



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: ASIKE-MAKHANDIA, KIAGE & MURGOR, JJ,A)**

**CIVIL APPEAL NO. 168 OF 2014**

**BETWEEN**

**ESTATE OF TERENCE PETER O'DONOVAN.....1<sup>ST</sup> APPELLANT**

**BRENDA JELIMO O'DONOVAN AND ANITA CHELAGAT O'DONOVAN**

**(suing as Executives of the Estate of Joyce Cherotich O'Donovan...2<sup>ND</sup> APPELLANT**

**ENGINEERING MANUFACTURERS LIMITED.....3<sup>RD</sup> APPELLANT**

**ENGINEERING EQUIPMENT LIMITED.....4<sup>TH</sup> APPELLANT**

**AND**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

***(Appeal from the whole judgment and decree of the High Court at Nairobi (Mwera, J.) delivered 27<sup>th</sup> September 2013***

**in**

***HCCC No. 333 of 2008***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

***The appellants, Estate of Terence Peter O'Donovan, Brenda Jelimo O'Donovan and Anita Chelagat O'Donovan (suing as Executors of the Estate of Joyce Cherotich O'Donovan), Engineering Manufacturers Limited, the 3<sup>rd</sup> appellant, (EM) and Engineering Equipment Limited, the 4<sup>th</sup> appellant (EE) are aggrieved by the judgment of the High Court, (Mwera, J (as he then was)) which dismissed their suit against **the respondent, National Bank of Kenya Limited** with costs.***

In the suit in the High Court, Terence O'Donovan and Joyce Cherotich O'Donovan were the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively. Terence O'Donovan was also a director in EM, a limited liability company incorporated in the Republic of Kenya under the provisions of the Companies Act. Both Terence and Joyce O'Donovan were also the registered proprietors of the property known as Title Number

Nairobi/Block 90/143 (*the Loresho property*). Joyce O'Donovan was a director of EE, a limited liability company incorporated in the Republic of Kenya under the provisions of the Companies act, Cap 486 Laws of Kenya, that was also the registered proprietor of the properties known as LR Number 209/11315 and LR No. 209/1/316 (*the Industrial Area properties*).

Terence and Joyce O'Donovan passed away in the course of the proceedings in the High Court and in this Court respectively, leaving the representatives of their respective Estates to finalise the suit and this appeal. In addition, during the High Court proceedings the trial judge, Hon. Mr. Justice Mwera was appointed a judge of the Court, and authorization of the Honourable the Chief Justice, Willy Mutunga was obtained to enable him to hear the dispute to conclusion, whereupon he crafted and rendered a judgment on 27<sup>th</sup> September 2013.

The dispute emanated from a sub contract dated 3<sup>rd</sup> April 1995, made between Marshall Fowler Limited (*Marshall Fowler*) and EM for the provision of electrical works and services. The sub contract, which was for a sum of sterling £1,454,310.50, arose out of a European Union-funded contract for the refurbishments of 4 tea factories, namely; Kitabi, Mata, Mulundi and Shagasha awarded to Marshall Fowler by the Government of Rwanda.

Under the sub-contract, it was agreed that Marshall Fowler would advance EM Stg £ 144,481 for materials and Stg £ 288,962.00 for mobilisation. To secure the advances, the appellants agreed to procure performance bonds and guarantees to be issued in favour of Marshall Fowler through its bankers, Barclays Bank. To this end, Terence and Joyce O'Donovan approached the respondent, with whom they had had a long banking history, for the necessary financial accommodation.

The respondent was agreeable and by a letter dated 27<sup>th</sup> July 1995, it offered financial accommodation of Kshs. 52,355,160, against securities totaling Kshs 53 million. On the 25<sup>th</sup> September, 1995 Terence and Joyce O'Donovan and EE executed a charge and further charge over their jointly-held leasehold title over the Loresho property and provided guarantees in favour of the respondent to secure an overdraft facility not exceeding an aggregate sum of Kshs. 6,000,000 granted to EM. In addition, EE executed a charge over the Industrial Area properties and, together with Terence and Joyce O'Donovan, provided guarantees in favour of the respondent to further secure the facility amount not exceeding an aggregate sum of Kshs. 6,000,000.

