IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & ODEK, JJ.A)

CIVIL APPEAL NO. 259 OF 2011

BETWEEN

GIDEON LETOYA OLE HAPU .....1ST APPELLANT

MAGDALENE HAPU .....2ND APPELLANT

AND

ESTATE FINANCE COMPANY OF KENYA LIMITED.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Koome, J) dated 28th January, 2011

in

H. C. C. C. No. 710 of 1999)

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JUDGMENT OF WAKI, JA

I have had the advantage of reading in draft the judgments of my brothers Makhandia and Prof. Odek, JJA. The appeal really turns on one issue raised and urged as ground 5 in the memorandum of appeal: whether the respondent was a legal entity which had the capacity to sue.

Divergent views have emerged on the issue, but I am persuaded by the view taken, and the reasoning made, by my Brother Prof. Odek, JA. The finding by the trial court that the appellants executed contracts of guarantee and indemnity with the respondent is not assailable. The indemnity and guarantee was up to a limit of Ksh.5 million. At the time, the respondent was in existence. When it subsequently rode into financial and management whirlwinds, it did not simply disappear. For such institutions, Parliament has provided a useful safety valve, not just for the investors, but more importantly to safeguard customers who had entrusted their funds with the collapsed institution. That is the **Consolidated Bank Act, No. 5 of 1991**. The preamble to the Act is instructive. It states:

> ***"WHEREAS the Consolidated Bank of Kenya Limited (hereinafter referred to as Consolidated Bank) is a company incorporated in Kenya for the purposes of carrying on banking, executorship and trust business;***
>
> ***AND WHEREAS the Consolidated Bank has acquired, or intends to acquire, the whole of the share capital of certain banks and financial institutions (hereinafter referred to as subsidiaries);***
>
> ***AND WHEREAS the Government and Consolidated Bank have agreed that the undertakings and businesses of subsidiaries should be transferred to and vested in the Consolidated Bank or other subsidiaries, as provided in this Act, and that the other provisions contained in this Act should take effect;***
>
> ***AND WHEREAS it is expedient that the transfers should be effected economically and without interference with the conduct and continuity of the businesses of the subsidiaries."*** [Emphasis added].

The idea, it seems, was to preserve, as far as possible, the continuity of the businesses of the subsidiaries. In addition, as correctly noted by Odek, JA, ***section 10*** of the Act preserved legal proceedings. There was evidence that the respondent was one such institution, and it had the capacity to continue with the suit against the appellants.

In those circumstances, I do not see how the appellants can wish away the contract of guarantee and indemnity and get away with the obligation of paying the Ksh.5 million on a technicality.

I agree with my two brothers that all the other issues raised in the appeal are not meritorious. In the result, the appeal fails and is hereby dismissed with costs.

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

P. N. WAKI

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JUDGE OF APPEAL

JUDGMENT OF MAKHANDIA, JA

Estate Finance Company of Kenya Ltd "*the respondent*" commenced suit before the High Court against **Narok Transit Hotel Ltd** as the 1st defendant with **Gideon Letoya Hapu** "*the 1st appellant*" and **Magdalene Hapu** "*the 2nd appellant*" being the 2nd and 3rd defendants respectively. The respondent claimed in the suit that by continuing guarantees dated 9th January 1990, the appellants guaranteed to repay or indemnify monies advanced to the 1st defendant from time to time either solely or jointly including interest, discount, bank and legal charges upon demand by the respondent. The guarantee contract contained the proviso that the monies recoverable from the appellants would not exceed Kshs. 5,000,000/- together with interest thereon at the rate applicable to the facilities accorded under the said guarantees from the date of demand till payment in full.

The respondent's claim was that it had loaned or advanced monies to the 1st defendant and in some instances paid certain monies on its behalf such that as at 31st June 1997, the 1st defendant was indebted to it in the sum of Kshs. 13,403,791/80. On 11th July 1997, it demanded from the 1st defendant, as the principal debtor, the aforesaid amount. By letters dated 22nd July 1997, the respondent further demanded from the appellants, as the guarantors of the principal, the guaranteed amount of Kshs. 5,000,000/- together with interest from the date of demand. The appellants failed to honour the demand within the 14 days given by the respondents leading to the suit, the subject of this appeal. The respondent in the suit claimed the sum of Kshs. 5,000,000/- together with interest thereon at the rate of 30% per annum from the 22nd July 1997 until payment in full against the appellants.

In their joint defence, the appellants denied ever binding themselves to act as guarantors for the loans advanced to the 1st defendant where they served as directors. Specifically, they denied ever executing any contracts of guarantee. They further denied that the respondent existed as a legal entity when it filed the suit. According to them, any indebtedness to the respondent by the 1st defendant had been cleared by the principal as at August 1996. The appellants imputed fraud on the respondent's part and accused it of taking advantage of a fiduciary relationship to dupe them into signing the guarantee and further for operating the 1st defendant's loan account improperly and dishonestly.

