IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, M'INOTI & MURGOR, JJ,A)

CIVIL APPEAL NO. 34 OF 2011

BETWEEN

DAVID HARRIS.....APPELLANT

AND

MIDDLE EAST BANK KENYA LIMITED.....1ST RESPONDENT

KILIFI AIR CHARTERS LIMITED.....2ND RESPONDENT

EDGAR IVAN MANASSEH.....3RD RESPONDENT

TIMOTHY MTANA LEWA.....4TH RESPONDENT

(Appeal from a judgment and decree of the High Court Milimani at Nairobi Commercial (Kimaru, J.) delivered 29th October 2010

in **Civil Suit No. 1198 of 1999)**

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JUDGMENT OF THE COURT

The appellant, David Harris, the 2nd respondent, 2nd respondent Charters *(2nd respondent),* ***the 3rd*** and ***4th respondents, Edgar Ivan Manasseh and Timothy Mtana Lewa*** respectively contrived a business venture that involved the subdivision of a parcel of land allotted to 2nd respondent known as Land Reference No. 1705/44, *(the Land parcel)* into plots of varying sizes, which portions it intended to sell to interested purchasers.

To finance the venture, they approached the 1st respondent, the Middle East Bank Limited (*the Bank*), and by various agreements made between 1995 and 1996, the Bank advanced to 2nd respondent financial accommodation for an aggregate principal sum Kshs. 10,000,000. An initial sum of Kshs. 5,000,000 was advanced on 27th January 1995 which was secured against a Charge over the Land parcel and the personal guarantees of the appellant, the 3rd and 4th respondents who were all directors of 2nd respondent.

Later on 19th April 1996, an additional credit facility for a further sum of Kshs. 5,000,000 was provided that was secured against a Further Charge over the same property, together with the directors personal guarantees. Under the agreements, 2nd respondent agreed to repay the sums loaned on demand together with interest thereon.

2nd respondent and its directors pursued and obtained the subdivisions, and thereafter made all efforts to market and sell the portions to interested persons. But, unfortunately, sale of the portions was rendered virtually impossible as the Land parcel was invaded by squatters who occupied parts of the land which they refused to vacate despite efforts made to have them removed.

By 31st of July 1999, the Bank claimed that 2nd respondent was indebted to it for a sum of Kshs.27,373,081.78 together with the interest rate of 26% per annum compounded monthly. The Bank made various demands for payment but to no avail.

The appellant denied owing the sums claimed, and stated that he had resigned from the 2nd respondent as at 18th January 1999. He nevertheless stated that, any liability to him did not exceed a sum of Kshs. 5,000,000 all inclusive which should be pro-rated amongst the three directors. The appellant complained that the Bank having issued a Statutory Notice of sale against the 2nd respondent failed or

neglected to exercise its Statutory right of sale without delay and in so doing, permitted unreasonable and unjustified accrual of interest and penalties; that the Bank had not mitigated its loss, as it had in its possession the Deed Plans for the subdivided portions which it had declined to partially discharge thereby breaching the agreed terms between them, and disabling the completion of the project. The appellant further complained that the interest rate of 26% had not been agreed, and that in any event, it was unlawful, unjustified, unreasonable and punitive. With respect to the personal guarantees, the appellant asserted that his liability under the personal guarantee was compromised following provision of an additional banking facility to 2nd respondent without his knowledge or consent, and that this led to his liability under the initial personal guarantee being extinguished.

It was his further contention that the additional loan was fraudulently utilized by the 3rd and 4th respondents for private purposes and that he would be seeking an indemnity and contribution from 2nd respondent and the 3rd and 4th respondents.

In their defence 2nd respondent, the 3rd and 4th respondents denied entering into a facility agreement with the Bank, and went on to state that the Bank and the 2nd respondent had entered into a joint venture agreement whereby the Bank would expend a total of Kshs 10,000,000 towards the subdivision of the Land parcel into 34 plots and upon sale, the Bank was to make reasonable profit thereon, with 2nd respondent retaining the balance; that the Bank held within its possession the Deed plans in respect of the subdivided portions but it had declined to execute partial discharges of the portions in breach of the terms of the joint venture. They denied entering into any personal guarantees with the Bank.

