**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: G.B.M KARIUKI, SICHALE & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL NO. 18 OF 2014**

**BETWEEN**

**ROBERT NJOKA MUTHARA.....1ST APPELLANT**

**EVANGELINE WANJIRA NJOKA.....2ND APPELLANT**

**AND**

**BARCLAYS BANK OF KENYA LIMITED...1ST RESPONDENT**

**EL-DIMA LIMITED.....2ND RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Embu (Ong'undi, J.)*

*dated 13th March, 2014*

*in*

**H.C.C.C No. 2 of 2003)**

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**JUDGMENT OF THE COURT**

1. It is apparent that the appellants and the 1st respondent had a long standing bank/customer relationship. The 1st respondent not only extended several facilities to the appellants but also to Njoka Tanners Limited (herein after referred to as the company) wherein the appellants were directors as well as the majority shareholders. Of relevance is an overdraft facility of Kshs. 9,000,000/= which was issued to the company vide a letter of offer dated 27th May, 1998. The same was secured by a guarantee executed by the appellants and charges registered on various properties belonging to the appellants.

2. Later on, the company fell into arrears but fortunately a repayment proposal made by the company was accepted by the 1st respondent. According to the appellants, they learnt on 17th December, 2002 that the 1st respondent had fraudulently instructed the 2nd respondent to sell the charged properties despite the fact that the requisite statutory notice of sale had not been served upon them.

3. The foregoing instigated the appellants to file suit. They claimed that the guarantee and the charges were illegal and of no effect; that the guarantee hadn't been executed by all of the company's directors and also that no Land Control Board consent was obtained for the said charges.

4. Be that as it may, the appellants averred that the company had paid the entire overdraft amount. They imputed that the 1st respondent had acted fraudulently by arbitrarily varying the interest rate to the detriment of the company. They also asserted that on 3rd March, 1999 the 1st respondent fraudulently consolidated the 1st appellant's account numbers 1166983 and 1166991 with the company's account number 1246162. Consequently, the appellants sought, *inter alia*,

- A permanent injunction restraining the defendants (respondents herein) by themselves, their agents and/or servants from advertising and/or selling and/or transferring and/or interfering in any manner whatsoever with L.R.Nos.

  EVURORE/EVURORE/1332, NGANDORI/KIRIGI/3408, NGANDORI/KIRIGI/ 3409, NGANDORI/KIRIGI/ 3410, NGANDORI/KIRIGI/3411, NGANDORI/KIRIGI/3577,NGANDORI/KIRIGI/ 4149,NGANDORI/KIRIGI/4150, NGANDORI/KIRIGI/4151, NGANDORI/KIRIGI/ 4159, NGANDORI/KIRIGI/4160, NGANDORI/KIRIGI/4161, NGANDORI/KIRIGI/4162, NGANDORI/KIRIGI/4163, NGANDORI/KIRIGI4164, NGANDORI/KIRIGI/4165, NGANDORI/KIRIGI/4004, NGANDORI/KIRIGI/6044, GATURI/NEMBURE/6045, GATURI/NEMBURE/3831, EMBU/TOWNSHIP/114, EMBU/TOWNSHIP/328 and GANDORI/KIRIGI/ 4005 situated in Embu District.

  - An order that the 1st defendant discharge the above mentioned properties and release titles thereof to the plaintiffs (appellants? herein).
  - An order for taking of accounts.

5. Save for admitting that the 1st appellant's accounts were erroneously consolidated with the company's, the 1st respondent's position was that the company had not repaid the entire overdraft facility. To the 1st respondent, the charges were continuing securities hence, the Land Control Board consents obtained in prior facilities sufficed for the overdraft facility. As far as the guarantee was concerned, the company and the appellants had enjoyed financial facilities from the 1st respondent on account of the same, and therefore, the appellants were estopped from claiming that it was not legal. The 1st respondent contended that it had only instructed the 2nd respondent to scout for potential buyers and not to sell the charged properties.

6. At the trial, the 1st appellant denied that the appellants had admitted that the outstanding amount was Kshs. 16,597,091/= at the time of filing suit. He imputed mischief on the 1st respondent's part for failing to produce full statement of accounts despite being served with a notice to produce the same. He explained that the company's books and documents had been confiscated by the Kenya Revenue Authority on an unrelated issue hence, they were unable to produce the statements which had been sent by the 1st respondent. He was convinced that the company had repaid double the amount which had been advanced.