During the trial, the 1st appellant testified that he executed the contract of guarantee without having understood its implication or effect. He however admitted that he was a director of the 1st defendant and that he initially approached the respondent for a loan of Kshs. 2,900,000/- for the construction of a hotel. Out of that amount, the 1st appellant admitted to having received a sum of Kshs. 2,755,000/- leaving a balance of Kshs. 445,000/-. He testified that he also wrote letters authorising payments to the contractor putting up the hotel and claimed that he was never involved in the way the monies were disbursed. He also testified that he had overpaid the borrowed sum by Kshs. 5,900,000/- though he never raised a counterclaim.

The 2nd appellant on her part admitted to having executed the contract of guarantee but also denied understanding its implications. She claimed to be illiterate and that the contracts were never interpreted or explained to her. This is despite being represented by counsel in the transaction.

Upon those facts in summary, the High Court dismissed with costs the appellants' claim. The Judge found that the 1st defendant existed in law contrary to the appellants' allegations. The Judge also found that the appellants had executed the guarantees with the understanding that they stood to be personally liable in the event of default in repayment by the 1st defendant as the principal borrower. The Judge was also persuaded that the money advanced had been utilized for a commercial venture *to wit* the construction of the hotel and so the advances were utilized for the benefit of the appellants.

The appellants were aggrieved by the High Court's findings and lodged the present appeal. They faulted the learned Judge (**Martha Koome, J (**as she then was) for finding liability on their part based on a contract of guarantee tainted with fraud and misrepresentation; liability based on contracts of guarantee which were accessory contracts, whereas the primary contract was itself found to be invalid, that the amount lent or owing was not determined; not making a finding that the respondent did not exist as a legal entity at the time of the institution of the suit and finally, in failing to find that the operation of the 1st defendant's accounts were fraudulent.

In their submissions in support of the appeal, the appellants reiterated the claims that they were duped into signing guarantees under the guise that they were signing a share transfer. According to the appellants, the advocate who attested the guarantees on their behalf, a **Mr. Raphael Ng'ethe** was a lawyer for the respondent and was also a director of the 1st defendant, but did not execute the contracts of guarantee to himself. In their view, the High Court failed to consider the fiduciary nature of an advocate-client relationship since the respondent's advocates on record had also acted for the appellants in transactions related to this matter.

The appellant submitted at considerable length on the point that as an accessory contract, such a contract of guarantee cannot be enforceable where the principal contract between the lender and the borrower has been extinguished. This contention was based on the trial court's dismissal of the claim by the respondent against the 1st defendant but allowing the guarantee contract against the appellants. The case of **Sri Lanka Insurance Corporation v People's Bank (2017) SC (CHC) Appeal No. 18/09** was cited for the proposition that if the principal's obligation turns out not to exist, or is void, diminished or discharged so is the guarantor's obligations in respect of it. According to the appellants, as the purpose of a guarantee is to secure the repayment of a debt, the existence of a recoverable debt is necessary and where there is no principal debt, there can be no valid guarantee. The cases of **Swan v Bank of Scotland (1836) 10 Bligh NS. 627** and **Fidelity Commercial Bank Ltd v The Kenya Grange Vehicle Industries Ltd(2017) eKLR** were also cited in support of the proposition. The appellants contended that since the claim against the 1st defendant was dismissed, the respondent had failed to demonstrate the loan or advances against which guarantees were given. The appellants contended that the Judge having found that there was no debt recoverable from the 1st defendant then the same ought to apply even where the rules of indemnity come into play and the indemnity suffers the same fate. With those sentiments, the appellants were of the view that the trial judge erred in failing to apply the principles governing guarantee as an accessory contract.

The appellants also maintained that the respondent was a non-legal entity at the time of execution of the guarantee and was therefore incompetent to have sued in its own name. According to them, the respondent's affairs were taken over by Consolidated Bank Mortgage Limited and it was not demonstrated how it came to succeed the respondent. They refuted evidence adduced by the respondent during trial showing that the respondent was a company owned by Consolidated Bank Mortgage Limited. According to the appellants, proceedings brought by a non-existent entity were a nullity and no form of amendment can cure such a nullity since a right cannot be enforced by a non-existent nullity. The appellants also accused the respondent of operating the loan account fraudulently since withdrawals of monies were made without the knowledge of the account holders even as late as a few months before the filing of the suit.

In opposing the appeal, the respondent contended that the appellants approached it with a request for a loan advance to establish a hotel business in the name of Narok Transit Hotel Limited, the 1st defendant. According to it, the business had not been registered or incorporated and the request therefore involved incorporation and financing. The respondent alleged that it disbursed a loan of Kshs. 2,900,000/- and a further sum of Kshs. 300,000/- which was paid to the contractor putting up the hotel. The respondent admitted that the advances were to be secured by a debenture over the assets of the 1st defendant and a charge over some parcels of land. However, the charge to secure the loan was not registered since the title documents were never availed to it by the appellants. It pointed out that the suit against the 1st appellant abated on 2nd October 2018 pursuant to **rule 99 (2) of the Court of Appeal Rules 2010** on grounds that the 1st appellant passed away on 23rd November 2015.