The dispute between EM and Marshall Fowler arose sometime in April 1998 when, Marshall Fowler notified the appellants of its intention to terminate the subcontract for non-performance by EM. Subsequently, on 1<sup>st</sup> December 1998, Marshall Fowler instructed its bankers, Barclays Bank, to call up the guarantee bonds that were issued in its favour by the respondent. By a letter dated 23<sup>rd</sup> December 1998, Barclays Bank issued the respondent with a notification calling up the performance bonds Bond No. MA/GG/28/46 and 28/47 and, in so doing, demanded repayment of Stg £ 79,464.49. When the respondent notified the appellants of the call up demand on the performance guarantees, they strenuously objected to the payment claiming that the sums demanded were not due; that in fact they (the appellants) were owed far much more for completed works; that the call up was improperly issued, since it did not indicate which performance guarantee was being called up, and further that the letter of call up was improperly executed; that for the reasons advanced, the respondent ought not to honour it. The appellants asserted further that in view of the existence of a dispute with Marshall Fowler under the sub contract, and an agreement to arbitrate, the respondent should await conclusion of the arbitration process before proceeding to pay.

In seeking to obtain orders prohibiting the respondent from honouring the demand, the appellants sought an injunction in *Nairobi High Court Civil Suit No. 177 of 1999*. After hearing the parties, the High Court (*Mbaluto, J.*) declined to grant the orders sought. The dismissal of the application paved way for the respondent to honour the guarantee bonds, and on 16<sup>th</sup> June 1999, it paid Marshall Fowler Stg £ 79,464.49, whereupon Marshall Fowler cancelled the outstanding materials guarantee.

After payment to Marshall Fowler, the respondent correspondingly debited EM's account with the

equivalent sum of Kshs. 9,684,274.80, and, by a letter of 22<sup>nd</sup> July 1999, it simultaneously demanded repayment of the sum of Kshs. 10,218,380,35. When no response was received from the appellants, the respondent invoked its statutory powers of sale over the charged properties.

The appellants' case is that by reason of the wrongful call up of the performance bonds and guarantee by the respondent, the appellants have suffered damage and as a consequence sought redress. The particulars of the respondent's breach of the guarantees were stated to be that the respondent, failed to obtain the appellants' consents prior to affording EM financial accommodation in excess of the guaranteed sums; failed to notify the appellants that EM was enjoying financial accommodation in excess of the guarantees already executed, or that it had fallen into arrears in its financial obligations; that multiple accounts were opened and operated in EM's name contrary to the contemplated guaranteed single account; that EM's accounts were mismanaged with unjustifiable debits, arbitrary commissions, and unconscionable interest rates applied, so that the terms and conditions of the Guarantee agreement were violated. The appellants sought for;

1. A declaration that the appellants do not owe the defendant the sum of Kshs 17,109,253.35 or any lesser or larger sum or at all and that the Defendant has no right to sell the plaintiff's properties.
2. (a) A declaration that the purported debit to the EM's account of Kshs. 9,684,274.80 on 16<sup>th</sup> June, 1999 together with all accrued interest and levies was without authority and of no effect.  
  
(b) A declaration that the respondent is in breach of the guarantee contracts with the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants.
3. A declaration that the respondent has not complied with the provisions of Transfer of property Act and that the Notification of sale issued by Garam Investments is null and void.
4. (a) An injunction restraining the respondent by itself, agent or servants from advertising for sale or proceeding to sell either by public auction or otherwise the plaintiff's properties.  
  
(b) That within 7 days, the respondent do release and deliver unto the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants duly discharged titles over properties duly discharged properties.  
  
(c) Damages.
5. An order that the respondent pay the costs of this suit and shall pay the Auctioneer charges and related costs
6. Such further or other relief as the court shall deem appropriate in the circumstances.

The respondent denied the appellants' claims and countered that the charge and further charge executed by Terence and Joyce O'Donovan and EE were to secure repayment of overdraft facilities and other financial

accommodation granted to EM and that the performance bonds and irrevocable guarantees were to secure repayment of the material and other advances to EM; that when it received a demand for Stg £ 79,464.49 in respect of one of the guarantees from Barclays Bank, it was duty bound to pay since the irrevocable letters of guarantee issued to Barclays Bank were contracts of strict liability binding it to unconditionally pay the sums guaranteed or part thereof upon receipt of the first written demand without any contestation and without need to prove or show any grounds or reasons for demand of the specified amount, and that being a stranger to the subcontract between Marshall Fowler and EM, it was not privy to the arbitration agreement, and therefore not bound to await conclusion of the arbitration process before honouring the demand.

It concluded that the debit of Kshs.9, 684,274.80 from EM's bank account was lawful and properly made

as was its exercise of the statutory power of sale to realize the properties for payment of the sums owed to it; that Terence and Joyce O'Donovan and EE being guarantors of EM's debts were truly and justly indebted to the respondent for the materials amounts advanced as well as for Kshs. 17,109,253.35 together with interest.