7. Mr. Ken Kiurah (DW1), the then 1st respondent's Manager for Corporate affairs, was adamant that the company had not fully repaid the overdraft. He stated that the 1st respondent was not in a position to produce a statement of accounts for the period between May 1998 and 1st March, 1999 at the time of the hearing; that they had been destroyed in accordance with the Central Bank's guidelines which permits banking institutions to destroy statements after a period of 6 years. He testified that the overdraft facility was non-performing, thus, the the outstanding amount ought to have been curbed at Kshs. 73,000,000/=.

8. Upon considering the evidence before it, the trial court by a judgment dated 13th March, 2014 dismissed the appellants' suit with costs. The trial Judge found, *inter alia*, that the in duplum principle

was applicable and directed parties to take accounts in respect of the outstanding amount. She also found that the securities offered by the appellants were valid. The decision triggered an appeal and cross appeal by the appellants and 1st respondent respectively. On the one hand, the appellants' complained that the learned Judge erred in law and fact by-

- ***Holding that the charges were valid.***
- ***Failing to draw a negative inference from the 1st respondent?s failure to provide full statement of accounts.***
- ***Holding that the applicable interest rate was clear.***
- ***Failing to order the taking of accounts.***
- ***Finding that the appellants had not proved that the entire loan amount and accrued interest had been repaid.***

- ***Dismissing the suit despite making a finding that there was no evidence that the 1st respondent had reversed the consolidated accounts.***
- ***Issuing a conditional order in respect of the reversal of the fraudulently consolidated accounts***

9. On the other hand, the 1st respondent complains that the learned Judge erred by-

- ***Failing to dismiss the appellants? suit in its entirety despite finding that the suit had been brought on behalf of a non-party.***
- ***Misapprehending the implication of the erroneous consolidation of accounts and subsequent reversal, therefore, erroneously directing the 1st respondent to „credit back? the sum of Kshs. 9,129,323.25/= to the 1st appellant?s account.***

10. The appeal was disposed of by way of written submissions and oral highlights. Learned counsel, Mr. Kinyua Muriithi, appeared for the appellants while learned counsel, Mr. Chacha Odera and Mr. John Mbaluto appeared for the 1st respondent.

11. From the onset the appellants contended that the terms of the judgment were unclear to the extent that parties could not agree on the terms of the decree. Still on the terms of the judgment, Mr. Muriithi argued that the trial Judge erred in giving a conditional order for the reversal of the consolidated accounts despite having clearly found that there was no evidence that the 1st respondent had corrected the error as alleged.

12. As to the Land Control Board consent, the appellants' claimed that the trial Judge failed to make a determination on the same. It was submitted that the consents which were produced by the 1st respondent did not relate to all the charged properties. Moreover, they were obtained for previous loan facilities which had since been cleared. In Mr. Muriithi's opinion, fresh consents ought to have been obtained for the overdraft facility.

13. The appellants maintained that the incomplete statements which were produced by the 1st respondent were not a true reflection of the loan and the repayments made thereunder. To them, the failure by the 1st respondent to produce the full statement of accounts insinuated that if they had been produced they would have shown that the company had paid more than double the amount borrowed. Therefore, there was no basis for the 1st respondent to claim that the loan was outstanding.

14. The trial Judge was faulted for not making a finding on whether the 1st respondent had violated ***Section 74*** of the ***Registered Land Act***. It was the appellants' view, that once the trial Judge found that the in duplum principle was applicable, she ought to have allowed compliance with the same before arriving at her final judgment. The appellants were also steadfast that they had locus to institute the suit.

15. The 1st respondent supported the trial court's finding that the suit had been instituted on behalf of the company which was not a party to the suit. It however criticized the trial court for not dismissing the suit

in its entirety. Mr. Odera stated that the obligation of a guarantor is limited to payment of the amount in issue where there is default by the principal debtor; he/she has no business questioning the amount which is due. Expounding further, he indicated that since the issue in dispute was in respect of a loan advanced to the company, it was imperative for the appellants to enjoin the company to enable the court grant relief, if any.

16. It was advanced that the learned Judge misapprehended the meaning of the term 'credit' which had strict connotations in the banking sector. Buttressing that line of argument, the 1st respondent referred to the following definition given in ***Modern Banking Law by E.P. Ellinger*** at page 43-

> ***"A credit transfer represents a „push? of funds by the originator to the beneficiary.?***

Thus, it followed that there could be no 'credit' transfer if an account had a debit balance to begin with because there could be no 'push' of funds if there were no funds in the first place. Challenging the trial Judge's finding that the 1st respondent had not credited the 1st appellants' account with the sum of Kshs. 9,129, 323.23, the 1st respondent was resolute that DW1 had pointed out that the above mentioned sum represented a debit balance. Further, the 1st respondent felt that the trial Judge compounded the issue by awarding interest on the amount she wrongly perceived to have been in credit.