In replying to the allegations that the contract of guarantee was tainted with fraud, the respondent relied on the authority of **Vijay Morjaria v Nansingh Madhusingh Darbar & Another (2000) eKLR** for the proposition that allegations of fraud must be specifically pleaded and the particulars of the fraud alleged, stated on the face of pleadings. Since the appellants failed to comply with the requirement, the 1st defendant submitted that its claim ought to fail. It denied that the appellants were duped into signing the contract of guarantees as alleged.

It contended that Mr. Raphael Ng'ethe was a shareholder in trust, and not a director of the respondent obliged to guarantee the loan as submitted by the appellant.

It was also the respondent's submission that no evidence was adduced to prove that the appellants executed the contract of guarantee disguised as share transfer forms. It submitted that the allegations were not pleaded but were only brought out during the trial. According to the respondent, the allegations of fraud regarding the fiduciary nature of the advocate-client relationship could only invalidate the contracts signed by the appellants if the allegations had been specifically pleaded and proved. It opined that the appellants voluntarily guaranteed the loan for their own benefit. In light of the fact that the appeal abated with regard to the 1st appellant, the respondent contended that there was no evidence to invalidate the 2nd appellant's contract of guarantee. As such, the respondent argued that the 2nd appellant remained bound since it was not obliged to inquire into the authenticity of the attestation upon receiving the contracts. It relied on the authority of **Mwaniki Wa Ndegwa v National Bank of Kenya Ltd & Another (2016) eKLR** to buttress that argument.

In the respondent's opinion, the appellants having executed the contracts for guarantee and indemnity, then even if the primary contract was held invalid, they remained independent contracts which they were bound to honour as the monies advanced were still outstanding.

To counter the contention that the contracts for guarantee were of no consequence in view of the fact that the principal debt was not upheld by the Judge, the respondent submitted that the appellants did not challenge or controvert the amount advanced nor adduce evidence that the loan had been repaid. The respondent maintained that the respondent existed as a legal entity when the contracts for guarantee were executed and even at the time of filing suit. The respondent's response to the allegations that the loan account of the 1st defendant was fraudulently operated, was that the allegations of fraud ought to have been specifically pleaded and proved but were not, nor was evidence adduced to support the claims.In our view, the issues for determination in this appeal are;

(i) Whether the respondent existed as a legal entity at the time of execution of the contract of guarantee by the appellants;

(ii) Whether the contract of guarantee was tainted with fraud;

(iii) Whether the appellant's liability based on their contract was extinguished upon the Judge's finding that the primary contract was invalid.

The appellants reiterated the arguments made before the trial court that the respondent was a non-legal entity at the time it instituted suit against them and therefore had no capacity to commence the suit. The trial court dismissed that claim on the basis that the appellants failed to adduce sufficient or reliable evidence to support the claim. The Judge however remarked that annual returns filed with the registrar of companies showed that the respondent was a registered company owned by the Consolidated Bank Mortgage Limited. On that basis, the

Judge proceeded to hold that the respondent existed at the time of suit. The appellants before this Court contended that the Judge erred in failing to find that the respondent does not and did not exist as a legal entity at the time of instituting suit and should therefore not have instituted suit in its own name in the first place. The contention was that the entire affairs of the respondent were taken over by Consolidated Bank Mortgage Limited when it went under and the respondent failed to adduce any evidence in support of a succession in law. The appellants' submissions were that even a mere change of name disqualified a company from instituting suit in its former name and cited the authority of **Victoria Commercial Bank Ltd v Devchand Shah Punja (2004) eKLR** for that proposition. The record reflects that the transaction in this suit originally started with the respondent. However, the respondent did not offer evidence to establish the nature of its existence or how and what period in time it came to be succeeded by Consolidated Bank Mortgage Limited despite the appellants having disputed its legal existence all through. The only evidence the respondent adduced was annual returns filed in the Companies' Registry for the years 2004 and 2005 showing that the respondent's affairs were taken over by Consolidated Bank Mortgage Limited. This, according to the appellants, is because the evidence of its legal existence was not available. The evidence of the annual returns was still queried and challenged by the appellants since the respondent exhibited two sets of annual returns with different details for the year 2005, yet returns are normally filed once annually. The learned Judge did not address or reconcile the contentions and so the evidence remained incredible. As it is now, the record does not reflect the legal existence of the respondent as no evidence of its existence was proffered. In **Victoria Commercial Bank Ltd v Devchand Shah Punja** (supra) the High Court held that a change of name can only be established by producing a certificate of change of names of a company and a party has to comply with the provisions of the Companies Act. **Section 20** of the former Companies' Act required a company to notify the registrar of a change of names to enable the Registrar to enter the new name in the record in place of the former name and to issue the company with a certificate of a change of names and notify the public of such change through the Kenya Gazette. In that case, the court held that since plaintiff had failed to produce a certificate from the Registrar of Companies to establish that it succeeded the company that sued, then it could not sue under the new name and its claim against the defendant failed. I am in total agreement with those views.

