Tropicana Hotels Limited v SBM Bank (Kenya) Limited (Formerly Known as Fidelity Commercial Bank Ltd (Civil Appeal 9 of 2019) [2023] KECA 1186 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1186 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL 9 OF 2019

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

OCTOBER 6, 2023

BETWEEN

TROPICANA HOTELS LIMITED ..... APPELLANT

AND

SBM BANK (KENYA) LIMITED (FORMERLY KNOWN AS FIDELITY COMMERCIAL BANK LTD ..... RESPONDENT

(Being an appeal from part of judgment of the Environment and Land Court (Hon. J. O. Olola, J.) dated 25th May 2018 in Malindi ELC No. 220 of 2015)

JUDGMENT

1. Before us is the main appeal as well as the Notice of Motion taken out by the Respondent in the appeal dated 15th March 2019, expressed to be brought under Rules 42, 77, 83 and 84 of the Court of Appeal Rules, 2010, seeking an order that the very record of appeal dated 4th February 2019 be struck out. The Motion was subsumed in the appeal and we heard both the appeal and the Motion on 21st March, 2023 on which day Learned Counsel Mr Kinyua Kamunde and Mr Gikandi Ngibuini appeared for the Appellant and Respondent respectively.

2. The Motion was supported by the grounds in the body of the motion and the averments in the supporting affidavit sworn by Mr Gikandi Ngibuini, on 15th March, 2019. In summary, the Respondent contended that the record of appeal as filed does not contain certified copies of both the decree and the judgment appealed against; that it does not incorporate all the rival pleadings and exhibits tendered in evidence at the trial by the respective parties; and that the appeal was filed outside the prescribed sixty (60) days period without leave.

3. In response to the Motion, the Appellant relied on the affidavit sworn by Salim Moloo, a director of the Appellant in which it was deposed that the Appellant's counsel lost or misplaced his file and as a result thereof had to rely on documents and the decree requested for and received from the court.

According to the Appellant the said documents were received on 9th March, 2023 and that the same date of receipt the Appellant filed supplementary record which was served on the Respondent on 10th March, 2023, the same day that the Appellant applied to the Deputy Registrar of the Court to admit the Supplementary Record.

4. At the hearing of the Motion and the appeal, Mr Gikandi, in arguing the Motion, relied on the written submissions filed and contended that the Appellant was inordinately guilty of the delay in filing the supplementary record of appeal. It was his submission that the court cannot be expected to rely on uncertified copies of the judgement and proceedings. It was further contended that the documents having been prepared in a hurry some of the documents incorporated in the record of appeal are ineligible hence it would be unsafe to rely on them.

5. On his part, Mr Kinyua submitted that the appeal was filed within time; that it is not mandatory that a record of appeal must contain all the documents under Rule 87 (now Rule

89) of the Court of Appeal Rules in light of the proviso thereto; that the record contains all the relevant documents and that the Respondent was at liberty to lodge a supplementary record containing the omitted documents; that there is no requirement that judgements and proceedings be certified; that the decree in the record mirrors the judgement and is duly signed, dated and stamped by the Deputy Registrar and that whether or not it is certified will not impair the ability of the parties to argue the appeal or the capacity of the court to determine the appeal.

6. We have considered the application, the supporting affidavit and the submissions made thereon. Rule 89 of the *Court of Appeal Rules, 2022* (herein the Rules) provides for the contents of the record of appeal. Of relevance to this Motion are rules 89(1)(d) and (g) of the *Rules* which provide for the trial judge's notes of the hearing and the judgment or order. Unlike Rule 89(1)(h) of the Rules which provides that the record ought to contain, inter alia, a certified decree or order, there is no requirement to incorporate the certified copies of the proceedings and the judgement in the record of appeal. Accordingly, the appeal cannot be struck out on the ground that certified copies of the proceedings and judgement were not incorporated in the record as long as copies of the proceedings and judgement are incorporated and it is not alleged that the same are not the documents they purport to be.

7. Regarding the omission of the pleadings and exhibits, the Appellant has explained the reasons for the failure to do so. It was averred that the Appellant received the said documents on 9th March, 2023 and that on the same day filed supplementary record which was served on the Respondent on 10th March, 2023 and that the same day the Appellant applied to the Deputy Registrar of the Court to admit the Supplementary Record. This averment was not controverted by the Respondent. Rule 90 of the Rule provides that:

> Where a document referred to in rule 89 (1) and (2) is omitted from the record of appeal, the appellant may, within fifteen days after lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 94
>
> (3) and, thereafter, with leave of the deputy registrar on application.