17. It was posited that the charges and guarantee in question were to be utilized as continuing securities for the company's present and future debts. Henceforth, there was no need for fresh Land Control Board consents to be obtained. The 1st respondent relied on ***Lingard?s Bank Security Documents, 3rd Edition*** at page 179 wherein it is stated,

> ***"Bank security documents should contain a continuing security clause to avoid a contention that the security is discharged if, subsequent to its creation, the accounts of the customer are in credit."***

The 1st respondent also cited ***"The Law of Guarantees" 2nd Edition by Geraldine Andrew and Richard Millet*** where the nature of a continuing guarantee was discussed at page 90 -

> ***"A continuing guarantee is one which covers liabilities or transactions which continue to occur between the principal and creditor, such as the debts which fall due from time to time on a running account between a supplier of goods and a regular purchaser, or between a supplier of goods and a regular purchaser, or between a banker and a customer."***

18. As far as the 1st respondent was concerned, whether or not a court can draw an adverse inference from the failure of a party to produce a document is discretionary; there was no hard and fast rule to the effect that the failure to adduce documents under a Notice to Produce necessarily raises a negative inference against such a party. Towards that end, it had given a satisfactory explanation of why it was unable to produce some of the statements of accounts.

19. In the 1st respondent's opinion, the interest charged on the facility was clearly set out in the letter of offer and charge documents. The 1st respondent also indicated that it would abide by the induplum principle from its effective date of application and only recover what it is lawfully entitled to. In so doing, the amount owing would be capped at Kshs. 73,995,143.20/=.

20. We have considered the record, submissions by counsel and the law. Our primary role as a first appellate court is to re-evaluate, re-assess and re-analyze the evidence before the trial court and then determine whether the conclusions reached by the learned trial Judge ought to stand or not and give reasons either way. In ***Kenya Ports Authority vs. Kuston (Kenya) Limited (2009) 2EA 212*** this Court held that:-

> ***"On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"***

21. It is imperative to first deal with the issue of the appellants' standing which has far-reaching implication on the determination of the appeal herein. *Locus standi* is defined in ***Black?s Law Dictionary, 9th Edition*** at page 1026 as-

***"The right to bring an action or to be heard in a given forum"***.

This Court in ***Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR*** put it in the following terms:

***"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt?s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."***

22. Whether or not the appellants had the requisite *locus standi* turns on the nature of their relationship with the 1st respondent. It is crystal clear that the appellants filed suit in their capacity as guarantors and as the 1st respondent's customer with respect to the guarantee and the issue of wrongful consolidation of the 1st appellant accounts respectively. The issue of the consolidated accounts related to an alleged breach by the 1st respondent of its fiduciary duty to the 1st appellant arising from bank/customer relationship. Hence, the 1st appellant was properly suited to institute that claim as against the 1st respondent.

23. A guarantee by definition is a pledge by a person (guarantor), other than a party upon whom the contractual or other legal obligation is imposed, to the effect that if the party so bound (principal) fails to perform the act in question, the guarantor, will either perform or make good any loss or claim arising from the non-performance. The pledge is ordinarily made to a creditor. The essence is that the guarantor agrees not to discharge the liability in any event, but to do so only if the principal debtor fails to honour his duty. ***Geraldine Andrews & Richard Millet*** succinctly described the nature of a guarantee in ***"The Law of Guarantees" (supra)*** at page 156 as herein under:-

***"A contract of guarantee <u>is an accessory contract</u>, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. <u>The</u> <u>surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point."</u> Emphasis added.***

24. By its very nature, a guarantee is distinct from the agreement which gives rise to the obligation guaranteed. The principal debtor is neither a party to the guarantee nor considered as one with the guarantor. See ***Moschi vs. Lep Air Services Ltd. [1972] ALL ER 393***. Consequently, the rights and/or obligations of a guarantor as against the creditor accrue to him/her from the relationship created by the guarantee. See ***Halsbury?s Law of England, 4th Edition (reissue) Vol. 20(1) at paragraph 217***.