The appellants have further cited the authority of **KPLC v Benzene Holdings Limited t/a Wyco Paints (2016) eKLR** where this Court held that once a court is made aware that the plaintiff is non-existent and therefore incapable of maintaining an action, it cannot allow the action to proceed. The demand letters sent to the 1st defendant ostensibly from the respondent were sent by an entity known as Consolidated Bank Mortgage Limited. It was imperative upon the respondent to clear the air or to put its house in order by establishing the nexus or succession between it and the appellants. It failed to discharge its obligation on a contested issue. It failed to adduce sufficient evidence to prove that indeed it existed legally at the time of filing suit and had the capacity to institute suit against the appellants.

The above finding is in my view sufficient to dispose of the appeal since lack of capacity to sue on the respondent's part meant that the appeal had no foundation.

However, and for completeness sake, I shall consider the merits of the other issues framed for determination. The appellants have alleged that the trial court erred in failing to find that the contract of guarantee was tainted with fraud. The appellant submitted that they were duped by their advocate into signing the contract of guarantee. They have claimed that they were under the impression that they were signing a transfer of shares forms. However, these allegations were discounted by the Judge who observed that from their demeanour, the appellants knew the nature of documents they were signing and their implications. In **J S M v E N B (2015) eKLR,** it was held that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. I have no reason to depart from that finding of fact.

The appellants have also claimed that the respondent operated their loan account fraudulently and or improperly. However, allegations of fraud have been held to be of a serious nature and have to be specifically pleaded and proved. See **Vijay Morjaria v Nansingh Madhusingh Darbar & Another (2000) eKLR; Nancy Kahoya Amadiva v Expert Credit Limited & Another (2015) eKLR.**

Similarly, in **Richard Akwesera Onditi v Kenya Commercial Finance Company Limited (2010) eKLR,** it was stated that fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability, and the bare allegations put forward by the appellants did not therefore avail him. Not only did the appellants fail to particularize the allegations of fraud but they failed to meet the threshold required which has been stated to be one slightly above a balance of probabilities but of course falling short of beyond reasonable doubt.

The appellants submitted on the issue of accessory nature of a contract of guarantee where the principal contract is found to be invalid. Their argument was that if the principal debtor's obligation is found not to exist or is void, diminished or discharged for some reason or another, then according to them, so is the guarantors obligation in respect of it. The Judge in his determination dismissed the claim against the 1st defendant. A reading of the judgement does not reveal the basis upon which the Judge dismissed the claim. However, the respondent admitted that the advances were to be secured by a debenture over the assets of the 1st defendant and a charge over some parcels of land. The charge to secure the loan was however not registered since the titles documents were never availed to it by the appellants. The security over the principal borrower was therefore never perfected and remained invalid. It is on that basis that the appellants questioned whether there can be a finding of liability on the guarantor's part where liability against the principal borrower has failed.

The contract of guarantee signed by the appellants remains valid in the absence of fraud as alleged and in light of finding by the trial court that the appellants had knowledge of the nature of the contract they executed. The appellants also admitted to have requested for the loan advance to build a hotel. The 1st appellant admitted to having received a sum of Kshs. 2, 755, 000/- leaving a balance of Kshs. 445,000/-. He testified further that he also wrote letters authorising payments to the contractor of the hotel. Upon those admissions, and disregarding the finding that the respondent did not exist at the time of filing suit, the only reason to absolve the appellants from liability would be if the law does not impute liability upon guarantors where the principal contract is invalid. The only reason the loan documentation was not perfected was because the appellants failed and or refused to avail the title documents. They cannot be seen to ride on their mischief by claiming that since the loan agreement was void on that basis, then they are not liable on the guarantees. The respondent has contended that the contract of guarantee remained valid and enforceable independent contract even where the principal contract is held to be invalid. The appellant has contended that the law relating to guarantees stems from the common law which as a general rule states that a cause of action cannot exist against a surety, unless the cause of action exists against the principal debtor. The appellants also relied on an authority from the Supreme Court of Sri Lanka (supra) where the court relied on a passage from "**Paget's Law of Banking**" as follows;

> **"A guarantee obligation is secondary and accessory to the obligation the performance of which is guaranteed; the guarantor undertakes that the principal debtor will perform his (the principal debtor's) obligation to the creditor and that he the (guarantor) will be liable to the creditor if the principal debtor does not perform. Therefore, the guarantor's liability for the non-performance of the principal debtor's obligation is co-extensive with that obligation. <u>If the principal's debtor's obligation turns out not to exist, or is void, diminished or discharged so is the guarantor's in respect of it.</u>"** (Emphasis)

The appellants hinged their argument on the latter part. In my view, the fact that a guarantee contract is an accessory or secondary contract does not mean that it is conditional on the principal contract's validity. It only means that no liability attaches to the guarantor unless and until the principal has failed to perform his obligations. In **<u>Mwaniki wa Ndegwa v National Bank of Kenya Ltd & Another</u> (2016) eKLR,** the Court of Appeal observed that a guarantor became liable upon default by principal debtor. The Court further remarked that it is not up to the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum. The Court further relied on a passage from **Halsbury's Laws of England 4th Edition Vol. 20** which put the guarantor's obligation as follows;

> **"On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent of his obligation, <u>without</u> <u>being entitled to require either notice of the default or previous recourse against the principal</u>...."**

In my view therefore, the appellants would have been liable under their contract of guarantee since the contract remained independent. However, having found that the legal existence of the respondent was not established and remained in limbo, then the appellants succeed in their appeal.