8. Therefore, the Appellant was within its right to seek for leave from the Deputy Registrar to incorporate the omitted documents in the supplementary record of appeal. Unlike the pre-2012 Court of Appeal Rules where there was a distinction between primary and secondary documents, under the current Rules, such distinction does exist and any document may be incorporated in a supplementary record provided that leave, where necessary, is sought and obtained.(See *Kinyua Muyaa & Co Advocates vs. Kenya Ports Authority Pension Scheme & 8 others*, Civil Appeal No. 69 of 2020).The reasons for doing

away with that distinction were firstly, that it created an avenue through which otherwise merited appeals were struck out thereby causing injustice to parties; and secondly, in light of development in technology, it was impossible to comply with the requirement to have certified copies of the decree since the mode of generation of the decree by printing made it impossible to identify which counterpart of the decree would be the original as opposed to copies.

9. The last issue was that the appeal was lodged outside time.

   This ground was based on the fact that the Appellant's record of appeal was incomplete. If we understood the Respondent properly, an incomplete record of appeal does not constitute a record of appeal and therefore is incapable of being cured by the filing of supplementary record of appeal. That argument, enticing as it may appear, is unfortunately not supported by the law. As we have stated above the distinction between primary and secondary documents no longer exists. A record of appeal which may appear incompetent for not incorporating all the documents specified under Rule 89 of the Rules may be perfected by the filing of a supplementary record of appeal. Accordingly, we are unable to deem the appeal as having been lodged out of time merely because some documents may have been filed outside the prescribed period.

10. In the premises the Notice of Motion dated 15th March 2019 fails and is dismissed with costs.

11. We now proceed to deal with the appeal. The cause of action in this matter, from the Appellant's perspective was that the Appellant, as the registered proprietor of land parcel Nos 775 and 776 registered at the Coast Registry as Nos 10407 and 10431 respectively at Malindi on which a hotel known as Sai Eden Roc previously known as Eden Roc Hotel (herein referred to as the suit premises), registered a charge dated 31st December, 2010, in favour of the Respondent herein for € 1,000,000.00. However, the said charge was not executed by the Appellant despite purportedly being sealed by the seal of the Appellant. It was therefore the Appellant's case that the said charge being a nullity, no sum is due or payable thereunder. Consequently, the said loan is rendered irrecoverable, being a loan advanced by the Respondent to enable the Appellant's directors and shareholders to purchase shares in the Appellant from the original shareholders contrary to the provisions of the Company's Act (since repealed).

12. It was pleaded that in 2012, the Appellant further charged the suit premises to the Respondent for Kshs 50,000,000/-. Additionally, the Appellant obtained overdraft facilities from the Respondent. It is however the Appellant's position that it is not aware whether the Charge or Further Charge were registered as required with the Registrar of Companies and its directors have no recollection of having affixed the Appellant's Seal on the Further Charge.

13. According to the Appellant, due to a down turn in tourism, it experienced financial difficulties which difficulties were compounded when a major part of the hotel caught fire in December 2013 forcing them to close the hotel until December 2014. Notwithstanding being made aware of the said difficulties, the Respondent recalled the facilities and demanded full payment. Disagreements however arose on the interest and other charges imposed on the loans advanced and hence this suit.

14. The Appellant therefore sought for the following reliefs:

    a. A declaration that the Defendant charged excessive and illegal interest over and above contractual rates;

    b. A declaration that the Defendant ought not to have threatened to report the Plaintiff to the Credit Reference Bureau before the illegal interest and other charges on the Plaintiff's accounts are reversed;

c. A declaration that any report to any unilateral report(sic) by the Defendant to any Credit Reference Bureau when there exists a dispute on the amount due is unconstitutional, unconscionable, oppressive, illegal and unreasonable to the extent that existing legislation does not require any Credit Reference Bureau to verify such information from the borrower thereby opening that procedure to abuse;

d. A declaration that a Charge by a Company is not enforceable until and unless it is registered with the Registrar of Companies and that the Charge is (un)enforceable as it was not executed in accordance with the law;

e. A declaration that the Charge to facilitate purchase of shares in the Plaintiff is a nullity;

f. A declaration that the Plaintiff did not receive the sum of Euros 1,000,000/= secured by the Charge and therefore the Charge fails for want of consideration;

g. A permanent injunction restraining the Defendant from enforcing the security in any manner or form before it serves the statutory 90 days notice and other notices required by the *Land Act*, 2012 and (the) *Land Registration Act*, 2012;

h. A permanent injunction restraining the Defendant from reporting the Plaintiff to any Credit Reference Bureau until the amount due is determined by Court;

i. A declaration that the defendant interfered with or curtailed the Plaintiffs right to redeem and that therefore the defendant has no statutory power of sale;

j. An order directing the defendants to reverse all fraudulent, irregular, unlawful and illegal entries in the Plaintiffs statements together with interest and Penal Interest accruing on those entries and to deliver to the Plaintiff bank statements containing only valid entries;

k. General, punitive and aggravated damages of a sufficient amount against the defendant for those fraudulent and illegal entries; and

l. Costs of and incidental to this suit.

15. By a Further Amended Statement of Defence dated and filed herein on 8th February 2017, Fidelity Commercial Bank Ltd (now known as SBM Bank of Kenya Ltd) (the Respondent) averred that indeed the suit premises stand charged in favour of the Respondent. Contrary to the Appellant's assertions, the Respondent averred that all documents due to be furnished to the Appellant were duly supplied and that, in any event, the Charge is a public document which could be obtained by the Appellant from the relevant land registry.

16. According to the Respondent the Charge and Further Charge were properly executed and sealed by the Respondent and that the same are enforceable in law. It was further their case that the sum of Euros 1,000,000/= was advanced to the Appellant for a lawful purpose and it is untenable for the Appellant to attempt to escape from its contractual obligations.

17. It was the Respondent's case that it legally and rightfully recalled the facilities advanced to the Appellant following the repeated and blatant default by the Appellant in meeting its repayment obligations. It was contended that all charges and other levies imposed by the Respondent on the Appellant's account were valid and proper and this suit is an unlawful attempt by the Appellant to frustrate the Respondent and its efforts to recover the substantial amounts owed to it by the Appellant.

18. The Appellant's case during the trial as propounded by the two witnesses called was that contrary to the Respondent's contention that the Appellant borrowed Euros 1,000,000/- from the Respondent,

the money went to the previous shareholders who were quitting the company as they came in. It was disclosed that both Directors of the Appellant, who were the two witnesses called by the Appellant, personally signed the Charge and that at the material time, both the Appellant and the Respondent had a common Advocate Messrs Alkinson Cleasby & Satchu Advocates. However, upon their arrival at the office of the advocate on the date they executed the Charge, Mr. Satchu Advocate had already prepared the documents and he just pointed to PW1 and PW2 where to sign after which Mr. Satchu asked PW1to send him their Company Seal. The same was delivered to Mr. Satchu's office by recorded delivery on 18th December 2010. It was PW1's evidence that the application for Credit Facilities from the Respondent for the term loan of Euros 1,000, 000/- was in the name of his co-director Salim Sultan Moloo (PW2).

19. PW1's evidence was that from a perusal of the account documents, the sum of 500,000/= Euros was disbursed on 20th December 2010 and another such sum on 26th July 2011. However, both were advanced to PW2 and not to Sai Eden Rock Hotel or the Appellant. In his evidence, by doing so, the Respondent was guaranteeing the previous shareholders Euros 500,000/- at the time at which the Hotel was being sold to them. It was disclosed that at some point the Appellants agreed with the Respondent Bank that the liabilities of PW2 be transferred to the Appellant so that it becomes the Appellant's debt.

20. PW1's evidence was that the Further Charge was created sometime in 2012 and that by virtue of the letter of offer, the Respondent gave the Appellants a Bill Discounting Facility of Kshs 10,000,000/- as well as terminal loan of Kshs 10,000,000/-. In addition, they had an overdraft facility of Kshs 5,000,000/- This total sum was secured with a Charge for Kshs 50,000,000/-. PW1 testified that as a result of inflated and arbitrary interest, the debt shot up by Kshs 10,000,000/- as interest. According to PW1, the Respondents then sent the Appellant a demand letter for Kshs 72 Million instead of Kshs 64 Million which was due. By then, the Appellant had not been supplied with Bank Statements.

21. In cross-examination PW1 admitted that when they filed the case on 3rd December 2015, his co-director, Salim Sultan Moloo (PW2), swore an Affidavit in which he admitted that the Appellant owes the Respondent in both Kenya Shillings and in Euros. PW1, while maintaining that they did not owe the Respondent more than Kshs 50,000,000/-, however denied that the Appellant owed the Respondent any money in Euros and that it appeared that, PW2, failed to distinguish between himself as an individual and the Appellant as a company. He however admitted that there was a letter in which PW2 had asked the Respondent Bank to transfer Euros 1,000,000/= from his account to that of the Appellant which money had been advanced to PW2 to purchase shares in the Appellant.

22. According to PW2, Salim Sultan Moloo, a director and 50% shareholder of the Appellant, he never signed a handwritten application for the loan. On being shown a Statement of Account of the Appellant in Euros, PW2 told the Court that he did not know how the Respondent discharged the loan which had been advanced to him from his account as no fresh Charge was created for the Appellant. In his view, as at 25th April 2015, he owed the Respondent Euros 506,400/- but after he made a loan repayment, the balance was reduced to a nil balance. It was his evidence that there were two sets of Bank Statements concerning his Euros account from the Respondent which do not tally.

23. According to PW2, as at 5th November 2015, the amount outstanding from the Appellant was Kshs 64,869,592/- which figure came from the Respondent's Malindi Branch. However, the Respondent demanded to be paid Kshs 71 Million. In his evidence, they had only borrowed Kshs 25 Million –Kshs 10 Million of which was a loan, another Kshs 10 Million for Bill discounting and Kshs 5 Million for an overdraft facility. Thereafter, they created a Further Charge of Kshs 50 Million to secure the loan.

24. PW2 however admitted that he received Euros 1,000,000/- from the Respondent in 2010. He, however contended that since the Bank Statement showed that he owed nothing, he could not pay when the Respondent Bank was not demanding anything from him. He conceded, though, that the loan was taken over by the Appellant although the Appellant did not really benefit from it as it was used to purchase the shares of the hotel. While admitting that the Appellant owed some money to the Respondent, PW2 was unable to tell the exact amount as the Statements supplied by the Respondent were, according to him, incorrect. He however conceded that they had not been very regular in payment of the loan as they had spent almost Kshs 78 Million renovating the hotel when they took it over. It was further his case that the Respondent Bank knew the hotel was destroyed by fire and there was therefore no reason to report them to the Credit Reference Bureau when they were doing their best to service the loan.

25. In PW2's evidence, even though the Further Charge Document indicated it had been signed and sealed in the presence of the Directors, he had only signed the document in the presence of Mr. Kinyua, his Advocate on record and it was not true that the seal was fixed in their presence. PW2 insisted that the Respondent was Charging interest irregularly and thereby inflating the amounts outstanding and though they had intended to instruct the Interest Rate Advisory Centre (IRAC) to compute the proper interest due, they discovered that IRAC's charges for such an exercise was too high. It was PW2's view that the only sum due to the Respondent was Kshs 64 Million.

26. On the part of the Respondent, their Legal Officer, James Oyuke (DW1), told the Court that the Appellant and the Respondent had a relationship dating back to the year 2010 and that from the Bank records, PW2 approached the Bank initially for a loan facility of 1 Million Euros. After the money was advanced, PW2 and his co-director wrote to the Bank confirming that the loan be taken over by the Appellant hotel, a proposal which the Respondent Bank agreed to and transferred the facility to Tropicana Hotels. Thereafter the Appellant was granted Credit Facilities totalling Kshs 25 Million and that as at 25th October 2016 the total amount outstanding on the Euros Account was Euros 1,203,726.26/- while for the Account in Kenya Shillings, the sum outstanding was Kshs 80,807,799.35/- as at 27th October 2016.

27. It was DW1's evidence that the loan was to be paid by 30th June 2011. Since they considered that this had become a non-performing loan, the Respondent informed the Appellant that they would disclose the information to the Credit Reference Bureau and when the Appellants learnt of the intention, they rushed to Court and filed this case. According to DW1, since then, the Appellant abandoned servicing the loan.

28. Upon cross-examination, DW1 told the Court that he did not know the origin of the Statements which the Appellant claimed to have received from the Bank's Malindi Branch. It was however his case that after comparing those Statements with the Respondent's, the final figure which was demanded was the same. He disclosed that the Respondent had initiated investigations into the source of the Appellant's documents.

29. DW1 however, conceded that the address to which the Statutory Letter of Demand was sent was P.O. Box 350- 80200 Malindi and not the address shown in the Charge and Further Charge which was P.O. Box 83063-80100 Mombasa. He further conceded that the sum of Kshs 71,593,000/- cited in their demand letter was in excess by about Kshs 9 Million and that the correct figure due was about Kshs 64 Million.