Upon considering the pleadings, the oral and documentary evidence, the High Court (*Kimaru, J*) concluded that the Bank had established on a balance of probabilities that the appellant, 2nd respondent, 3rd and 4th respondents owed the sums as claimed. The court found that 2nd respondent borrowed an aggregate sum of Kshs. 10,000,000, and entered judgment against 2nd respondent, the appellant and the 3rd and 4th respondents both jointly and severally in the sum of Kshs. 27,373,081 as at 1st August 1999. The 3rd and 4th defendants liability executed under the personal guarantees was determined to be for the sum of Kshs. 10,000,000, while the appellant's guarantee was limited to Kshs. 5,000,000 which was for the initial sum advanced by the Bank. The court reduced the applicable interest from 26% to 18% per annum at simple interest to be applied on the amount outstanding.

Aggrieved by the said decision the appellant has appealed to this Court on the grounds that the learned judge was wrong in finding that the appellant was liable; in failing to hold that the appellant's liability was compromised when the Bank, 2nd respondent, and the 3rd and 4th respondents entered into a further banking facilities without his knowledge or consent; in neglecting to exercise its statutory power of sale over the Land parcel; in misdirecting himself that the appellant was a party to the second loan facility, and by failing to find that the second personal guarantee was null and void; in relying on a personal guarantee of 16th May 1995 that was not produced; by disregarding the appellants' evidence and written submissions; by concluding that the sum of Kshs. 27,373,081 was proved yet there was no evidence to support the claim; by failing to reduce the appellant's liability of Kshs. 5,000,000 proportionally by the sum of Kshs 2,500,000 paid by 2nd respondent on 19th March 2001; by wrongly awarding interest of 18% per annum from 1st August 1999 which was unlawful, illegal, punitive and oppressive, and for the delay in rendering the judgment which was not delivered until 14th October 2010, after a delay of over eleven months.

The 1st respondent also filed a notice of cross appeal on 1st October 2015 where it was contended that: The learned judge was wrong in limiting the appellant's liability to the first guarantee for Kshs. 5 million; in finding that the appellant had executed only one guarantee for the first facility of Kshs. 5 million; in failing to appreciate the uncontested evidence that the appellant had indeed executed two guarantees and in the alternative; in failing to specifically deny giving the second guarantee in his defence; and finally that the learned Judge had no jurisdiction to change the agreed contractual rate of interest.

Both the appellant and the Bank filed written submissions and through their learned counsels, Mr. Billing for the appellant and Mr. Ismael for the Bank, we were informed that the parties would adopt their written submissions in their entirety. Mr. Ochieng informed us that he would not be submitting as the 3rd and 4th respondents view was that they did not have any stake in the decision one way or the other.

The appellant argued that, the principal debtor was 2nd respondent against whom the Bank retained an adequate legal charge over the Land parcel so as to enable it to realize and recover the sums owed, but the Bank had done little or nothing to recover the debt, and had instead allowed the debt to escalate.

It was further submitted that the appellant had not signed a personal guarantee for the additional loan advanced to 2nd respondent and therefore was not liable for the additional debt. With regard to the sum demanded, the appellant's submission was that the Bank had not proved how the debt and the guarantee agreements was arrived at; that, there was nothing to show that the initial facility of 16th May 1995 for Kshs. 500,000 was disbursed as none of the bank accounts showed any disbursements by 2nd respondent of the borrowed sums; that furthermore, as at 25th August 1999 the overdraft and loan accounts showed an outstanding debt of Kshs. 29,310,725, and when the suit was filed on 31st August 1999 the sum demanded was Kshs. 27,373,081.77; that none of the statements showed that as at 1st July 1999 an amount of Kshs. 27,373,081.78 was due and owing, and no demand for this amount was at anytime made. In the alternative, it was submitted that the Bank's pleadings and the evidence were at variance and this warranted that the suit be dismissed. In support of this proposition, the appellant cited the cases of ***Captain Harry Gandy vs Casper Air Charters Limited (1955) EACA 139; Kenyenga vs Ombwori Civil Appeal No. 96 of 1998 KLR 103.***

The appellant went on to submit that the liability under the personal guarantee of 16th February 1995 had been compromised by the Bank's actions of enhancing the banking facilities without the appellant's knowledge or consent; that this action extinguished 2nd respondent's liability. The cases of ***Harilal & Company Advocates vs The Standard Bank Limited Civil Appeal No 41 of 1966*** *and* ***Kenya National Capital Corporation vs Thamo Holdings Limited*** & ***Another HCCC 1501 of 1985*** were cited in support of this proposition