Accordingly, I allow the appeal and set aside the judgment and decree of the High Court dated 28th January 2011. I make no orders as to costs.

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

ASIKE MAKHANDIA

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JUDGE OF APPEAL

<u>JUDGMENT OF OTIENO-ODEK, JA</u>

1. The appellants, ***Gedion Letoya ole Hapu*** and ***Magdalene Hapu*** jointly and severally executed continuing guarantees and indemnity in favour of the respondent, ***Estate Finance Company of Kenya Limited***, in consideration of the appellants advancing by way of a loan the sum of Ksh. 5,000,000/= to ***Narok Transit Hotel Limited***. Under the instrument of guarantee and indemnity, the appellants bound themselves to repay on demand the sums of money the respondent advanced to the said ***Narok Transit Hotel Limited***. From time to time, the appellant advanced monies to the Hotel.

2. By letter dated 11th July 1997, the respondent called upon ***Narok Transit Hotel*** as the principal debtor to pay or cause to be paid the sum of Ksh. 13,403,791/80 and interest thereon. Further, by letters dated 22nd July 1997, the respondent called upon each of the appellants to pay the sum of Ksh. 5,000,000/= and interest thereon being money secured under the letter of guarantee and indemnity. Both the ***Narok Transit Hotel Limited*** and the appellants failed to pay the sums demanded.

3. Upon failure of ***Narok Transit Hotel Limited*** and the appellants to pay the sum demanded, the respondent filed suit against the appellants seeking judgment in the sum of Ksh. 5,000,000/= together with interest thereon from 22nd July 1997 until payment in full.

4. In the suit before the High Court, ***Narok Transit Hotel Limited*** was the first defendant and the appellants were the 2nd and 3rd defendant's respectively. In this appeal, ***Narok Transit Hotel*** is not a party, the suit against it having been dismissed by the trial court. Meanwhile, the appeal against the 1st appellant, was marked as abated on 2nd October 2018 on account of her death on. Consequently, the instant appeal is effectively by the 2nd appellant.

5. In the plaint, the respondent avers that in consideration of according ***Narok Transit Hotel Limited*** banking facilities and a loan, the appellants bound themselves as guarantors to pay on demand any monies due and owing by ***Narok Transit Hotel Limited***; it was a term of the instrument of guarantee and indemnity that the total amount recoverable from each appellant shall not exceed Ksh. 5,000,000/= together with interest thereon; that from time to time, the respondent advanced monies to the said ***Narok Transit Hotel Limited.***

6. In their joint statement of defence, the appellants denied any liability and averred that the respondent, ***Estate Finance Company of Kenya Limited***, no longer existed as a legal entity; that any indebtedness that may have been owed ***to Estate Finance Company of Kenya Limited*** could not and cannot be called in as the respondent had ceased to exist. It was further alleged that in the course of bank-customer relationship, the respondent failed in its fiduciary and contractual duties as it never sent a statement of accounts to ***Narok Transit Hotel Limited*** and the 1st appellant. The appellants denied receipt of any demand letters.

7. In reply to the defence, the respondent reiterated the appellants each owed it the sum of Ksh. 5,000,000/= and that statements of account and demand letters were duly sent to the appellants.

8. Upon hearing the parties, the trial judge Koome, J. (as she then was) entered judgment against the appellants in the sum of Ksh. 5,000,000/= with interest at court rates from 22nd July 1997 until payment in full. In entering the judgment, the learned judge expressed herself thus:

> ***"The plaintiff's claim is challenged by the defendant on three principle issues. Firstly, the defendant challenged the locus standi of the plaintiff and alleged that the plaintiff did not exist in law and therefore it has no capacity to file this suit. On the part of the plaintiffs, they produced copies of annual returns filed with the Registrar of Companies to show that the plaintiff is a company owned by Consolidated Bank of Kenya who own… majority shares and a Mr. Fred Ojiambo one share….***
>
> ***The court finds that although the defendants alleged the legal capacity or legal existence of the plaintiff, there was no evidence to support the fact that the plaintiff is not a legal entity that lacks capacity to sue….(sic)***
>
> ***The other defence raised by the defendants…is that they did not know what they were signing when they signed the guarantee…I have examined the above contention against the background…the defendants having signed the guarantee and indemnity. During the hearing, the court had the opportunity to listen and evaluate the evidence and demeanor of both defendants who are apparently literate and the 2nd defendant came across as a seasoned businessman. I am of the view that the guarantees and the indemnity signed by the 2nd and 3 rd defendants are binding on them. This is because in ordinary commercial transactions it is not necessary to prove that parties in fact intended to create legal relations. The onus of proving there was no such intention is on the party who has asked that no legal effect is intended and the onus is a heavy one….Applying the objective test, I do not find the contention by the defendants that they signed the guarantee in a hurry without reading the contents credible….***
>
> ***The loan was granted and utilized for the benefit of the 1st defendant so there was consideration. …The 2nd defendant does not deny having borrowed the money and having benefitted from the proceeds….He admitted he borrowed a sum of Ksh. 2.9 million and he received a sum of Ksh. 2.755,000/= leaving a balance of Ksh. 145,000/=. ….I find that there was consideration for the guarantee. The 2nd and 3rd defendants are bound to honour the guarantee and indemnity that they signed"***