25. What were the terms of the relationship created by the guarantee in question? Clause 1 (a) of the guarantee provided in part as follows,

***"…… the Guarantor, unconditionally and irrevocably undertakes and agrees with the Bank as follows:***

***1. Guarantor to pay on demand***

***(a) The Guarantor, as a primary obligor and not merely as surety, <u>on demand will pay to the Bank all the</u> <u>moneys and discharge all obligations and liabilities, whether actual or contingent, now or hereafter due, owing or incurred to the Bank by the Principal</u>***

> ***…….. Any statement of account of the Principal signed as correct by any duly authorized officer of the Bank shall be conclusive evidence against the Guarantor of the indebtedness of the Principal to the Bank.*** *(Emphasis added.)*

Based on the foregoing, the appellants' obligation was to pay on demand any outstanding amount under the overdraft. As a result, the appellants' claim, if any, could only be on the basis of the terms of the guarantee.

26. The appellants' claim as guarantors was fourfold; first, that the 1st respondent had purported to exercise its power of sale under the charges without serving the required statutory notice; second, that the guarantee and charges in favour of the 1st respondent were invalid; third, that the company had fully paid the overdraft; and fourth, that the 1st respondent had unilaterally varied the interest rate to the detriment of the company.

27. Whether or not the 1st respondent purported to sell the charged properties without serving the requisite statutory notice and whether the securities given by the appellants were valid, in our view, went to the root of the appellants' liability under the guarantee. For that reason, the appellants had locus to raise those issues.

28. Whether the company had repaid the entire overdraft, called for the examination of the terms of the overdraft agreement between the 1st respondent and the company. The appellants were not privy to the said agreement and could not enforce or base a claim thereunder. See ***Kenya National Capital Corporation Ltd vs. Albert Mario Cordeiro & another [2014] eKLR***. It is only the company that could maintain a claim that it had paid the entire amount under the facility. The appellants could not rightly make the said claim on behalf of the company which has a separate legal personality from its directors and shareholders. See ***Salmon vs. Salmon (1897) A.C. 22.***

29. In actual fact, once the appellants executed the guarantee they assumed the company's liability under the overdraft in the event of default by the company. Equally, the appellants could not question the terms of the overdraft which had been negotiated by the company and the 1st respondent. The letter of offer of the overdraft facility which was accepted by the company provided for interest thereunder in the following terms -

> ***"INTEREST***
>
> ***Interest to be charged on overdraft at 4% above banks base rate as published by the bank from time to time, calculated on daily basis and payable monthly in arrears."***

30. Could the appellants in their capacity as guarantors question the interest charged by the 1st respondent under the aforementioned clause? We think not. In ***Mwaniki Wa Ndegwa vs. National Bank of Kenya Ltd & another [2016] eKLR*** this Court discussing a similar situation observed:

> ***"From these provisions it is evident that although the security documents did not provide a specific rate of interest, the documents clearly provided the manner in which such interest was to be determined.***
>
> ***….***
>
> ***<u>Having voluntarily signed the security documents the appellant must be taken to have been fully aware of the conditions upon which the security was given, and in particular that the documents did not contain a specific rate of interest, but provided for the interest rate to be determined at the ruling rate for Bank advances in Kenya.</u>***
>
> ***We restate the position taken by this Court in Ajay Indravadan Shah vs. Guilders International Bank Ltd [2003] eKLR, that:***

***"If by their agreement the parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."***

***By signing the Charge and the Guarantee, the appellant and the respondents agreed on a rate of interest to be determined by the Bank, and once the rate of interest was determined as agreed, the appellant was bound by that rate of interest. This is the same position that was taken by this Court in Fina Bank Ltd vs. Ronak Ltd (2001) 1 EA 54 where it was held that:***

***"As the Charge documents which were in evidence before the High Court expressly reserved, in favour of the appellant, the right to charge interest at variable rates its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified ..."*** *(Emphasis added.)*

In the circumstances, the proper party to question or take issue with the interest applied by the 1st respondent in the overdraft facility would have been the company.

31. In our understanding, the appellants were not claiming that their liability under the guarantee had been discharged on account of either the 1st respondent committed repudiatory breach of its contract with the company; or that the 1st respondent acted in bad faith against them or connived with the company in respect of the overdraft facilities; and/or the 1st respondent and the company carried out dealings without their consent, which dealings were prejudicial to them. See ***Lalji Karsan Rabadia & 2 others vs. Commercial Bank of Africa Limited [2015] eKLR***.

32. Instead, the appellants stepped into the company's shoes and were litigating on its behalf to the extent of the issues relating to repayment of the overdraft by the company and the interest applied in the overdraft. The trial Judge correctly observed as much but she should have gone a step further to strike out the issues advanced on behalf of the company which was not a party, which we hereby do. We find that the trial Judge erred in entertaining and making a finding on the aforementioned issues.