Turning to the issue of interest, it was submitted that there was no evidence to show that interest of 26% per annum compounded monthly from 1st August 1999 was agreed by the appellant, and that the personal guarantee did not specify the rate of interest to be applied or that

interest should be compounded monthly; that the interest rate applied was punitive unconscionable, and unlawful. The appellant cited ***Daima Bank Limited vs Osmond Civil Appeal No 82 of 1998; Peter Muriithi Ngatia vs Kenya Commercial Bank Limited HCCC No 675 of 1999;*** *and* ***Kenya Commercial Bank Limited vs Peter Muriithi Ngatia Civil Appeal No 310 of 2000*** to support the contention that the interest rate applied was punitive and unlawful.

On its part, the Bank submitted that the amount claimed was proved as there was evidence to show that the sum of Kshs. 10,000,000 was disbursed to 2nd respondent in two tranches in 1995 and 1996; that the terms of the facilities were clearly spelt out in the letters of offer, the Charge and the Further Charge, and there was evidence to show the exact amount due to the Bank. It was argued that any discrepancy in the amount due between the initial amount demanded of Kshs. 29,310725 and the lesser amount prayed in the claim, did not negate the Bank's claim against the appellant, 2nd respondent and the 3rd and 4th respondents.

Submitting in respect of the two personal guarantees, the Bank asserted that the appellant admitted providing the first guarantee dated 16th February 1995, and that he had not at anytime denied providing a second personal guarantee, but conceded that his liability was limited to a prorated portion of the amount specified in the second guarantee, so that in the absence of any specific denial, he was deemed to have accepted both guarantees.

And as to whether the appellant was a party to the additional facility, it was submitted that the Charge and the personal guarantees were separate and distinct, and independent one from the other, and therefore the contention that the personal guarantees was nullified by the variation of the loan did not hold any water. Further, that the terms of the guarantees were clear that the guarantor's liability was one of a principal debtor and the Bank was entitled to hold each of the guarantors responsible for the loan. To support this proposition, the Bank cited the cases of ***Kenindia Assurance vs Commercial Bank of Africa*** where this Court considered the case of ***China and South Sea Bank vs Tan (1989) 3 All ER 838*** where it was held that the guarantors remained liable even if there had been variations in relations between the principal debtor and the Bank.

As regards the allegation that the Bank had refused to dispose of the land parcel to settle the outstanding debt, the Bank responded that the mortgage property had no commercial value since squatters had invaded it. It could therefore not lie in the appellants mouth to demand that the Bank dispose of the land parcel before calling on his personal guarantee, particularly as he was at all times aware that the personal guarantees were the principal security, and not the charged land.

On the issue of interest, it was submitted that when it signed the letters of offer of 27th January 1995 and 19th April 1996, 2nd respondent accepted to pay interest at the rate of 26% and 30% per annum respectively and that the personal guarantee was clear that the guarantors were liable to pay the amount claimed together with the interest accrued there on.

We have considered the pleadings of the parties herein, the evidence and the submissions. Having done so, we find that the issues for determination turn on the Charge and further Charge over the land parcel and the personal guarantees issued by the appellant in favour of the Bank to secure the sums advanced to 2nd respondent. In addressing the issues in both the appeal and the cross appeal, we consider that the following issues therefore fall for consideration;

i) whether the Bank proved the outstanding debt;

ii) whether the Bank took into account the sums of Kshs. 2,500,000 paid towards liquidating the loan;

iii) whether the Bank disposed of the charged property prior to calling upon the appellants' personal guarantee;

iv) whether the appellant was liable to pay interest at the rate of 26%.

v) whether the appellant entered into the two personal guarantee agreements with the Bank; and

vi) whether the appellant had knowledge of and consented to the second loan facility, and whether he was discharged from the personal guarantee.

This is a first appeal and as stated in ***Susan Munyi vs Keshar Shiani, Civil Appeal No. 38 of 2002;***

> ***"As a first appellate court, our duty of course, is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions. In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them."***

As stated earlier, this is a fairly straightforward case where 2nd respondent sought and obtained credit facilities and other banking accommodation amounting to Kshs. 5,000,000 from the Bank. The borrowed sums were secured by a Charge, over Land parcel, and personal guarantees for the same amount were issued by each of the directors, that is the appellant and the 3rd and 4th respondents. Subsequently, 2nd respondent sought for and obtained further financial accommodation of Kshs. 5,000,000, where a Further Charge over the Land parcel together with additional personal guarantees of the 3rd and 4th respondents were provided. The appellant disputed providing an additional or second guarantee.