9. Aggrieved by the judgment of the learned judge, the appellants instituted the instant appeal. As already stated, the appeal by the 1st appellant abated. The grounds cited in the memorandum of appeal are as follows:

> *(i) The judge erred in making a finding of liability based on a contract of guarantee and indemnity which suffered from fraud in its execution due to misrepresentation as to its content, purposes and form and which did not have consideration so as to make it a valid contract.*
>
> *(ii) The judge erred in finding liability based on an instrument of guarantee which is an accessory contract whereas the primary contract was itself found by the trial court to be invalid.*
>
> *(iii) The judge erred in finding liability on the guarantee when the amount lent or repaid was not determined and the amount owing to the respondent was not established.*
>
> *(iv) The judge erred in failing to find that the operation of the account allegedly held by the 1st defendant and or the 1st appellant with the respondent was fraudulent.*
>
> *(v) Failing to find that the respondent does not and did not exist as a legal entity when the suit was filed.*
>
> *(vi) The judge erred in failing to find monies were fraudulently withdrawn without the knowledge and or consent of the account holders.*

10. At the hearing of this appeal, learned counsel ***Mr. Mbuthia Kinyanjui*** instructed by the firm of P.K. Njoroge Advocates appeared for the 1st appellant. Learned counsel ***Ms Gatuli*** holding brief for ***Mr. Charles Nganga*** appeared for the respondent. The appellant and the respondent filed written submissions as well as the list, bundle and digest of authorities.

APPELLANT'S SUBMISSION

11. Counsel for the appellant rehashed the background facts leading to the dispute between the parties. Counsel urged that the appellants adduced evidence before the trial court that they were tricked into signing the contracts of guarantee; that the evidence on trickery was not controverted; that the respondent did not deny the instrument of guarantee was attested by a ***Mr. Raphael N'gethe advocate***, who was also a director of ***Narok Transit Hotel Limited*** and the said advocate invited the appellants to sign the guarantee in the guise of a share transfer; that the fiduciary nature of an advocate-client relationship was not observed by Mr. N'gethe. It was submitted that the appellants agreed to sign the instrument of guarantee and indemnity without reading it; that Mr. Raphael N'gethe committed a fraud against the appellants; that as a director of Narok Transit Hotel Limited it is ironical that Mr. N'gethe never signed any instrument of personal guarantee; that failure of Mr. N'gethe to sign and provide a guarantee implies he was fraudulent and violated the fiduciary duty owed in an advocate-client relationship; in the instant appeal, the learned judge erred and it is an oxymoron for a client to be held liable for trusting his lawyer. In totality, the trial judge erred and failed to appreciate the nature of the relationship between the appellants and Mr. Raphael N'gethe advocate.

12. The appellant strenuously urged that the learned judge erred in her finding on the legal capacity and existence of the respondent; the judge also erred in finding the instrument of guarantee was valid. In advancing the submission, it was pointed out that the trial judge correctly held the primary contract between ***Narok Transit Hotel Limited*** and the respondent was a nullity as the monies were borrowed without resolution of the promoters of the Hotel when the said Hotel had not been incorporated. The appellant submitted that the judge

correctly held that ***Narok Transit Hotel Limited*** (the principal debtor) did not exist in law at the time when the monies claimed were advanced. Premised on the finding by the trial court, the appellant submitted that if there is no principal debt or debtor, there can be no valid guarantee.

Citing the case of **Fidelity Commercial Bank Limited vs. Kenya Grange Vehile Industries Limited [2017] eKLR,** counsel submitted that a guarantee is an accessory contract by which the guarantor undertakes to be answerable to the promisee for the debt or default of another person. It was urged that the respondent's claim against ***Narok Transit Hotel Limited*** having been dismissed, then, there was no debt to be paid by the principal debtor, it should follow that there is no debt to be paid by the guarantor. Likewise, if the amount of money due and owing from the principal debtor has not been proved and determined, the liability of money due from a guarantor cannot be determined. From this analogous reasoning, the appellant contends that since the amount of money due and owing from ***Narok Transit Hotel Limited*** was not proved in evidence, it follows the liability of the appellant as guarantor was not proved.

13. A pivotal issue urged in this appeal is that the judge erred in failing to determine the competence of the suit given that the respondent, ***Estate Finance Company Limited***, was not in existence at the time of instituting the suit. The appellant contends that at the time of filing suit, the respondent was non-existent and therefore incompetent to file suit in its own name; that the respondent's affairs were being run by ***Consolidated Bank of Kenya Limited*** which had failed to demonstrate how it came to succeed the respondent company. Citing the case of **Victoria Commercial Bank Limited vs Devchand Shah Punja [2004] eKLR** it was submitted that change of name disqualifies a company from instituting a suit in its former name. Further citing the case of **Fort Hall Bakery Supply Co. Limited vs. Fredrick Muigai Wangoe (1959) EA 474**, the appellant submitted that a non-existent person cannot sue and once a court is made aware the person is non-existent, it cannot allow the action to proceed. (See also **Sietco (K) Limited -v- Fortune Commodities Limited & another, Civil Case No. 1264 of 2002).**

14. The appellant concluded this submissions by urging that the judge erred in failing to find the respondent operated the account held by ***Narok Transit Hotel*** and or the 1st appellant in a fraudulent manner; that there was a trail of fraud and none of the account holders were allowed access to bank statements or to withdraw monies from the account; that the statement of accounts was done fraudulently without the knowledge of the account holders; and that the fraudulent transactions in the account cannot be seen in any other way other than they were used and aimed at enriching individuals known or unknown to the respondent and Consolidated Bank.

RESPONDENT'S SUBMISSION

15. The respondent submitted that the instant appeal is premised on allegations of fraud on the part of one ***Mr. Raphael N'gethe advocate*** as well as alleged fraud by the respondent in the running and operation of the bank account of ***Narok Transit Hotel Limited.*** In opposing the appeal, it was submitted that fraud must be specifically pleaded and proved; that in this matter, the appellant neither pleaded fraud nor provided particulars thereof in the statement of defence; that no evidence was adduced to prove Mr. Raphael N'gethe advocate tricked the appellant to sign the instrument of guarantee and indemnity. Counsel submitted that a contract of guarantee can only be invalidated if the allegations of fraud is specifically pleaded and proved. (See **Mwaniki wa Ndegwa -v- National Bank of Kenya Limited & another [2016] eKLR)**. The respondent further submitted that there was consideration for the guarantee and indemnity in the sum of Ksh. 2.9 million and Ksh. 300,000/= that was paid and advanced to ***Narok Transit Hotel Limited***; and that the evidence on record shows the 1st appellant did not deny borrowing and receiving the benefit of the sum of Ksh. 2.9 million that was advanced.

16. On the contestation that the judge erred in failing to find the contract of guarantee and indemnity were a nullity because the primary debtor (Narok Transit Hotel Limited) was not liable, the respondent submitted that a contract of guarantee and indemnity is a separate and independent contract enforceable on its own. Counsel cited the case of **Mwaniki wa Ndegwa -v- National Bank of Kenya Limited & another [2016] eKLR** to support the submission.

17. A pivotal ground pressed by the appellant in this appeal is that the judge erred in failing to find the suit is incompetent as the respondent does not exist as a legal entity. Rebutting this ground, it was submitted that the respondent existed at the time the loan was guaranteed by the appellants; that a background online check and the **Consolidated Bank of Kenya Act No. 5 of 1991** reveal that the respondent still exists as a subsidiary of Consolidated Bank of Kenya Limited.

18. On the issue of contention that the bank account of ***Narok Transit Hotel Limited*** held at the respondent was operated fraudulently, counsel submitted that the allegation of fraud was not specifically pleaded and the learned judge could not consider and determine unpleaded issues.

ANALYSIS

19. This is a first appeal. I have considered the grounds of appeal, submissions by counsel and the authorities cited by the parties. The principles which guide this Court in an appeal from a trial by the High Court are now well settled. In **Selle and Another vs. Associated Motor Boat Company Ltd & Others, [1968] EA 123**, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:

> ***"An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

20. Two of the grounds repeatedly urged in this appeal relate to fraud. The appellant contends that the judge erred in failing to find there was fraud on the part of ***Mr. Raphael N'gethe Advocate*** who allegedly abused the advocate-client privilege. It is also contended that the judge

erred in failing to find the respondent operated the account held by Narok Transit Hotel and the 1st appellant in a fraudulent manner; that there were withdrawals from the account without the knowledge and consent of the account holders.

21. In **Vijay Morjaria vs. Nansingh Madhusingh Darbar & another [2000] eKLR** Tunoi, JA (as he then was) correctly stated as follows*:*

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

22. In the instant appeal, I have examined the statement of defence filed by the appellant. Nowhere in the defence is fraud specifically pleaded and particularized. Accordingly, it is my finding that the judge did not err in failing to make a finding that ***Mr. N'gethe Advocate*** or the respondent was fraudulent during the signing of the instrument of guarantee and in the operation of the account of ***Narok Transit Hotel***. A judge cannot determine a contestation that is not in issue and has never been pleaded.

23. I now consider the ground that the judge erred in failing to dismiss the suit against the appellant for the reason that the respondent was non-existent as a legal entity capable of filing suit. The appellant contends that at the time of filing suit, the respondent was non-existent as a legal person and its affairs were and are being run by the ***Consolidated Bank of Kenya Limited***. Conversely, the respondent submitted that the ***Estate Finance Company Limited*** is in existence as a subsidiary of ***Consolidated Bank of Kenya Limited.***

24. The learned judge in considering the contestation on existence or non-existence of the respondent observed that the respondent produced copies of annual returns filed with the Registrar of Companies showing it is a company owned by Consolidated Bank of Kenya Limited who own the majority shares. The judge in finding that the respondent had legal capacity to institute the suit expressed there was no evidence to support the fact that the respondent is not a legal entity that lacks capacity to sue in its own name.