During the hearing, **Terence O'Donovan** who was PW1 testified on behalf of the appellants. He was followed by **Brenda Jelimo O'Donovan PW2** who took the stand after he passed away. Thereafter **Paul Chelang'a DW1** testified on behalf of the respondent. In his evidence, Terence O'Donovan set out the chronology of events leading up to the letter of call up of 23<sup>rd</sup> December 1998, and went on to state that the call up ought not to have been effected because a provision of the subcontract specified that the bonds would not be called up if the appellants had completed 90% of the works and further, that the existence of an agreement to arbitrate required the parties' dispute be determined prior to issuance of any call up; that since they had completed between 95% and 98% of the contract, and the parties had yet to proceed to arbitration, the call up was in contravention of the terms of the subcontract. It was further stated that the call up letters were with respect to the wrong bonds and did not conform to the requirements of the irrevocable letters of credit, and therefore it was not known which bonds were actually called up.

Concerning the performance and the mobilisation bonds, the witness clarified that by the time of the call up, both bonds had lapsed, leaving only the materials bond no 28/48.

The witness further stated that, as a consequence, Stg £ 79,464.49 ought not to have been paid, and the respondent should not to have debited the amount of Kshs. 9,684,274.80 from EM's account. In addition, because interest on the bonds was not chargeable, and EM's accounts had been subjected to serious mismanagement, and the amount of Kshs. 17,109,253.35 that the respondent claimed the appellants owed was not due. PW2 mostly reiterated the evidence of Terence O'Donovan.

DW1, an employee of the respondent likewise stated that the issue turned on the 3 guarantee bonds issued by the respondent to Barclays Bank on the appellants' behalf, and in terms of the letter of offer of 27<sup>th</sup> July 1995; The witness stated that the amount of Stg £ 79,464.49 was paid following the call up of 23<sup>rd</sup> December 1998 made by Barclays Bank pursuant to the irrevocable letter of credit which specified that the sum demanded would be paid without contestation; that the equivalent amount of Kshs.9,684,274.80 was simultaneously debited from EM's account, and that the sum of Kshs. 17,109,253.35 that was demanded comprised the overdrawn amount on EM's account of Kshs.9,684,274.80, an outstanding loan of Kshs. 3,199,997.50, and an overdraft facility of Kshs. 237,991.55 together with interest and EE's overdraft facility of Kshs. 367,210.74 together with interest accrued thereon; that statutory notices were issued to the appellants in respect of the sums claimed, and that the appellants were truly indebted to the respondent.

In the judgment, the learned judge dismissed the appellants' suit having concluded that the respondent rightly paid Barclays Bank Stg £ 79,464.49 in respect of the materials guarantee that was called up in favour of Marshall Fowler, and for correspondingly debiting EM's account of Kshs. 9,684,274.80. The court found that nothing in the evidence showed that the respondent was not entitled to the sum of Kshs. 17,109,253.35 together with interest that was demanded.

The appellants were dissatisfied with the decision on the grounds that the learned judge erred in failing to construe the respondent's call up on the basis of contracts of strict liability; in applying different standards between the appellant's and the respondent's obligations; in failing to identify the document that constituted the call up notification and whether such document competently called upon the respondent to make the payment, and in concluding that the respondent was obliged to pay up upon "*first written demand to the defendant Bank to pay up*" without determining whether the document that constituted the call up existed.

The appellant's further complained that the learned judge wrongly concluded that the dispute centered around the materials guarantee, when in fact the dispute centered on whether it was the materials guarantee, or performance or both that had been called up by the respondent, and in failing to find that the call up was unnecessary since the subcontract works performed exceeded the threshold necessary for a

call up to be effected, and failing to find that the call up should have awaited conclusion of the arbitration process.

A further ground was that the learned judge failed to find that the obligations of the guarantors, under the further charge over the Loresho property and the charge over the Industrial Area properties should not have exceeded Kshs. 6 Million each, and in failing to appreciate that the respondent had breached the terms of the guarantees by operating multiple accounts, levying improper interest, and commissions; improper management of the debt account; and failing to exhaust recovery from the principal debtor before realizing Terence and Joyce O'Donovan's personal guarantees.

Other grounds were that the learned judge failed to make a finding that all statutory notices were incompetent and did not warrant statutory sale, and upholding the respondent's claims that the notices were not part of the pleadings to the appellant's prejudice.

In the brief submissions that were made before us on Skype owing to the rapidly spreading Covid-19 pandemic, **Mr. Katwa Kigen** learned counsel who had filed written submissions submitted that the appeal related to 3 guarantee agreements, namely MA/GG/28/46, 28/47 and 28/48 issued in favour of Marshall Fowler through its banker, Barclays Bank; that the respondent relied on the letters of demand dated 1<sup>st</sup> December 1998 from Marshall Fowler and 23<sup>rd</sup> December 1998 from Barclays Bank to pay the call up amount of Stg £ 79,464.49 which related to the materials bond No. 28/48, and yet, the letters of call up specified bond Nos. 28/46 and 28/47 as the specific bonds of call up. It was argued that there was no provision for payment of a bond that was not called up, and that therefore the respondent wrongly paid the call up of the materials bond. Furthermore, that in order for the bonds to be called up firstly, a written demand was required to be issued, secondly, the demand was required to be countersigned, and thirdly, two duly authorized attorneys of Barclays Bank Limited were required to countersign the demand.