30. After considering the evidence, the Learned Trial Judge in his judgement dated 25th May, 2018 found that both PW1 and PW2 who are the only two directors and shareholders of the Appellant, admitted that they signed the Charge documents before Mr. Satchu Advocate of Atkinson Cleasby & Satchu

Advocates; that while they contended that the Company Seal was not affixed to the document in their presence, the two witnesses did not deny any of the contents of the Charge documents; that the Appellant's two directors knew the document they were signing as well as the obvious implication that by signing the document, they were confirming that the Common Seal of their Company had been affixed in their presence; and that the Appellant could not therefore turn around and deny that the Statement in the charge document they signed was incorrect.

31. According to the Learned Judge, the rule has always been that where a contract has been reduced in writing, neither party can rely on extrinsic evidence of the terms alleged to have been agreed and he cited *Muthuri v National Industrial Credit Bank Ltd* (2003) 1 KLR.

32. It was the Learned Judge's view that even if the Appellant's Seal was not affixed in the presence of its directors who signed the Charge document indicating it was affixed in their presence, the Appellant could not rely on its own mistake to claim that the same is invalid after benefiting from the Credit Facilities extended as a result. Based on *Lochab Transport Ltd v Kenya Orient Insurance Ltd* [1986] eKLR the Learned Judge held that since the Advocate who prepared the document was acting for both parties, any omissions on his part cannot be attributed to and/or used against the Respondent. The Learned Judge found the evidence of PW1 and PW2 insincere since they gave evidence according to what was expedient to them thus contradicting themselves. From the conduct of the Appellant in requesting the Respondent to transfer the financial facility of Euros 1,000,000/- which was then due to the Respondent from PW2 to the Appellant, the Court found that the Appellant was estopped from running away from liabilities that it had gladly taken and cited *John Mburu v Consolidated Bank of Kenya* [2015] eKLR, in support.

33. It was the finding of the Learned Judge that the Appellant executed contracts with the Respondent whereby monies were advanced to the Appellant and in its own admission, the Appellant fell in arrears leading to the demand from the Respondent. According to the Appellants, the sum due from them to the Respondent is in the region of Kshs 64 Million and at the trial, it was admitted that since this suit was filed and an order of injunction obtained on 6th May 2016, the Appellants stopped servicing the loan which could have been the reason for accumulation of further interests.

34. According to the Learned Judge the Appellant did not lead any evidence to support the allegation that the Respondent had imposed unlawful, irregular and arbitrary interest and other penalties, the Appellant's intention to instruct the Interest Rate Advisory Centre (IRAC) to compute the proper interest due and to prove that the Respondent was charging arbitrary interests and inflating the amounts outstanding, having not materialized.

35. With respect to Credit Reference Bureau Regulations whereby every banking institution is under an obligation in law to report on a monthly basis the performance of the loan advanced to its customers, the Learned Judge relied on *Martin Odhiambo & 3 Others v Housing Finance of Kenya* [2016] eKLR and found that even though there was a dispute as to the extent of liability, the Appellant admitted that they were not servicing the loan regularly, especially after a fire is said to have destroyed the Appellant's Eden Roc Hotel. According to the Learned Judge, the Respondent was under a legal obligation to report the performance of the Appellant's loan to the Credit Reference Bureau and the Appellant's objection was misconceived.

36. It was however appreciated that DW1 admitted that the Statutory Letters of Demand had been sent to an address in Malindi and not the Appellant's address in Mombasa as provided under both the Charge and the Further Charge and that the sum of Kshs 71,593,000/- cited in the said Notices were erroneous and in excess of the sum due from the Appellants by about Kshs 9 Million. Based on Section 90(2)(b) of the *Land Act*, 2011 that requires a three months' notice to be issued to the Chargor before the

Chargee can move to exercise its Statutory Power of sale, it was found that, from the Respondent's own admissions, it was apparent that no proper Statutory Notice was served upon the Appellant. Accordingly, the Chargee's equity of redemption had not therefore matured.

37. In the circumstances, the Learned Judge restrained the Respondent from proceeding to offer for sale the suit property based on the purported Statutory Notice that was sent to an address other than the one indicated in the Charge and Further Charge executed by the parties. However, save for the failure by the Respondent to serve a proper Statutory Notice, the Learned Judge found the Appellant's suit to be misconceived and untenable in its entirety. Accordingly, he held that if the Appellant remained in default as he had found, the Respondent was free to start the recovery process afresh and issue the proper notices as required by law.