25. On my part, I have considered the submission by both parties as to the legal existence or non-existence of the respondent as a legal person. I have taken into consideration ***Section 384 (3)*** of the **Companies Act, Cap 486** of the **Laws of Kenya**. The Section provides as follows: **"384 (3) A copy of, or extract from, any document kept and registered at the office of the registrar, certified to be a true copy under the hand of the registrar (whose official position it shall not be necessary to prove), shall in all legal proceedings be admissible as prima facie evidence of such document or extract, as the case may be, and of the matters, transactions and accounts therein recorded."**

26. In my reading of the sub-section, it is apparent that the annual returns filed with the Registrar of Companies is *prima facie* evidence of the contents of the annual returns. In this context, the annual returns filed in relation to the respondent company *prima facie* points to the existence of the respondent as a *legal persona*. The Registrar would not have expected the annual returns if the respondent company did not exist. I find the learned judge did not err in relying on the annual returns to find the respondent existed as a person and had legal capacity to sue in its own name.

27. I have also taken into consideration the provisions of ***Section 10 (1)*** of the **Consolidated Bank of Kenya Act No. 5 of 1991.** The Section provides:

> **"10 (1) No existing legal or arbitration proceedings or application to any authority by or against a subsidiary shall abate, be discontinued or be in any way prejudicially affected by reason only of any of the provisions of this Act, but the same may be prosecuted or continued by or against Consolidated Bank and any judgment or award obtained by or against the subsidiary and not fully satisfied before the vesting day shall thereafter be enforceable by or against Consolidated Bank."** (Emphasis supplied)

28. It was submitted that the respondent is a subsidiary of ***Consolidated Bank of Kenya Limited***. The fact that the respondent is a subsidiary of the ***Consolidated Bank of Kenya Limited*** cannot *per se* be used to extinguish a loan, debt or security hitherto held by the respondent, ***Estate Finance Company Limited***. ***Section 10 (1)*** of the **Consolidated Bank Act** specifically provides no existing legal proceedings shall be discontinued or abate by virtue of the Act coming into force. In addition, the Section does not precluded continuance of legal proceedings in the name of subsidiaries.

The word "May" in the Section is discretionary, it denotes the proceedings can continue in the name of ***Consolidated Bank of Kenya Limited*** or its subsidiary.

29. Guided by the provisions of ***Section 10 (1)*** of the Act, it is my finding the ground of appeal challenging the existence or non-existence of the respondent has no merit. It would also be inequitable for a party to borrow money, guaranteed the same and turn around to raise technical objections with a view to extinguish his debt or liability. In equity, parties are bound to their transactions and it would be unconscionable for me to extinguish the debt due and owing to the respondent despite the explicit provisions of ***Section 10 (1)*** of the **Consolidated Bank of Kenya Act**.

30. On the issue of validity of the instrument of guarantee and indemnity, it is my finding that there is no evidence on record vitiating the contract of guarantee that was signed by the appellant. In addition, the appellant by letter dated 25th June 1987 applied for a loan for Ksh. 2,900,000/= for construction of ***Narok Transit Hotel*** and requested an immediate drawdown of Ksh. 300,000/=. Further, on record there is a letter dated 1st July 1997 in which the appellant accepted the terms and conditions of drawdown and disbursement of the loan amount; he acknowledge receipt of Ksh. 300,000/= as drawdown. In my considered view, this is an acknowledgment of disbursement of the loan amount and consideration for the instrument of guarantee and indemnity. I find the trial judge did not err in holding that the instrument of guarantee was valid and executed with consideration and that the appellant is bound to honour his obligations under the guarantee.

31. In penultimate, it is urged that the judge erred and did not consider that the appellant did not know he was signing an instrument of guarantee and that he signed the same in a hurry. In her judgment, the trial judge expressed that she had listened to and observed the demeanor of the witnesses. As regards the 1st appellant, the judge specifically stated he was "*literate and came across as a seasoned businessman."* This is a finding on credibility of the 1st appellant. As the Supreme Court stated in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 3 others [2014] eKLR ,** an appellate court should rarely interfere with findings of a trial court that is based on credibility of a witnesses. The Court expressed:

> **"[82]** ….**it follows that a petition which requires the appellate Court to re-examine the *probative value of the evidence* tendered at the trial Court, or invites the Court to *calibrate any such evidence,* especially calling into question the *credibility of witnesses,* ought *not* to be admitted…."**

32. In this appeal, the learned judge made credibility findings after observing the demeanour of the 1st appellant. It is trite that the views of a trial court on credibility of a witness carry greater weight. As guided by the Supreme Court in ***Gatirau Peter Munya case*** (supra), I hereby decline to interfere with the findings of the trial court based on credibility of the 1st appellant that he is a seasoned businessman who knew what he was signing. I find the judge did not err in holding the 1st appellant was bound by the instrument of guarantee and indemnity that he signed.

33. For the foregoing reasons, I find this appeal has no merit and I would dismiss the same with costs.

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

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR