothing. We do not think this position to be incongruent with one of the objectives of pleadings being that it is a forewarning to a party defending a claim as to nature and extent of the claim it has to confront so as to prepare its defence. This is why a party that pleads a specific sum but proves more, without amendment, will only be entitled to the amount pleaded. Yet that is not to affirm the practice where a claimant pleads completely speculative figures or, with intent to confuse the defendant or convolute a claim or to saddle the defendant with an unwarranted laborious task makes wild, unjustified and deliberately misleading claims. There, the court may, where there is malfeasance, strike out the offending pleading and in other cases show its disapproval with an appropriate order on costs.

32. As it has not been proved, much less stated, that the Bank's pleading was misleading, the Bank would have been entitled to a judgment for a lesser sum than that pleaded if indeed that smaller sum was specifically proved and found to be truly due. In these circumstances, the principle restated in *Odd Jobs* (supra) need not be invoked.
33. We can now turn to the question whether the sum found by the trial judge to be due was specifically proved. In this regard, the appellant assails the learned trial judge for supposedly constituting himself as an expert and descending into the arena of litigation by recalculating what would be due to the Bank.
34. We start by restating the general rule found in section 107 of the *Evidence Act*, that he who asserts must prove. It is then incumbent on us to examine whether, on the basis of the evidence placed before the trial court, the Bank which asserted was owed the sum of Kshs.3,197,351.96 by the 1<sup>st</sup> appellant was nevertheless able to prove a debt of Kshs.2,535,675/- as found to be due by the learned trial judge. In carrying out this examination, we proceed on the basis that there are some fundamental observations and findings by the trial court that the Bank did not challenge either through a cross-appeal or by way of affirmation of the appeal and are therefore uncontested.
35. These findings are:
  - i. The 1<sup>st</sup> appellants account was managed unprofessionally, "unaccountably", haphazardly and in disregard of all the safeguards required under applicable banking practice guidelines and regulations, whether in actual existence or implied.
  - ii. The overdraft amount which at 25<sup>th</sup> July 1995 was Kshs.394, 675.00 shot up to Kshs.906,086.25 by 25<sup>th</sup> March 1996 recording a phenomenal growth rate of over 125% per annum. The Bank did not provide a rational explanation of this growth nor did the trial court find that growth to be rational. Curiously, that debit balance remained unchanged over a period of 6 months as confirmed at paragraphs 7 and 8 of the *Plaint* which stated that the outstanding balance on the account as at 25<sup>th</sup> February 1997 was still the same amount of Kshs.906,086.20.
  - iii. By 1<sup>st</sup> September 1997, the outstanding balance on the account dropped down to Kshs.770,000/- without apparent cause. All these was evidence that the said account was carelessly and irregularly maintained. With those irregularities, it was easy to believe the 1<sup>st</sup> appellant's allegations that Kshs.149,154.00 paid by it between July 1995 to 30<sup>th</sup> August 1997 was not acknowledged; that Kshs.100,000.00 was paid on or about 15<sup>th</sup> September 1999 by M/s Crop Care Limited on its behalf was not acknowledged and that a further sum of kshs.50,000/- around the same time by the 2<sup>nd</sup> appellant was also not acknowledged.



iv. Without paraphrasing the learned trial judge, he also found that;

“With this kind of records kept by the plaintiff it would require an expertise which this court does not have to know how the original sum of Kshs.400,000 escalated to the level of the present claim. In this regard, I take the view that the court must determine one date when the amounts herein could be determined by some sense of accountability, even if not acceptance, from all the parties. In this regard, I consider the 1<sup>st</sup> September 1997, when the overdraft facility was converted into a term loan under the loan account number 31309695025. On that date the loan stood at Kshs.770,000/-. This brings us to the bank statements starting from 1<sup>st</sup> September 1997 when the overdraft was converted to term loan and stood at Kshs.770,000/- to 31<sup>st</sup> July 2002 when the outstanding balance was 3,197,396.96 – the amount being claimed herein. Those statements are found at paragraph 157 to 162 of the defendant’s defense.”

36. The bedrock of the trial court’s decision that aggrieves the appellants was the finding that it was a proven fact that, on 1<sup>st</sup> September 1997, when the overdraft was converted into a term loan a sum Kshs.770,000.00 was due to Bank from the 1<sup>st</sup> appellant. Yet we think that to be problematic. The case of the Bank was that the amounts overdrawn by the 1<sup>st</sup> appellant were on 1<sup>st</sup> September 1997 converted to a term loan of Kshs.770,000.00 No additional amount was granted to the 1<sup>st</sup> appellant. Logically, the amount that was overdrawn as at 1<sup>st</sup> September 1997 had to be equivalent to what was converted into a term loan, that is, Kshs.770,000.00 or if different, the difference needed to be explained.

37. It was however the learned trial judge’s finding that the court was unable to find proof of how the overdrawn amount of Kshs.394,675.00 as at 25<sup>th</sup> July 1995 shot to Kshs.906,086.25 by 26<sup>th</sup> March 1996. The trial court’s further finding, and that is crucial, is that as at the 1<sup>st</sup> September 1997, the outstanding balance dropped to Kshs.770,000.00 “without apparent cause.” It bears repeating that those findings have not been challenged by the Bank. We understand the learned trial judge to be saying that the growth of the overdraft from Kshs.394,675 to Kshs.906,086.25 and then the drop to Kshs.770,000.00 as at 1<sup>st</sup> September 1997 was unexplained and unproved. In addition, and again not contested in this appeal, the trial court concluded that the conversion was a unilateral act of the Bank. It is also to be remembered that the trial court found the 1<sup>st</sup> appellant was well within its right to resile from any admission it had made because first, it had not paid the admitted amount and second, the 1<sup>st</sup> appellant had proof that the Bank’s accounting was faulty.

38. Once it can be deduced the alleged claim of Kshs.770,000.00 was unproven, then it could never form a proper anchor upon which the debt to the Bank, if any, could be worked. Indeed, before accepting the Kshs.770,000.00 as a basis for working the recalculation, the trial court lamented:

“In this regard, I take the view that the court must determine the date when the amount herein could be determined by some sense of accountability, even if but acceptance (sic) from all parties.”

39. Once the mainstay of the decision is in doubt then the decision itself is on shaky ground. The conclusion we draw is that the Bank failed to provide specific proof of the amount it had claimed or any lesser sum and unable to uphold the finding of the trial court.

40. If, however, we had come to a different conclusion, we would have no difficulty in affirming the trial court’s decision that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were liable for their guarantees. It is true as submitted



by counsel for the appellants that a guarantor's liability only accrues when the primary borrower is in default. We have little doubt that had the Bank proved that a debt from the 1<sup>st</sup> appellant was due, then it would also have proved that the principal debtor had failed to pay the due debt as demand had not only been made for its payment but also a suit commenced for its recovery.

41. Ultimately, we allow the appeal and make the following orders:
- a. The judgment dated and delivered on 25th June 2014 is hereby set aside.
  - b. Judgment is entered in favour of the appellants as against the respondent by way of a permanent injunction restraining the Bank by itself or its servants, agents and/or servants from selling L.R. Kwale/Majoreni/1499, Kwale/Wasini Island/356 and Kajiado/Ntashart/258 or otherwise howsoever moving to enforce the guarantees herein against the 2nd and 3rd appellants.
  - c. The 2nd and 3rd appellants' liabilities under the guarantees are discharged.
  - d. The appellants shall have costs on this appeal and the successful counterclaim at the High Court.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.**

**S. GATEMBU KAIRU, FCI Arb.**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