Following non payment of the loan facilities, the Bank demanded the repayment of an amount of Kshs. 27,373,081.78 from the appellant, and the 3rd and 4th respondents.

We will begin by determining whether the Bank proved the existence of the outstanding debt. In this regard the learned judge stated;

> ***"…it was clear that the defendants had only repaid Kshs. 2,500,000 out of the sum of Kshs. 10,000,000/= that was advanced to the 1st defendant. Taking into account the interest element, this court holds that the plaintiff proved to the required standard of proof on a balance of probabilities that it is owed a sum of kshs 27,373,081/= as at 1st August, 1999. The evidence offered by the defendants in their defence did not challenge the thrust of the plaintiff's case which is essentially that money was advanced to the 1st defendant and it has not been repaid the same together with the accrued interest. In the premises therefore, this court holds that the plaintiff has established its case that it is entitled to be paid the amount pleaded in the plaint by the 1st defendant. The 2nd, 3rd and 4th defendants are held liable on account of the guarantees that they executed. Judgment is therefore entered, as against the defendants, both jointly and severally for the sum of Kshs 27,373,081/= as at 1st August 1999."***

It is not disputed that 2nd respondent applied for banking facilities, where the sums were disbursed in two tranches in 1995 and 1996.

Borkatte Srinivas Pai, (PW1) the Executive Director of the Bank testified that;

> *"By the time we filed suit on 31/8/1999, the amount that was outstanding – the overdraft was Kshs. 19,311,664/=. The loan account was Principal Kshs 5,000,000/= plus interest."*

This would bring the total outstanding balance on the two accounts to Kshs. 24,311,664.

The appellant argues, that in view of the discrepancy between the amount demanded and the amount claimed in the plaint, it was clear that the 1st respondent was unable to prove the amount owed.

The Bank documents disclose that 2nd respondent maintained two separate facilities, a loan account operated as account no. 8297060057 and an overdraft operated as account no. 200225-007. 2nd respondent's bank statements showed that as at 31st August 1999 the overdraft account had an outstanding balance of Kshs. 19,311,664/=, while the loan account as at August 1999 showed an outstanding balance of Kshs. 8,088,080. The statements show that various sums were disbursed from the bank accounts by 2nd respondent, and that the debt was subjected to varying interest rates.

Since there is evidence to show that 2nd respondent was the beneficiary of financial facilities from the Bank, which sums continue to remain due and owing, and it has not been demonstrated that the outstanding amounts were repaid, the only conclusion that can be reached is that on a balance of probability, the Bank has discharged the burden of proving that 2nd respondent owes the amount claimed. In any case, it is not the position of the appellant that the principal debtor has discharged the liability and that the bank was wrong in its redemption process. And that since the principal debtor had settled or repaid the loan, then there is no need for the recall or demand of the guarantee from the guarantors.

The next issue was whether the Bank took into account Kshs. 2,500,000 that was paid into the account. The learned judge did not address this issue, but this not withstanding, Mr. Pai stated, *"…A sum of 2.5 million was paid to our Advocate Esmail & Esmail by Rachier Advocate he received the money on 19/3/2001. The sum of 1.5 million was not paid to us."*

Consequently, if Kshs. 2,500,000 was not paid to the Bank until 19th March 2001, it could not have been computed within the debt as claimed, as by the time of filing the suit, the amount had yet to be paid into the Bank. It therefore follows that it is an amount yet to be computed into the outstanding balance, and we so find.

We next turn to the issue of whether the Bank ought to have realised the charged security before calling on the directors' guarantees. The appellant's contention is that the Bank did not seek to exercise its rights of redemption of the charged property before seeking to demand repayment of the loan by the directors.

In answer to this, the learned judge observed as follows;

> ***"The 1st defendant was unable to subdivide the suite property on account of the fact that the suit property had been invaded by squatters. The squatters refused to vacate from the suit property despite efforts that were made by the directors of the 1st defendant to secure their removal with assistance of the provincial administration. The 1st defendant was therefore not able to sell the subdivided portions of the suit property due to the fact that no buyer was willing to take the risk of purchasing a parcel of land that was being occupied by a considerable number of squatters."***

Indeed, the evidence is clear that inspite of all their efforts, the 2nd respondent and its directors were unable to dispose of the subdivided portions due to the presence of squatters on the Land parcel.

We are therefore satisfied that having regard to the peculiar circumstances of this case, that the Bank was left with no option but to resort to calling upon the personal guarantees of the directors in lieu of its rights of redemption over the charged property.

It also transpires that squatters had invaded and occupied parts of the Land parcel thereby diminishing the ability to sell the Land parcel.

Given these circumstances, the Bank was not compelled to sell the land prior to calling on the guarantees. It could call upon them ahead of any of the other remedies available to it.

On the interest rate, besides asserting that the rate charged by the Bank was not agreed, both the appellant and the Bank also complained that the interest rate applied by the lower court was unlawful, illegal, punitive and oppressive. The learned judge found that the interest rate of 26% charged by the Bank was indeed oppressive, and reduced it to 18% per annum, at simple rates.

The letter of offer dated 27th January 1995 specifically indicated interest at the rate of 26% per annum, while the letter of offer of 19th April 1996 specified interest at 30% per annum. Various other interest rates were charged over the period of the credit facilities, and 2nd respondent was duly notified. Therefore, the contention that the interest rate was not agreed is not a worthwhile argument.

As regards the interest rate applied by the court below, the Bank argued that the High Court had no jurisdiction to change the rate that was agreed by the parties.

Halsbury's Laws of England Volume 22 (2012) 5th Edition at Paragraph 298 states that;

> ***"Even in the absence of duress of persons or undue influence, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of the law: for instance, in respect of salvage agreements; or against contractual penalties, forfeiture of mortgages, extortionate loans or expectant heirs. ... The jurisdiction of the courts to set aside is based on unconscientious conduct by the stronger party; relief will not be granted solely on the grounds that the transaction is unfair or improvident."***

Clearly, the court had jurisdiction to interfere with the rate of interest charged. The learned Judge found that the rate of 26% at the time was unconscionable and we see no reason to interfere with that decision.

Finally we turn to consider the additional banking facility and the dispute surrounding the appellant's personal guarantees. The appellant's argument is that he neither participated in obtaining the additional banking facility advanced to 2nd respondent nor provided a second personal guarantee in respect of that facility. He further claimed that it was granted without his knowledge and consent which amounted to a variation of the terms of the original banking facility for which he had initially guaranteed, with the result that the variation effectively discharged him from guarantying the sums owed. The Bank response to this is that the appellant did not deny providing a second guarantee and infact conceded that a second guarantee existed.

After considering the evidence surrounding the additional facility the learned judge observed;

> *"It is instructive that the second application for additional loan facility was made at the instance of the 3rd and 4th defendants. Unlike the application for the first loan, the 2nd defendant did not sign the application. Neither was he present when the 3rd and 4th defendant (sic) meet as directors of the 1st defendant to pass the resolution requesting for additional funds from the plaintiff".*

And as to whether the appellant signed a personal guarantee for the additional facility, the learned judge had this to say;

> *"The 3rd and 4th defendants executed personal guarantees for the entire sum of kshs.10,000,000. The 2nd defendant executed the guarantee only for the first amount of Kshs. 5,000,000/= which was initially advanced to the 1st defendant by the plaintiff."*

So was the appellant involved in securing the additional facility, and did he provide a second guarantee? There is uncontroverted evidence to show that, sometime in April 1996, 2nd respondent applied for an additional loan facility from the Bank. On the basis of the Board minutes, and resolutions, the Bank agreed to advance a further sum of Kshs. 5,000,000 together with interest. It is apparent from this documentation that the appellant did not sign the loan application for the additional facility or the board minutes or resolution or the letter of offer or the Further Charge. Only the 3rd and 4th respondents signed all these documents.

Elaborating on the existence of a signed second guarantee, ***Mr. Pai (PW1)*** testified that the appellant provided a second guarantee, and as proof, he produced a photostat copy of a personal guarantee dated 15th May 1996 alleged to have been provided by the appellant. He stated that the original was misplaced and could not be traced.

Mr. Manasseh testimony was that;

> *"When the 2nd amount was disbursed, we executed a further discharge. I do not remember if the directors signed a further guarantee of the cumulated sum of Kshs.10,000,000. The 2nd defendant participated in the borrowing of the 2nd loan. I do not have any document to support my claim."*

The witness then contradicted himself on cross-examination when he stated that all the directors gave personal guarantees.

For his part, the appellant was emphatic that he had not provided any such agreement. It is the evidence of the appellant that he was out of the country, and did not have any knowledge of the additional banking facility. He only came to learn of it, long after it had been granted and disbursed, when the matter was "*a fait accompli,"*.

Clearly, the evidence is inconclusively as to whether the appellant provided the Bank with a second guarantee. The only evidence pointing to

it's possible existence was a photostat copy produced by the Bank. But without an original, and in view of the controversy, was a copy admissible as proof as to the existence of a second personal guarantee?

Section 67 of the ***Evidence Act*** specifies that documents must be proved by primary evidence except in the instances mentioned under ***section 68*** where secondary evidence may be given of the existence, condition or content of a document. Of the instances set out, ***section 68 (c)*** is relevant to this case. It provides for *"…when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time."*

Section 66 makes provision for production of copies, and specifies that copies are secondary evidence, and include certified copies, copies of the original, counterparts of documents and oral accounts of documents. But to qualify, they must meet the criteria set out by ***section 68 (a),*** which is, when;

> ***"(a) the original is shown or appears to be in the possession or power of—***
>
> ***(i) the person against whom the document is sought to be proved; or***
>
> ***(ii) a person out of reach of, or not subject to, the process of the court; or***
>
> ***(iii) any person legally bound to produce it".*** (emphasis ours)

Ordinarily, the Bank would have been the person legally bound to produce an original second guarantee, but we are not certain that it has been shown to be the case here. This is because, the second guarantee was a central feature in the dispute, and with the appellant having disputed its existence, it was incumbent upon the Bank to demonstrate that the original was one of the documents in its possession, save that it could not be traced.

In the case of ***Masquarade Music Limited and others vs Springsteen [2001] EWCA Civ 563,*** where an agreement assigning a copyright could not be found, Parker, LJ took the view that;

> ***"In my judgment, the time has now come when it can be said with confidence that the best evidence rule, long on its deathbed, has finally expired. In every case where a party seeks to adduce secondary evidence of the contents of a document, it is a matter for the court to decide, in the light of all the circumstances of the case, what (if any) weight to attach to that evidence. Where the party seeking to adduce the secondary evidence could readily produce the document, it may be expected that (absent some special circumstances) the court will decline to admit the secondary evidence on the ground that it is worthless. At the other extreme, where the party seeking to adduce the secondary evidence genuinely cannot produce the document, it may be expected that (absent some special circumstances) the court will admit the secondary evidence and attach such weight to it as it considers appropriate in all the circumstances. In cases falling between the two extremes, it is for the court to make a judgment as to whether in all the circumstances any weight should be attached to the secondary evidence. Thus, the "admissibility" of secondary evidence of the contents of documents is, in my judgment, entirely dependent upon whether or not any weight is to be attached to that evidence. And whether or not any weight is to be attached to such secondary evidence is a matter for the court to decide, taking into account all the circumstances of the particular case."*** (Emphasis ours)

What this means in a nutshell is that, it is for the court to determine having regard to all the circumstances of each particular case, whether or not the secondary evidence is admissible and whether or not to ascribe any weight to that evidence. In this case, the existence or not of a second personal guarantee was fundamental in determining whether the appellant had guaranteed the additional borrowing. The original document was therefore essential to prove the existence of a guarantee. In place of the original, the Bank produced a copy of a personal guarantee alleged to have been provided by the appellant to secure the additional facility. However, the documentary evidence pertaining to the additional loan facility did not bear the appellant's signature, and Mr. Manasseh's evidence was inconclusive as to whether a personal guarantee was actually provided. This begs the question whether the appellant would have provided a personal guarantee and not the additional loan documentation, as he had done for the initial loan.

Our view is that, the surrounding documentation was necessary to unequivocally support the existence of the original. But when the surrounding evidence is considered in its totality, we are not persuaded that the Bank discharged the burden of proving on a balance of probabilities that the appellant provided a second personal guarantee, and therefore the Bank had nothing to show that it was in its possession prior to its disappearing and, and we so find. The learned judge was right in concluding that the appellant only signed the initial guarantee for Kshs. 5,000,000, and no other.

Having so found, this leads us into the next question of whether the additional facility resulted in a variation of the original banking facility, discharged the appellant from his personal guarantee?