33. Turning back on the purported sale of the charged properties, the appellants' contention was that the 1st respondent, through its advocates, had instructed the 2nd respondent vide a letter dated 5th August, 2002 to sell the properties without serving the requisite notice under ***Section 74*** of the ***Registered Land Act*** (repealed). ***Section 74*** of the ***Registered Land Act*** provided as follows:

"***74 (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.***

***(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under subsection (1) the chargee may –***

***(a) ……..***

***(b) sell the charged property:.."***

34. The germane portion of the said letter is set out herein below-

***We act for Barclays Bank of Kenya Limited who hold charges over the properties listed herein securing certain banking facilities made available to the above named debtor. The banking facilities are in arrears in the sum of Kshs. 32,961,263.70/= as at 16th June, 2000 and interest continues to accrue thereupon at the per annum rate of 12% (revisable) above the base rate from time to time.***

*……..*

***We have been instructed by our client to write to you in your capacity as one of our client?s approved auctioneers as follows-***

***(i) That you endeavor to obtain buyers for the properties at no cost; and***

***(ii) On obtaining potential buyers to report to us your findings***.

It is clear from the said letter that the 1st respondent intended to exercise its statutory power of sale. It is also clear that prior to giving the above mentioned instructions, the 1st respondent had not served the requisite notice contrary to ***Section 74*** of the ***Registered Land Act***. Like the trial Judge, we find that the notices served during the pendency of the suit and interim orders therein were of no legal effect.

35. On the validity of the securities offered by the appellants, Clause 7(b) of the guarantee was couched as follows:

***"The Guarantors agree to be bound by this Guarantee notwithstanding that any other person who was intended to sign or to be bound may not do so or***

*……, whether or not the deficiency is known to*

***the Bank."***

It goes without saying that the appellants were bound by the above terms and as a result, their claim that the guarantee was invalid for not being executed by all the company's directors fails.

36. Likewise, the letter of offer of the overdraft was clear on the nature of the securities thereunder. It provided that-

***"SECURITY***

***It is a term of the facility that we retain the undermentioned security as continuing security for all moneys, obligations and liabilities, actual or contingent, now or hereafter due, owing or incurred by you to us."***

Thus, it is manifest that the charges were continuing securities to a series of transactions and the liability thereunder until the transactions contemplated by the parties and covered thereunder had been exhausted. ***See Halsbury?s Law of England Vol. 49 (2015) paragraph 638.*** Therefore, contrary to the appellants' argument, fresh Land Control Board consents were not required for subsequent transactions contemplated by the parties, such as the overdraft.

37. Last but not least, apart from admitting that it had erroneously consolidated the 1st appellant's accounts with the company's account, the 1st respondent maintained that it had reversed the said error. Indeed, Mr. Kiurah testifying on behalf of the 1st respondent, stated in his own words that, ***"There was a consolidation of the accounts which was an error. We demanded it (sic) and reversed it. Our bundle page 116- there was a reversal of Kshs. 7,570,000/=; 1,305,006/= and 254,317/25/=."***

Under ***Section 112*** of the ***Evidence Act***, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. Consequently, the onus was on the 1st respondent to prove that the reversal was actually done. From the record, the 1st respondent produced statements which confirmed the reversal. The trial Judge appreciated as much in the judgment when she stated, ***"DW1 admitted that an error had been made when the 1st plaintiff?s account and Njoka Tanners Ltd. loan account were consolidated. The same was amended via a reversal of Kshs. 7,570,000/=; 1,305,006/= and 254,317/25/=. This is clearly noted on the statement of account at page***

***116 of the defendant?s bundles. There is a credit and debit of these amounts on 4/3/1999. Issue No. IV is therefore answered."***

38. We are at a loss as to why the learned Judge later in her judgment found that the 1st respondent had not proved the reversal despite her foregoing sentiments and the evidence on record. We find that she erred in issuing a conditional order directing the 1st respondent to make the reversal in the event it had not by crediting the 1st appellant's account with the total sum of Kshs. 9,129,323.25/= and awarding interest on the said amount. We therefore set aside the said order.

39. The upshot of the foregoing is that the appeal is dismissed and the cross appeal succeeds for the reasons herein above stated. The appellants shall bear the costs of the appeal and the cross appeal both in the trial court and in this appeal.

***Dated and delivered at Nairobi this 3rd day of March, 2017.***

***G.B.M KARIUKI***

**……**

***JUDGE OF APPEAL***

***F. SICHALE***

**……**

***JUDGE OF APPEAL***

***J. MOHAMMED***

**……**

***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***