Counsel went on to argue that the manner in which the respondent called up the guarantee bond No. 28/48 did not conform to the requirements specified in the irrevocable letter of guarantee, because, to begin with, there was no first written demand issued by Barclays Bank calling it up, secondly, the demand of 1<sup>st</sup> December 1999 did not conform to the laid down format set out in the irrevocable letters of guarantee, because, it was not countersigned by two duly authorized representatives, and thirdly the respondent could not argue that the second letter of 27<sup>th</sup> January 1999 from Barclays Bank was sufficient to amend the call up bond from No. 28/47 to No 28/48 as it did not fulfill the requirements of a first written demand in respect of the materials bond since it was not countersigned by two attorneys, and furthermore there was no indication that the person who signed it was a duly authorized attorney. Counsel posited that if the full meaning of the guarantee bonds was strictly construed, the letters were seriously deficient and incompetent and incapable of calling up bond No. 28/48, with the result that the call up ought not to have been effected by the respondent. The appellants relied on the Indian case of **SMT Kamala Devi vs Seth Takhatmal and another 1964 AIR 859; 1964 SCR (2) 152** for the supposition that a strict construction of the bond was a necessary requirement of its enforcement, and that the materials bond called up having been defective, meant that the *contra proferentem doctrine* (interpreted against the drafter) applied to construe the letters against the respondent for effecting a call up that was a nullity.

Counsel further asserted that, another reason that the respondent ought not to have paid was that the subcontract specifically provided that recovery of the materials guaranteed under bond No. 28/48 could only be undertaken if the works performed were between 50% and 90% works, and that since the works were over 94% complete, the appellants were effectively discharged from liability on the outstanding materials guarantee.

Next, counsel argued that the statutory notices seeking to auction the properties were defective as the respondent demanded payment "within three months from the date of the demand as opposed to the date of service, as was held in the case of **Trust Bank Limited vs Eros Chemist Limited Nairobi, Civil Appeal No 133 of 1999**; that therefore the statutory sale of the charged properties was a nullity. It was also contended that, in breach of the guarantee terms, the appellants as guarantors were not regularly informed of EM's debt position, the effect of which was to discharge them from their respective guarantees. In support of this contention the appellants cited the case of **Harilal & Company and another vs The**

**Standard Bank Limited [1967] 1 EA 512.**

Other issues raised in the submissions were that the guarantees did not provide for payment of interest, yet the respondent unilaterally charged compound interest at the rate of 30%; that in addition, the interest charged was not authorized by the Central Bank of Kenya. Counsel concluded that the respondent introduced additional claims after the pleadings were closed and the issues agreed upon which was prejudicial to the appellants as by the time of introduction of the new claims, Terence O'Donovan had completed his testimony and had subsequently passed on.

**Mr. Odhiambo**, learned counsel for the respondent opposed the appeal. Counsel submitted that there was no defect in the manner of calling up the materials guarantee; that before the materials guarantee was called up, a demand by Marshall Fowler was made on 1<sup>st</sup> December 1998 which was followed by the call up letter of 23<sup>rd</sup> December 1998 from Barclays Bank to the respondent; that all the material information in respect of the call up was specified in the letters, and therefore the materials bond call up was proper and the learned judge correctly found that there was no uncertainty as to the guarantee bond that was called up, which at all times was the material bond. It was submitted that it was inappropriate for the appellants to rely on minor errors in the call up letters to allege that the wrong bond was called up, particularly as two attorneys of Barclays Bank countersigned the two letters; that notwithstanding the minor errors, a clarification of the bond on call up was issued in a letter from Barclays Bank dated 29<sup>th</sup> January 1999. It was asserted that in any event the performance bonds that the appellants claim was called up, that is Bonds Nos 28/46 and 28/47 were not in contention as it had already expired on 6<sup>th</sup> December 1997, and were not in existence by the time of the call up.

It was further argued that the terms of the materials guarantee bond specified that it was to be paid without contestation or justification, and were couched in mandatory terms; that the strict liability nature of the terms imposed a rigid obligation on the respondent to pay following a first demand.

Regarding the loan payments, it was submitted that the respondent had proved that the appellants owed an aggregate liability of Ksh. 17,109,235.35 as was evidenced by the letter of offer, the charge documents and the bank statements, which evidence was not challenged; that in addition, no evidence was produced to support the allegation that the respondent had mismanaged EM's account. On the Statutory notices, the respondent submitted that the power of sale was exercised on the basis of fresh notices issued after the delivery of the High Court ruling on the injunction, and which the appellants did not challenge. It was also argued that in any event, the notices did not form a part of this appeal.

Concerning the allegation that additional evidence was introduced in the course of the hearing, it was asserted that the evidence was admitted by consent, with no objections being raised during the trial; that as a consequence, no prejudice or disadvantage was occasioned to the appellants, and PW2 had the opportunity to examine, cross examine and reexamine that evidence at the time that she testified.

On his part **Mr. Muriu**, learned counsel for the Interested Party submitted that their interest was limited to the Loresho property that had been offered as security, and which was sold pursuant to the respondent's exercise of its statutory power of sale; that recently this Court observed in *Nairobi Civil Appeal No. 300 of 2015* that, the titles having been acquired by the Interested Party and already registered in their name inferred that they were the absolute owners; that as a consequence, the appellants' recourse would not lie against the Interested Party, but would lie in a claim for compensation in damages against the respondent.

Mr. Kigen briefly responded that the respondent accepted that the call up was with respect to the wrong guarantee, and that the letter of 27<sup>th</sup> January 1999 sought to correct the error, raising the question of whether the call up was correctly demanded.

On the Interested Party's ownership of the Loresho property, it was submitted that a separate suit emanating from fresh Statutory Notices of sale had been instituted.

We have considered the record, the grounds of appeal and the rival written parties' submissions. This is a

first appeal, and as stated in Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212;

**“On a first appeal from the High Court, the Court of Appeal shall reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen or heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in evidence.”**

Whilst adhering to these principles, it is apparent to us that two broad issues arise. Firstly, concerning the guarantee bonds, whether the call up referred to the materials guarantee, and if so, whether the threshold was satisfied for the effective call up of the materials guarantee, including whether the call up should have taken into account the terms of the subcontract, and the arbitration provision, and finally, whether the respondent ought to have honoured it. Then secondly, as a consequence of the payment of the materials guarantee, whether the respondent rightly debited Kshs. 9,684,274.80 from EM’s account, and if so, whether interest and other charges were payable. Related to this, was the question whether EM’s accounts were mismanaged, and finally whether the respondent rightly exercised its statutory powers of sale over the charged properties.

In addressing the complaint that the performance guarantees were not properly called up, the learned judge found that there was no uncertainty in the identification of the guarantee called up in view of the clarification Barclays Bank issued before the payment was effected.

The learned judge’s conclusion notwithstanding, the appellants’ contestation is that the materials bond called up was not ascertainable because, the call up format adopted by Barclays Bank did not conform to the format specified by the irrevocable guarantee, in that, for the call up to be effective, it was necessary for Barclays Bank to have indicated the nature of the bond being called up; that the letter required to be countersigned by two authorized attorneys of the bank; that since, the performance guarantee No. MA/GG/28/46 and mobilization bonds No. MA/GG/ 28/47 were referred to in the first letter of 23<sup>rd</sup> December 1998 that was countersigned by the two attorneys, and the letter of 27<sup>th</sup> January 1999, which carried the clarification that it was the materials bond and not the other two bonds that was being called up, was not signed by two authorized attorneys, then the call up of the materials bond No. MA/GG/28/48 was defective and unenforceable, and, the respondent ought not to have complied with it. They therefore faulted the learned judge for concluding that it was the materials bond that had been called up, when the letter of 23<sup>rd</sup> December 1998 specified otherwise.

In ascertaining whether the letters issued by Barclays Bank were sufficient to effect a call up of the materials bond, a reassessment of the evidence discloses that, it was not disputed that the appellants sought for financial accommodation by way of *inter alia* 3 guarantee bonds from the respondent.

In return, the respondent offered the appellants financial accommodation vide a letter of offer dated 27<sup>th</sup> July 1995 in the following terms;

*“Banking Facilities....*

<i>Facility:</i>	<i>Guarantee</i>	<i>K.Shs. 39,266,370-</i>
	<i>Performance Bond</i>	<i>K.shs. 13,088,790-</i>
<i>Total</i>		<i>Kshs. 52,355,160-</i>
<i>Purpose:</i>	<i>To assist you execute a contract awarded by E.E.C. In Rwanda</i>	
<i>Security</i>	<i>Directors Joint and Several guarantees for Shs. 800,000</i>	

*Legal Charge for K.Shs.1,500,000- over property*

*Held:*

*L.R. No. 90/143 – Loresho Nairobi i.n.o Terence*

*P. O'donovan and Joyce J. O'Donovan valued at K.Shs. 6,0 million by M/s Tysons Ltd. 24/7/95.*

*Directors Joint and several Counter and Indemnity Guarantee in favour of the Bank to secure K.shs.53.0 million*

*Fixed deposit account for K.Shs. 39.0 million (equivalent to Stg £ 436,293-) to be held under Lien to the Bank.*

*Offered:*

*Guarantee for K.Shs. 53.0 million to be executed by M/s. Engineering Equipment Ltd. supported by a Legal Charge over Company's property L.R. No. 209/11315 and 11316 Nairobi Industrial Area valued at Kshs. 5,800,000- by Ms. Kinyua Koech ltd. 21.7.95*

*Further Legal Charge for Kshs. 4.5 Million property L.R. No. 90/143 Loresho...”.*

Subsequently, the respondent issued irrevocable letters of guarantee in respect of the 3 guarantee bonds all dated 20<sup>th</sup> July 1995 to Barclays Bank, namely;

1. The Performance Bond – No. MA/GG/28/46 for Stg £ 144,481 or 10% of the subcontract value;
2. The Mobilisation Bond – No. MA/GG/28/47 for Stg £ 144,481 or 10% of the subcontract value;
3. The Materials Advance Bond – No. MA/GG/28/48 for Stg £ 288,965 or 20% of the subcontract for the purchase of materials required for the project.

The Performance Bond and irrevocable letters of guarantee for the mobilization bond and materials advances comprised similar terms, the relevant excerpts of which are set out below as;

**“ ...IRREVOCABLE LETTER OF GUARANTEE NO. MA GG 28/48**

**BARCLAYS BANK OF KENYA LIMITED**

*... And whereas, we, the undersigned, NATIONAL BANK OF KENYA LIMITED, of Moi Avenue P.O Box 72497 NAIROBI, Kenya have agreed to issue to Barclays Bank of Kenya Limited on behalf of the Sub contractor the required bank guarantee.*

*NOW THEREFORE, in consideration of, you, Barclays Bank of Kenya Limited at our express request paying to the Sub-contractor the aforesaid advance payment. We in our capacities as Manager and Accountant of the National Bank of Kenya Limited and duly authorised by this bank which expression shall where the context so admits include its successors and assignors hereby guarantee to you as primary obligor and not merely as a surety, on behalf of the sub-contractor, the payment to you, upon receipt of your first written demand, of any sum or sums up to the total of Stg £ 280,962.00 representing 20% of the Electrical Sub Contract value, without contestation and without your needing to prove or to show grounds or reasons for your demand of the sum specified therein.”*

It is not also in dispute that on 1<sup>st</sup> December 1998, Marshall Fowler wrote to Barclays Bank demanding payment of the balance of the sums advanced to EM in respect of the electrical works. The letter prompted Barclays Bank to demand the payment of the specified amounts from the respondent in a letter

dated 23<sup>rd</sup> December 1998 which read;

*“The Manager*

*National Bank of Kenya*

*P.O. Box 72497*

*NAIROBI*

*Dear Sir*

1. *LETTER OF GUARANTEE NO MA/GG28/47 STG POUNDS 144,481=*
2. *IRREVOCABLE LETTER OF GUARANTEE NO MA/GG 28/46 STG POUNDS 288,962=*

*We refer to your unsigned letter dated 10<sup>th</sup> November 1998 and enclose herewith our customers claim for STG P. 79,464.49 against guarantee No. 2 above.*

*In accordance with the terms and conditions of your irrevocable credit, please let us have the payment for our customers account.*

*Yours faithfully*

*For & Behalf of Barclays Bank of Kenya Ltd*

*J B KARIUKI*

*J K MWANGI*

*BUSINESS CENTRE MANAGER SENIOR CORPORATE MANAGER”*

Upon receipt of the demand, the respondent wrote to the appellants to inform them of its intention to honour the demand. The appellants adamantly protested against the respondent’s intention to pay Barclays Bank as they claimed, amongst other reasons, that the letter failed to specify the guarantee bond to which the demand related. By a further letter dated 27<sup>th</sup> January 1999, Barclays Bank clarified that the guarantee bond being called up was bond No. MA/GG 28/48 and not bond No. MA/GG 28/47. Only Mr. J.K. Mwangi, Senior Corporate Manager signed this letter. Once again the respondent notified the appellants of their intention to make good on the sums demanded.

Aggrieved, the appellants filed a suit seeking an injunction to restrain the respondent from paying Barclays Bank. After hearing the parties, the trial court declined to grant the injunction thus paving way for the respondent to pay the sum demanded. Consequently, by a letter of 6<sup>th</sup> June 1999, the respondent honoured the demand, and paid Barclays Bank a sum of Stg £ 79,464.49 being the portion of the materials advance bond.

So, could the letters of call up from Barclays Bank be construed to have effectively called up materials bond guarantee? In answer to this, **section 72** of the ***Interpretation and General Provisions Act*** provides some guidance. It specifies that;

***“Save as is otherwise expressly provided, wherever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.”***

The provision clearly provides that a departure from the specified format of a document will not render its

substance or effect void by reason of such departure. Furthermore, in so far as the 3 guarantees were concerned in the case of *Marks vs Whiteley [1912] 1 Ch 735* Lord Fletcher Moulton LJ explained that;

***“Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purpose such as relevant to the case as if they were one deed.”***

It is not disputed that the 3 guarantees related to one transaction which was the provision of advances for the performance of the sub contract between Marshall Fowler and EM. It is also true that the letter of 23<sup>rd</sup> December 1998 specified that the performance and mobilization bonds were to be called up. Thereafter, in the letter of 27<sup>th</sup> January 1999, Barclays Bank clarified that it was in fact the materials bond that it intended to call up and not the other two bonds. By construing the two letters together, within the context of the same transaction, it becomes clear that Barclays Bank’s intention was to call up the materials bond, and by virtue of **section 72** of the *Interpretation and General Provisions Act* a deviation from the format specified in the irrevocable letter of credit did not render the call up to be void and of no effect, with the result that the two letters essentially called up the materials bond, and the learned judge was right in so finding.

Similarly, in so far as the related complaint that two authorized attorneys did not sign the call up of the materials bond is concerned, we consider the same principles to be applicable, because when the letter of call up of 23<sup>rd</sup> December 1998 that was signed by two attorneys of Barclays Bank, is read together with the letter of clarification of 27<sup>th</sup> January 1999 that was signed by one attorney of the bank it can be concluded that it resulted in a call up, notwithstanding that all the specification for calling up the bond were not comprised in a single letter.

On the appellant’s argument that the attorneys who signed the letters were not duly authorized attorneys of Barclays Bank, it is worthy of note that no reason was provided for this assertion, or evidence produced in support of the allegation. This was despite the respondent having produced Barclays Bank’s schedule specifying the bank’s authorized registered attorneys. **Sections 106 and 107** of the *Evidence Act* clearly stipulate that the burden of proof rests on he or she who alleges. So that without any proof that they were not authorized attorneys, it must be concluded that the allegation was unfounded and that Mr. Kariuki and Mr. Mwangi who signed the letters of call up were duly authorised attorneys of Barclays Bank.

The last complaint concerning the performance bonds was that the respondent should not have paid the amount without reference to the terms of the subcontract or at the very least, it should have awaited for the dispute with Marshall Fowler to be determined through arbitration. Regarding this issue, the learned judge observed that;

***“At this point it can be added that the defendant had nothing to do with the dispute between Marshall- Fowler and the 3<sup>rd</sup> plaintiff or that such a dispute had to go for arbitration and it had not. The dispute or and arbitration was a subject of a subcontract executed between the 3<sup>rd</sup> plaintiff and Marshall – Fowler. The defendant was not privy to that contract at all.”***

We agree and would add that in the case of *Transafrika Assurance Co. Ltd vs. Cimbria (EA) Ltd [2002] 2 EA 627 (CAU)*, it was held:

***“A performance bond has many similarities to a letter of credit and it has long been established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of credit are satisfied. Any dispute between a buyer and seller must be settled between themselves and the bank must honour the credit...A bank or institution giving a performance bond is therefore bound to honour it in accordance with the terms of the bond if it appears the papers are in order regardless of any dispute between the buyer and the seller arising from the contract in respect of which the bond was given. It is only excused where there is fraud of which it has notice.”*** (emphasis ours)

And in the case of *Kenindia Assurance Company Limited vs First National Finance Bank Limited* [2008] eKLR, this Court cited Denning MR in the case of *State Trading Corp. of India Limited vs ED of Man (Sugar) Limited* (1981) Times 22<sup>nd</sup> July where it was stated that;

***“I may say that performance bonds fulfill most useful role in international trade. If the seller defaults in making delivery, the buyer can operate the bond. He does not have to go to far away countries for damages, or go through a long arbitration. He can get damages at once that which are due to him for breach of contract...”***

As set out in the irrevocable letter of guarantee above, a call up of the guarantee bonds was unqualified and categorical. They stipulated that the respondent was to pay upon receipt of a first written demand, “...without contestation...” and without the need “...to prove or to show grounds or reasons...” in order to demand the sums specified. This meant that the respondent was obliged to pay the amount demanded in the terms dictated, and it mattered not that a dispute existed between the parties, or that the subcontract provided for settlement of their disputes through arbitration, particularly since no fraud was alleged. We therefore find that the respondent cannot be faulted for honouring the terms of the irrevocable letter of guarantee in the manner that it did.

That said, we turn next to whether the respondent rightly debited EM’s account of the demand amount equivalent to Kshs. 9,684,274.80. There is evidence that when the appellants sought for and obtained an overdraft and loan facilities from the respondent, the purpose was to enable EM secure payment advances to undertake the electrical works under its subcontract with Marshall Fowler.

The securities provided for the irrevocable letters of guarantee included a further charge over the Loresho property and a charge over EE’s Industrial Area properties both dated 25<sup>th</sup> September 1995. Clause 1 of the charge and further charge provided in express terms that the borrower would pay to the bank on demand,

*“... moneys which the borrower becomes liable to pay to the Bank either under guarantee given by the borrower to the bank or for money or any other facility guaranteed by the Bank for and on behalf and at the request of the borrower or in any other manner whatsoever and whether any such moneys or liabilities shall be paid to or incurred on behalf of the borrower or any other persons or persons in partnership or any company society or corporation or otherwise at the request of the borrower or for any other account whatsoever or otherwise howsoever or for another usual bank charges law and other costs charges and expenses and together with interest at a rate decided by the Bank and calculated on daily balances and debited monthly by way of compound interest and the Bank need not inform the borrower of any change in the rate of interest so payable...”*

In effect the provision authorized the reimbursement to the respondent of such sums that were paid out on the appellants’ behalf. The respondent was therefore entitled to a refund of the sums paid in respect of the materials bond by debiting EM’s account with a corresponding amount of Kshs.9, 684, 274.80. Though the appellants have sought to argue that the amount debited from EM’s account exceeded the ceiling specified of Kshs. 6,000,000, a consideration of the Letter of offer makes it clear that the total facility ceiling was Kshs. 52,355,160, with the guarantee bond ceiling standing at Kshs 39,266,370. In the event of default of the all the 3 guarantee bonds, Kshs. 52,355,160 was at one point available for payment to Marshall Fowler. In this case, the respondent was only required to pay a portion of the materials guarantee bond of Kshs. 9,684,274.80, which was well within the available facility ceiling. And we so find.

On the complaint that interest and other commitment fees were not chargeable, we have reviewed the letter of offer, the charge and further charge and find that it was a specific term of the parties’ agreement that the respondent was entitled to charge interest and a commitment fee of 2%. Furthermore, the evidence does not disclose that the appellants at any time during the life of the financial accommodation or in the pleadings specifically challenged the interest rate charged, or demonstrated in any way that interest ought not to have been charged, or if it was chargeable that the sums paid were exorbitant or unlawful. We therefore find this ground to be unmerited.

So too is the complaint that the respondent mismanaged the appellants' account so as to warrant a discharge of the guarantees. Nothing was produced in support, and we accordingly dismiss it.

As pertains to the claim that they did not owe the respondent Kshs. 17,109,253.35, the respondent provided bank statements in respect of the appellants' various accounts and letters of demand detailing the manner in which the sum demanded was arrived at, which the appellants did not in any way controvert or traverse, save to merely deny owing such sum. For this failing they argue that they did not have an opportunity to lead evidence on the respondent's documents, as they were introduced after the appellants' witness had testified. We have been through the record and can find no evidence that lends support to this allegation. Instead, the proceedings show that the documents were admitted by consent of the parties. The record does not also disclose that the appellants objected to their admission, or that the appellants' witness did not have an opportunity to controvert this evidence. In effect, they are estopped from turning around to claim at this late stage that the documents were arbitrarily introduced, and we find that the evidence produced sufficiently demonstrated that the appellant's owed Kshs. 17,109,253.35. This ground therefore lacks merit.

Regarding the complaint that the respondent's Statutory notices for sale of the charged properties were defective and rendered their sale a nullity, besides the mention in the proceedings that the notices with respect to the Industrial Area properties were defective, we are not satisfied that sufficient evidence was led on the record so as to enable us reach a considered finding on this issue. In addition, in view of the appellants' and the respondent's submission that the impugned statutory notices on which the sale of the Loresho and Industrial Area properties were premised did not form a part of this appeal, we find that it is not a matter that is within our remit for determination. The same reasoning would apply to the Interested Party's contestations as to the validity of the sale, since it also goes beyond this Court's remit.

For the aforesaid reasons, we find that there is no basis for interfering with the decision of the High Court. The appeal is unmerited and is dismissed with costs to the respondent.

***It is so ordered***

***Dated and Delivered at Nairobi this 2<sup>nd</sup> day of October, 2020.***

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**