In ***HALSBURY'S Laws of England, Fourth Edition, Volume 20 (1) para 324 page 210*** it is explained that;

> ***"The basis of the principle that a guarantor is discharged by an agreement between the creditor and the principal debtor which has the effect of varying the guarantee, is that it is the clearest and most evident equity not to carry on any transaction without the privity of the guarantor, who must necessarily have a concern in every transaction with the principal debtor, and who cannot as a guarantor be made liable for default in the performance of a contract which is not the one the fulfillment of which he has guaranteed."***

And in the case of ***Holme vs Brunskill (1878) 3 QBD 495*** which established the principle as to discharge of a surety by an agreement made by a creditor to give a principal debtor time to pay Cotton LJ elucidated the rule thus;

> ***"The cases as to discharge of a surety by an agreement made by the creditor, to give time to the principal debtor, are only an exemplification of the rule stated by Lord Loughborough in the case of*** *Rees vs Berringtom* ***(I): "It is the clearest and most evident equity not to carry on any transaction without the knowledge of him [the surety], who must necessarily, have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him". The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is insubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, and will hold that in such as case the surety himself must be the sole judge whether or not he will consent to remaining liable notwithstanding the alteration, and that if he has not so consented, he will be discharged."***

What this means in effect is that the guarantor may be discharged from a guarantee where there has been a variation of the original facility to which he has not been privy, and has not consented, thereby extending time to pay will result in the guarantor being discharged from the original guarantee agreement.

While in the case of ***Marubeni Hong Kong and South China Ltd vs Government of Mongolia [2004] All ER (D) 257*** the court found that applying settled law principles on the effect on the surety of any agreement between the creditor and the debtor with reference to the contract guaranteed, the alterations in, inter alia, the 1998 and 1999 reschedulings were not insubstantial and were prejudicial to the defendant.

And after observing that the principal debtor had extended time for repayment of the loan which radically varied the agreement and directly affected the rights of the respondent in the case of ***Cooperative Bank of Kenya vs Washington Otieno Ogindo [2012] eKLR*** this Court stated;

> ***"…the respondent ought to have been made aware of the extension; as we have seen from the quotation from HALSBURY'S LAWS of England, when such a radical variation of the terms of the contract are being contemplated the guarantor ought to consent to them whether he is or is not prejudiced by them."***

The letter of offer for the initial facility of 27th January 1995 specified that 2nd respondent would borrow a maximum of Kshs. 5,000,000 together with interest and charges thereon. The borrowed amount was secured by the creation of a First Legal Charge over the Land parcel. The tenure of the facility was to be one year from the time of creation of the First Legal Charge.

When the initial terms are considered along side the terms of the additional facility, it is apparent that the further financial accommodation increased the sums advanced to Kshs. 10,000,000 together with interest and charges, and a Supplementary First Legal Charge was created over the Land parcel. At Paragraph 4 of the Further Charge, it was stated that;

> *"The Bank has at the request of the Mortgagor agreed not to call for the immediate payment of the existing debt to continue to grant and to grant further banking facilities of a sum of Shillings Five Million (Kshs. 5,000,000) over and above the balance of the mortgage debt (making with the balance of the existing mortgage debt an aggregate maximum of Kenya Shillings Ten Million (K.Shs. 10,000,000) upon having the same secure in the manner hereinafter appearing."*

In effect, not only did the additional banking facility increase the 2nd respondent's debt, it also extended the time for which the credit facilities were to be repaid. All this was carried out without the appellant's consent, and materially charged the entire banking arrangement between appellant on the one hand, and the Bank, the principle debtor, and the guarantors, on the other hand.

The way in which the principal debtor, the Bank and the 3rd and 4th respondents jointly and severally dealt with the original and subsequent facilities, resulted in their creating a liability without the knowledge and consent of the appellant. It means that the appellant cannot take responsibility for the liability created behind his back. For clarity, we think that since the appellant was not privy to the transactions, which enhanced the debt and guarantee, he should not be made to suffer for the acts and omissions of the Bank, the principal debtor and the 3rd and 4th respondents.

Consequently, it is our humble view that the totality of the conduct of the bank, principle debtor, 3rd and 4th respondents discharges the appellant from the initial guarantee and the further liability charged and created by the said parties.

Consequently, the appeal against the appellant is allowed with costs.

It is so ordered.

Dated and Delivered at Nairobi this 8th day of March, 2019.

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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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

DEPUTY REGISTRAR