38. In light of the role played by each party to the proceedings leading to the said determination, he directed each party to bear their own costs.

39. It was submitted on behalf of the Appellant that from the evidence adduced there is no way the sum in questions could mushroom to 64,000,000.00 from 15,000,000.00 in less than 2 years; that in light of the receipt of Kshs 64,174,762.00 from APA Insurance Company, there Appellant's account had a credit balance, but an artificial debit of Kshs 24,777,791.00; that in light of the evidence adduced, particularly, the report by Waweru Kimathi Associates, Certified Public Accountants that found excess charges in the sum of Kshs 4,948,148.69, the Learned Trial Judge erred in finding that there was no evidence placed before him to prove that the Respondent imposed unlawful, irregular and arbitrary interest; that the Learned Trial Judge failed to deal with and determine the issue of the propriety of the transfer of PW2's liability to the Appellant without the Appellant executing a charge as a guarantor for that liability and the unenforceability of the charge dated 31st December, 2010 for want of execution. In support of this submission, the Appellant cited *Standard Chartered Bank Limited vs. Mehotoro Farm Limited and 2 Others* [1973] EA 78 for the holding that a loan given by a bank on the security of the 1st Respondent's property to enable the 2nd Respondent acquire and pay for the shares in the 1st Respondent is unlawful, illegal and irrecoverable.

40. It was submitted that as the charge dated 31st December, 2010 was illegal, null and void, since the interest in the further charge was based on the reference to the interest in the said charge date 31st December, 2020, interest on the further charge was similarly irrecoverable.; that in light of the fraudulent discrepancies in the bank statements, the Appellant was entitled to general, punitive and aggravated damages.

41. We were urged to set aside the judgement and to find that the Appellant was erroneously charged with the amounts exceeding Kshs 9,000,000.00 and that the Respondent had not served statutory notices. The Appellant also sought for the costs, both in the appeal and in the court below.

42. On behalf of the Respondent, it was submitted, based on the case of *Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR that there is no basis to differ with or interfere with the decision of the trial court and we were urged to uphold the same. According to the Respondent the Appellant expressly conceded that the loan requested by PW2 of One Million Euros was at the request of PW2 transferred to the Appellant and that there was a further advance of Kshs 50 million to the Appellant both of which were secured by the charge and the further charges created in favour of the Respondent by the Appellant, both charges being registered at the appropriate registries. Based on *Mistry Amar Sigh v Serwano Kulubya* [1963] EA 408, it was submitted that the Appellant, who has not repaid the loan cannot rely on tricks to evade repayment. It was submitted that the charge and further charge constitute the legally binding agreements between the Appellant and the Respondent and that it is not open to the Appellant to deny the terms therein. This

submission was based on Margaret Njeri Muiruri vs. Bnak of Baroda (Kenya) Limited [2014] eKLR, Universal Education Trust Fund v Monica Chopeta [2012] eKLR, Lochab Transport Ltd v Kenya Arab Orient Insurance Ltd [1986] eKLR and National Bank of Kenya Ltd v Anaj Warehousing Ltd [2015] eKLR.

43. According to the Respondent, based on Section 120 of the *Evidence Act*, the Appellant is estopped from seeking to avoid settlement of its liabilities that have genuinely and legitimately accrued in favour of the Respondent in light of the admission of the debt by the Appellant. This submission was based on John Mburu v Consolidated Bank of Kenya [2015] eKLR and John Mburu v Consolidated Bank of Kenya [2018] eKLR.

44. We were therefore urged to dismiss the appeal with costs.

Analysis And Determination

45. We have considered the issues raised in this appeal. Before us, the Appellant relied on 25 grounds of appeal. We have considered the submissions made on behalf of the Appellant. With due respect to the Appellant, an attempt has been made in the submissions to either introduce facts which were not placed before the trial court or to attempt to expound on the documents which were produced but which were not explained before the trial Court. It is trite that submissions are not an avenue to either introduce facts or explain otherwise vague documentary evidence which explanation did not emanate from the witnesses when they testified. This Court has had occasion to express itself on the issue in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR where it held that:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

46. The Court in Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997 emphasized that no judgement can be based on written submissions since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules].

47. This Court in held Kenya Meat Commission v Richard Ambogo Raden [1990] eKLR that:

> "To include in the memorandum of appeal grounds on which the Judge did not make the findings of fact merely clutters up the record and the inclusion of such unnecessary grounds as a makeweight in a petition or memorandum of appeal lengthens the appeal and tends to distract the minds of the court from the essential issues."

48. Counsel, while drafting grounds of appeal should scrupulously adhere to rule 88(1) of the Rules of this Court which prescribe that:

> A memorandum of appeal shall concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against.

49. Precision, brevity and comprehensiveness is therefore key to drafting of grounds of appeal. Grounds of appeal which offended against the said provision was found by this Court in Mbugua Njuguna &

Another v Shamsudin Sidi Civil Appeal No. 71 of 1985 to be liable to be struck out though the Court appreciated that the Rules are just meant to guide the parties.

50. This being the first appeal, this Court's mandate as re- affirmed in Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR is:

> "...to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

51. However, this Court (Apaloo, JA, as he then was) in Kiruga v Kiruga & Another [1988] KLR 348, while dealing with what amounts to proof, cited Watt vs Thomas [1947] AC 484; Peters vs. Sunday Post Ltd [1958] EA 424 and expressed itself as hereunder:

> " An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. It is a strong thing for an appellate court to differ, from the finding, on question of facts, of the Judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon evidence should stand. But this is jurisdiction, which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

52. This Court (per Hancox, JA, as he then was), in Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] KLR 661; [1986-1989] EA 183, held that:

> "The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."

53. It is important to set out the gist of the Appellant's case as pleaded in order to determine whether the issues pleaded were addressed by the trial court. As stated at the beginning of this judgement, the Appellant's case was that the charge against the Appellant's land parcel Nos 775 and 776 though registered in favour of the Respondent herein for € 1,000,000.00, was not executed by the Appellant despite purportedly being sealed by the seal of the Appellant and was therefore a nullity and rendered the sum advanced irrecoverable. However, in cross-examination, PW1 admitted that both himself and PW2, the Appellant's directors signed the charge. He however denied that the purport of Section of the Act was explained to him and secondly, that the seal of the Appellant was not affixed to the charge document in his presence. As regards the first issue, the same was not expressly pleaded in the amended plaint. As was aptly put by the Supreme Court of Kenya in *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law

is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings..."

54. The issue of pleading apart, it is clear that the firm of Alkinson Cleasby & Satchu Advocates was acting for both the chargee and the chargor in the transaction in question. As the agent for the Appellant, the Appellant was bound by the actions taken by the said firm. In this case, apart from the allegation that the seal was not placed in the presence of the Appellant's directors, in cross-examination, PW1, an accountant of 20 years standing, acknowledged the importance of appending a signature to a document; agreed that his co-director, PW2, in an affidavit filed in Court admitted that the Appellant owed the Respondent a debt both in Kenya Shillings and in Euros; was however of the view that the amount owed by the Appellant to the Respondent did not exceed Kshs 50,000,000.00; agreed that he was aware that the sum of Euros 1,000,000.00 was advanced to the Appellant arising from a transfer of the said sum, at PW2's instance from PW2 to the Appellant based on a charge that was signed by both PW1 and PW2; a charge which expressly stated that the common seal was fixed in the presence of both PW1 and PW2 though he denied being present; that the acquisition of the shares from the outgoing shareholders by PW1 and PW2 was through the said facility of Euros 1,000,000.00; and without denying borrowing Euros 1,000,000.00 it was his case that the money was borrowed by PW2.

55. It is clear from the foregoing testimony that PW1 and PW2, that they benefited from the disputed sum which enabled them to acquire the shares in the Appellant company which sum though initially advanced at the instance of PW2 was transferred to the Appellant and both directors, the only shareholders of the Appellant, were aware of that fact. There is no evidence adduced to show that the said amount was repaid. To the contrary, both PW1 and PW2 admitted that they owed some money to the tune of Kshs 50,000,000.00 or thereabouts to the Respondent.

56. The question that we are called upon to deal with is whether in the circumstances of this case, the trial court ought to have relieved the Appellant of any liability arising therefrom on the ground that the Appellant's agent, the joint firm acting for both the chargee and the chargor did not strictly comply with the legal provisions. In our view, and it is trite that the law should not be used as an instrument of fraud or for the purposes of evading one's contractual liabilities particularly where the party relying on the same is the one whose action or inaction led to the failure in effecting non- compliance with the law. Our position is supported by the decision of the Supreme Court in *National Bank of Kenya Limited v Anaj Warehousing Limited* [2015] eKLR where the Court expressed itself as hereunder:

> "(62) By virtue of the financial arrangements between the parties in Ndolo Ayah, monies belonging to the appellant are now held by the respondent, and it is held to be irrecoverable, just on the policy ground that the Courts ought to be seen to deter illegality. The illegality stems from the fact that the conveyance was prepared by an advocate who at the material time, did not hold a current practising certificate. However, such illegality, in our view, is by no means as manifest as that of unjust enrichment, conferred upon the borrower. Could Parliament have intended, by Section 34 of the *Advocates Act*, the perpetration of such an injustice" The injustice, indeed, multiplies, and subsumes the plane of public interest, in view of the fact that the monies in question were drawn from a public financial institution.
>
> (63) To hold that monies lent in conformity with the provisions of the law, save that the relevant conveyancing instruments were drawn by an advocate who at the time did not hold a practising certificate, are not recoverable, would be to sanction unjust enrichment for unscrupulous borrowers, while

depriving innocent lenders creating a wide scope for fraudulent borrowing. Such a position in law, in our view, does not represent an "announced rule" – precedent that should guide the disposal of the matter now before us. Just as the law frowns upon unscrupulous lenders, especially those whose actions would fetter the borrower's equity of redemption, so also must it frown upon unscrupulous borrowers, whose actions would extinguish the lender's right to realize his or her security. There is to be, in law, a substantial parity of rights-claims, as between the lender and the borrower.

66. The Court's obligation coincides with the constitutional guarantee of access to justice (*Constitution of Kenya, 2010*, Article 48), and in that regard, requires the fulfillment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practising certificate. The guiding principle is to be found in Article 159(2)(d) of *the Constitution*: "justice shall be administered without undue regard to procedural technicalities."

67. To invalidate an otherwise binding contractual obligation on the basis of a precedent, or rule of common law even if such course of action would subvert fundamental rights and freedoms of individuals, would run contrary to the values of our Constitution as enshrined in articles 40 (protection against arbitrary legislative deprivation of a person's property of any description), 20 (3) (a) and (b) (interpretation that favours the development and enforcement of fundamental rights and freedoms) and 10 of the same."

57. In our view, a party ought not to invoke the law in order to evade his contractual obligations after enjoying the benefits of in order to get the courts to unscrupulously sanction unjust enrichment. While there are occasions when the law may be invoked to shield parties from illegalities, to invoke he law, not as a shield, but as a sword in order to achieve such a goal ought to be frowned upon.

58. We agree that courts of law and particularly not this Court ought to sanction conduct of parties who, having benefited from actions voluntarily entered into by them and having led the other party to believe that they will not insist on scrupulous adherence to the niceties of law, to suddenly spring a surprise on the party in order to obtain undeserved forensic advantage.

59. Regarding the issue of interest, it is clear that there was completely no evidence to support that allegation. The Appellant having approached the Court with allegations that the interest imposed was excessive the burden was upon it to prove that allegation on the prescribed standard, on a balance of probabilities. In this case, the Appellant deprived itself of the opportunity of doing so when it failed to call evidence from the Interest Rate Advisory Centre to back its case. While the Appellant may well have been financially constrained, that does not make the burden on it any lighter than the legal burden. We cannot help but agree with the learned trial judge when he summed the conduct of PW1 and PW2 in the following words:

> "both PW1 and PW2 would choose what they could remember about the Credit Facilities extended to the Plaintiff when convenient and pretend not to recall whatever they deemed inconvenient."

60. Although we were urged to interrogate certain documents PW1 and PW2 while giving evidence did not make any attempts to explain the tenure and purport of the said documents to the learned trial judge. This Court cannot at this stage purport to take into account the purported explanation based on submissions which strictly speaking are not facts but legal opinions arrived at based on learned counsel's interpretation of the evidence.

61. The Learned Trial Judge, rightly in our view, having found that the statutory notice was not sent to the correct address and that the amount claimed in the notice was admittedly incorrect. In the exercise of his discretion, as he was entitled to do, the learned Judge barred the Respondent from basing its actions on the said Notice but gave the Respondent the liberty to issue a proper notice if it intended to exercise its power of sale in the event that the situation remained un- remedied.

62. On our part, we have re-evaluated the evidence adduced by the parties and we find no reason to depart from the finding made by the learned trial judge.

63. In the premises, we find no merit in this appeal which we hereby dismiss with costs.

64. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER, 2023

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR