



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M KARIUKI & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 149 OF 2014

BETWEEN

APPOLLO INSURANCE COMPANY LIMITED APPELLANT

AND

EAST AFRICAN DEVELOPMENT BANK 1st RESPONDENT

CMC MOTORS GROUP LIMITED 2nd RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Hon. J. B. Havelock J) dated 24th April 2014

in

HCCC No. 160 of 2003)

JUDGMENT OF THE COURT

1. By a Plaint dated 24th March 2003 and re-amended on 31st January 2007, the 1st respondent Bank, **EAST AFRICAN DEVELOPMENT BANK**, filed suit against the appellant, **APOLLO INSURANCE COMPANY LIMITED**, for a liquidated claim of Ksh. 35,490,000/= with interest thereon at 18% per annum from 13th February 2002 until payment in full.
2. The appellant issued a Third Party Notice joining the 2nd respondent, **CMC MOTORS GROUP LIMITED**, seeking the following reliefs from the 2nd respondent:
 - “(a) Indemnity in full if the appellant is held liable for the whole or any part of the 1st respondent’s claim including interest and costs;
 - b. Costs of the suit including costs of Third Party proceedings; and
 - c. Such further or other relief as the court shall deem fit”
3. The facts that gave rise to the 1st respondent’s liquidated claim against the appellant and the facts

giving rise to the appellant's Third Party indemnity claim against the 2nd respondent are as follows:

- “(a) By an agreement dated 1st October 1998 made between the 1st respondent Bank and Kenya Bus Services (Mombasa) Limited (hereinafter referred to as KBS) the Bank agreed to grant KBS a loan to finance the purchase of twenty-four (24) Sanayi buses from the 2nd respondent, CMC Motors Limited. To finance KBS, the 1st respondent demanded a performance bond and the appellant executed a bond in favour of the 1st respondent Bank.*
- b. *In its plaint, the 1st respondent averred that it was an express condition of the bond that the bond shall remain in force until the 1st respondent shall release the appellant from the bond on performance when CMC furnishes the 1st respondent with delivery notes for twenty-four (24) buses and such delivery notes having been duly signed by the representatives of CMC and KBS.*
- d. *The 1st respondent Bank contends that the performance bond entailed delivery of 24 buses complete with body and seats. The appellant contends that the buses to be delivered were chassis only with no body and seats.*
- e. *The 2nd respondent only delivered seventeen (17) out of 24 buses and the 1st respondent filed suit against the appellant as guarantor under the performance bond seeking the liquidated sum of Ksh. 35,490,000/= being the value of seven (7) buses that were financed and not delivered by the 2nd respondent as per the performance bond.*
- f. *When the 1st respondent filed suit against the appellant, the appellant issued a Third Party Notice against the 2nd respondent seeking indemnity.”*
4. In its defence, the appellant admitted issuing a performance bond to the 1st respondent and agreed to be surety for 2nd respondent (CMC Motors Limited) in the supply of 24 vehicles to KBS. However, the appellant contends that the twenty-four (24) vehicles to be delivered were chassis only and not buses complete with body and seats as alleged.
5. The appellant contends that the contract between CMC and KBS required CMC to deliver 24 chassis to Associated Vehicle Assemblers Limited (hereinafter referred to as AVA) to build the body and seats and then deliver the completely built buses to KBS; that AVA duly received and signed delivery notes of all 24 units of vehicle chassis as advised by CMC and that the appellant believes that CMC fully performed the contract to the extent provided for in the performance bond. On this belief, the appellant contends that it was discharged from the performance bond because 24 units of busses were received and delivered to AVA as advised by CMC. In its defence, the appellant urged that it will seek indemnity from the 2nd respondent for any liability that might arise. This position is supported by the testimony of DW1 **Paruc Shakant Khimasia** , the Executive Manager of the appellant company, who testified in cross-examination that in the event the appellant is held liable, it shall rely upon the indemnity.
6. Upon hearing the parties, the trial judge entered judgment for the 1st respondent against the appellant as prayed for in the plaint. The trial judge made a finding of fact that only seventeen (17) complete busses with body and seats were delivered and seven (7) buses remained undelivered. In support of this finding, the trial court observed that the total purchase price per bus delivered was Ksh. 5,070,000/= and this price was inclusive of body and seats as the unit price for the chassis was costing Ksh.2.5 million and the balance of Ksh. 2,570,000/= was the cost of fabrication to build the body and seats. Based on the price breakdown, the trial judge made a finding that the performance bond executed was for delivery of 24 units of buses completely built with body and seats. The court came to a finding that the appellant had failed to satisfy its obligations under the performance bond as surety; the court entered judgment in favour of the 1st respondent for the

liquidated claim of Ksh. 35,490,000/= together with interest at 18% per annum as well as costs as prayed in the plaint.

7. Aggrieved by the judgment, the appellant lodged the instant appeal urging the following compressed grounds of appeal:

- “a. The learned judge erred in law and fact in holding that the issues dated 10th August 2007 were the “Agreed Statement of Issues”;*
- b. The judge erred in law and fact in not drawing issues for adjudication which would have identified the rival position of the parties;*
- c. The judge erred in law and fact in not appreciating that KBS had instructed the 2nd respondent to deliver 24 bus chassis to AVA for body fabrication and onward delivery of the complete units to KBS;*
- d. The judge erred in finding that once the body and seats were fabricated and installed on the bus chassis, the 2nd respondent took possession of the units for onward delivery to KBS;*
- e. The judge erred in not appreciating that if any unit was not delivered, it was incumbent upon the respondent Bank and KBS to raise the issue of non delivery timeously without delay;*
- f. The judge erred in law and fact in failing to find that by not timeously raising the issue of non-delivery, the appellant was deprived an opportunity to enjoin KBS and seek recompense;*
- g. The judge erred in not appreciating that the issue of delay was a cardinal issue for adjudication and or apportionment of liability;*
- h. The judge erred in failing to appreciate that the 1st respondent Bank placed KBS into receivership and ultimately wound up the company and the 1st respondent did not disclose to the trial court the amount recovered towards the sums owed;*
- i. The judge erred in awarding interest at 18% per annum;*
- j. The judge erred in failing to make a finding on the Third Party Notice and claim of indemnity by the appellant from the 2nd respondent;*
- k. The learned judge erred in law in arriving at a decision that was contrary to the evidence before the court.”*

8. At the hearing of the present appeal, learned counsel Mr. Mansur Issa appeared for the appellant while learned counsel Mr. Gitonga Murugara appeared for the 1st respondent and learned counsel Ms Jakaiga appeared for the 2nd respondent. All counsel filed written submissions and lists of authorities in the matter.

9. The appellant in its submissions reiterated the grounds of appeal emphasizing that the learned judge erred in finding that there was a statement of agreed issues for determination when in fact there was no such statement of agreed issues; that the agreed statement of issues cited by the judge were issues filed by the 2nd respondent who was a Third Party to the proceedings; that the 1st respondent filed its agreed issues that were detailed and set out the extent of the dispute to be determined by the trial court; that the learned judge did not address his mind to the issues as framed by the 1st respondent; that the judge erred in law in not framing any issues for determination; the appellant submitted that following the dicta in **Darcy -v- Jones (1959) EA 121**, the trial court had a duty to frame issues for determination. The decision in **Chandaria -v- Njeri**

(1982) KLR 84 was cited where this Court stated that failure to deal with all issues raised in the pleading and failure to give reasons for believing a witness amounted to a mistrial. The appellant urged this Court to find that there was a mistrial when the trial court failed to frame issues for determination; we were urged to find that the trial judge erred in failing to draw issues and to identify the rival positions of the 1st respondent as Plaintiffs, the appellant as defendant and the 2nd respondent as the Third Party.

10. The appellant submitted that the trial court erred in misdirecting itself as to the status of the 2nd respondent in the suit; that the 2nd respondent was a Third Party in the proceedings and despite being a Third Party, the trial court proceeded to determine the suit as if the 2nd respondent was a defendant in the case; that as a result of this misdirection and error, the trial court did not determine the issue of indemnity raised in the Third Party Notice; the trial court did not determine whether the 2nd respondent was liable to reimburse the appellant or indemnify the appellant from the Counter Indemnity signed by the 2nd respondent; that the judge erroneously held that the 1st respondent had no claim against the 2nd respondent. In support of this submission, counsel cited the case of **Sango Bay Estates Limited & Others -v- Dresdner Bank (1971) EA 17.**
11. The appellant further submitted that the trial court erred in enforcing the performance bond without strict proof thereof; that the performance bond referred to was a contract of surety and not a performance guarantee or performance bond as defined in law; that the bond executed by the appellant did not require payment on demand; that all that the appellant committed itself to was to act as surety that the 1st respondent Bank would finance and pay CMC Motors for the purchase of the vehicles; that the performance bond relied upon in the suit was a misnomer and the trial judge erred and misdirected himself and proceeded on the notion that the bond was a performance guarantee subject to the principle of autonomy when it was not; the appellant submitted that a performance bond being a normal contract of guarantee or surety required strict proof and the trial court was required to determine if the bond executed by the appellant was enforceable; that the 1st respondent did not produce any evidence in support of the claim that seven (7) buses were not delivered to KBS; that there has been no complaint from KBS on non-delivery of seven buses.
12. The appellant submitted that it guaranteed a contract for the supply of 24 vehicles being British Motor Corporation (CMC) buses and the 2nd respondent and KBS altered the contract without the appellant's consent and made the contract to be for a delivery of twenty-four (24) Sanayi Buses. It is the appellant's submission that the primary contract was altered with the legal result that the appellant was discharged from its obligations as surety under the bond; that the variation of the primary contract without the appellant's consent amounted to discharge of the appellant from the bond by operation of law.
13. The appellant further submitted that delay in notification of non-delivery of the seven (7) buses discharged it from its contract of surety; that the buses were to be delivered in 1999 and it was not until 2003 that demand was made for non-delivery of seven buses; that there was considerable delay in calling for the guarantee; that the 1st respondent should have immediately demanded delivery of the 7 units and or called up the loan facility; that failure to do this implies that the loss should lie on the 1st respondent. The appellant cited dicta in **Lickbarrow -v- Mason (1775-1802) ALL ER Rep. 1 at page 3** where it was stated that "we may lay it down as a broad general principle that wherever one of two innocent persons must suffer by the acts of a third he who has enabled such third person to occasion the loss must sustain it."
14. The appellant contends that the 1st respondent is seeking restitution from the innocent appellant when to its knowledge KBS had been wound up and no indemnity could be sought by the appellant and 2nd respondent from KBS. The appellant further submitted that it was not clear if it was 24 or 23 buses that had to be delivered; that the confusion arises because KBS confirmed that 23 Sanayi busses were to be registered in the joint names of the 1st respondent and KBS as the borrower; that whereas 24 buses were to be purchased, only 23 were to be registered in the joint

names.

15. On receivership of KBS, the appellant submitted that during examination-in-chief, the receiver testified that the 1st respondent understood that 24 buses had been delivered but the delivery notes indicated 17 buses were delivered and it was submitted that the trial court ignored this crucial evidence from the receiver.

16. As regards the 18% interest rate awarded by the trial court, the appellant submitted that the performance bond did not provide for payment of interest by the surety and no evidence was tendered in support of the claim for 18% interest rate. Counsel cited the decision in **Kahia -v- Nganga (2004) 1EA 75** where it was stated:

“...We would express ourselves in a similar way as regard the 25% rate of interest ordered by the learned judge since the plaintiff neither pleaded the 25% interest rate nor led any evidence to prove it. We are satisfied that the appellant must succeed on that ground.”

17. The 2nd respondent associated itself with the appellant's submission that the trial court erred in not framing the issues for determination; the respondent submitted that all the 24 buses were delivered as per the correspondence in the letter dated 17th May 1999; that the trial court ignored this letter and ought to have found that the performance bond was discharged and unenforceable; that when KBS was put under receivership, all the 24 buses were sold by the 1st respondent and the proceeds realized from sale had not been accounted for by the 1st respondent; that the 1st respondent having sold the buses was seeking an unjust enrichment. On the issue of interest, the 2nd respondent submitted that the performance bond did not stipulate that interest was payable and no evidence to support the interest rate of 18% was led in court; counsel submitted that the 1st respondent was the author of the saga in this case and it should bear the 2nd respondents costs in the appeal. Counsel cited various judicial authorities in support of its submissions.

18. The 1st respondent in opposing the appeal emphasized that in a suit, issues for determination can either be framed by a party, both parties or the court; that the trial judge clearly identified the issues that were to be resolved in the suit and proceeded to make a determination on those issues; that issues flow from pleadings and in this regard, the trial court correctly made determination on the issues raised in the plaint and defence. The 1st respondent cited the following cases to support its submissions: **Captain Harry Gandy -v- Caspar Air Charters Limited (1956) 23 EACA 139**; **Aga Wanjiru Mwaniki -v- Jane Wanjiru Mwaniki (1997) eKLR**; **North Kisii Central Farmers Limited -v- Jeremiah Mayaka Ombui & 4 others (2014) eKLR**; **IEBC & Another -v- Stephen Mutinda Mule & 3 Others (2014) eKLR** and **Galaxy Paints Company Limited -v- Falcon Guards Limited (2002) 2 EA**.

19. On non-delivery of the seven (7) buses, the 1st respondent submitted that it led evidence on a balance of probabilities to prove that out of 24 buses only 17 were delivered; that only 17 delivery notes were tendered in evidence yet the appellant paid for and financed purchase of 24 buses each completely built with body and seats.

20. The 1st respondent submitted that the performance bond tendered in evidence was not a misnomer; that a contract of surety takes the form of either a guarantee, an indemnity and or a performance bond and that the surety, guarantor or indemnifier assumes personal responsibility for the debt, that in this case, the appellant as surety, took personal responsibility for the debt of the 1st and 2nd respondent.

21. On the issue of alleged delay, the 1st respondent submitted that delay was not raised during trial; that in any event, limitation period had not been pleaded; that the 1st respondent's claim was brought within the limitation period provided in law; that the fact that KBS was placed in

receivership and wound up was an irrelevant consideration because the performance bond contract was between the 1st respondent and the appellant and it had nothing to do with KBS and or AVA; that there is no requirement in law that the performance bond had to be carried out in entirety; that the 1st respondent was right in law in enforcing the bond in relation to the seven (7) non-delivered buses and not the entire 24 buses.

22. Pertaining to the 18% interest rate, the 1st respondent submitted that award of interest is at the discretion of the court; that the appellant had failed to show that the trial judge erred in the exercise of his discretion in awarding the 18% interest rate; the trial court properly evaluated the evidence on record and arrived at correct conclusions of fact and law.

ANALYSIS

23. This is a first appeal and we are obliged to re-evaluate the evidence on record and arrive at our own conclusions. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123**); see also (**Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270**).

24. The overall issue in this appeal is whether the trial judge properly evaluated the evidence on record and arrived at correct findings and conclusions. In considering this appeal, we have re-evaluated the evidence on record, submissions by counsel and the applicable law.

25. The appellant and 2nd respondent submitted that the trial court erred in not framing issues for determination and in failing to do so, a mistrial occurred. The decision in **Kukal Properties Development Limited -v- Maloo & Others (1990-1994) EA 281** was cited to support the proposition that a judge is obliged to decide on each and every issue framed and failure to do so constitute a serious breach of procedure. The appellant further urged this Court to find a mistrial and follow the dicta in **Chandaria -v- Njeri (1982) KLR 84 at 85** where it was observed:

“The pleadings raised numerous issues of fact and law, but no issues were framed and recorded by the trial judge... As a result, the learned judge...failed to deal with many of the issues which he should have decided. In my view, the trial in the High Court and the judgment of the learned judge were so unsatisfactory as to amount to a complete mistrial. Many of the important issues were left undecided and not even considered... I would allow the appeal and remit the suit to the High Court for retrial on properly framed issues...”

26. We have considered the appellants submission on what constitutes a mistrial. This Court stated in **Galaxy Paints Company Limited -v- Falcon Guards Limited (supra)**, that issues for determination in a suit flow from the pleadings filed by the parties. The statement of agreed issues dated 10th August 2007 cited and relied upon by the trial judge was neither signed nor agreed upon by all the parties. We are of the view that the trial court erred in relying on this statement as agreed issues since it was not approved by all parties as containing issues for determination in the suit. It was not open to the trial court to use a statement of issues filed by one party and constitute the statement as agreed issues. However, we pose the question, was any party prejudiced by the trial court’s reliance on the statement of issues dated 10th August 2007?

27. In **North Kisii Central Farmers Limited -v- Jeremiah Mayaka Ombui & 4 Others (supra)**, this Court observed that a judgment must be based on issues arising from the pleadings. In the instant appeal, the 2nd respondent was the plaintiff and the appellant was the defendant. As between these two parties, the primary issues for determination as disclosed in the plaint and defence were whether the performance bond was valid and enforceable; whether the 24 “vehicles” to be delivered were chassis only or buses with chassis and complete body and seats; whether it was proved that 7 out of the 24 buses were not delivered and who was liable for non-delivery. As between the appellant and the 1st respondent *inter se*, there is no claim or issue of indemnity and counter-indemnity emanating from their pleadings as filed.

28. As between the appellant and the 2nd respondent who is a Third Party, the issue for determination was one of indemnity and counter indemnity. Analysis of the judgment of the trial court reveals that the Third Party Notice and the issue of indemnity and counter indemnity between the appellant and 2nd respondent was not determined. We note that the 2nd respondent averred that there was no privity of contract between it and the 1st respondent. To this extent, we uphold the ground of appeal that the learned judge erred in law in not making a determination on the Third Party Notice and the indemnity and or counter indemnity of the appellant *vis-à-vis* the Third Party 2nd respondent.
29. As relates to the other grounds of appeal, it is our considered view that a judgment need not contain a specific heading or title "Issues for Determination." It suffices that in the text of the judgment, the issues that have been identified, considered and determined by the trial court are discernible.
30. The other issue for our consideration is whether the performance bond tendered in evidence was a misnomer and unenforceable. The appellant in its defence dated 12th March 2007 at paragraph 5 thereof admits that it executed a performance bond in favour of the 1st respondent. In **Re Conley (1938) All ER 127** it was stated that a contract of surety-ship is generally meant to be a contract by which personal responsibility for the debt of another is assumed. In its submissions before this Court, the appellant stated that pursuant to the performance bond it executed, it stood as a surety. In **Edward Owen Engineering Ltd. -v- Barclays Bank International & Another (C.A) 1 QB 159**, it was held that a performance bond stands on a similar foot to a letter of credit and the person giving such a guarantee must honour it according to its terms unless there is notice of clear fraud.
31. In the present case, the appellant contends that the document it executed was not a performance contract. In our view, the nature and nomenclature of the document executed by the appellant is immaterial given the facts of this case. Whether it is called a performance bond, an instrument of guarantee or a contract of surety is immaterial; what is critical is that the instrument as executed was a contract between the appellant and the 1st respondent wherein the appellant gave its surety to the 1st respondent that 24 buses would be delivered by CMC to KBS. In **Edward Owen Engineering Ltd. -v- Barclays Bank International & Another (supra)** it was stated that a performance bond or performance guarantee is a guarantee that the suppliers will perform their obligations under the contract and such a contract is enforceable on its terms.
32. It is worth noting that in modern commercial transactions, a performance bond is an aval or endorsement (also called avalization, avalkredit, bon aval, pour aval). The aval is a guarantee added to a debt obligation by a third party who is not the payee or the holder, but who ensures payment, should the issuing party default. The aval (endorsement) implies that a third party, known as a surety or guarantor, is jointly liable for the full amount of the debt with the principal debtor. The third party (guarantor) commits himself to cover the payment of the amount of the credit and its interest, in case the original debtor does not fulfill his or her obligation.
33. In this case, the trial court enforced the contract between the appellant and the 1st respondent in accordance with its tenor, terms and conditions. We find no error in law or fact on the part of the trial court in enforcing the contract between the appellant and the 1st respondent.
34. The appellant further contended that the contract to deliver the 24 buses was varied by KBS and the 2nd respondent. Drawing an analogy from the decision in **Sztejn -v- J. Henry Schroder Banking Corporation (1941) 31 N.Y.S. 2d 631**, we are of the view that a performance bond is independent of the primary contract of sale between the buyer and seller; the person issuing the bond agrees to stand surety and answer when there is either default in presentation of goods or default in payment upon presentation of documents not goods. In the present case, the appellant stood surety that 24 completely built buses with chassis, body and seats would be supplied and

delivered to KBS. The relevant fact that would discharge the performance bond was delivery notes signifying delivery of 24 units of completely built buses with body and seats. The delivery note tendered in evidence shows only seventeen (17) completely built buses were delivered. The appellant in relying on the evidence of the receiver asserts that 24 buses were delivered. However, there are no delivery notes for 7 completely built buses. In our view, he who asserts must prove. The onus to prove that the bond was discharged by way of delivery of 24 buses completely built with body and seats was upon the appellant. The appellant failed to discharge this burden by tendering in evidence delivery notes for the seven buses.

35. A contentious issue in this appeal is whether the 2nd respondent was to deliver 24 vehicle chassis or 24 chassis of buses built complete with body and seats. DW 2 **Titus Thome Mbiti** testified as follows:

“At the time of the case, I was the Financial Controller of CMC Mombasa. I was involved in the transaction... We supply chassis and then the customer identifies what body and seating is required. The Ksh. 2.5 million price was for the bus chassis. When you add the cost of the body to what we quoted to KBS (Mombasa) Limited, the price for one unit would come to approximately 5 million. We then dealt with the performance bond. The chassis were delivered to AVA Mombasa.... The bodies were fabricated by AVA, complete buses including seats were done by AVA. We do not know whether AVA delivered complete buses to KBS. AVA had prepared a letter dated 30th November 1998 to KBS. This was the confirmation of contract between AVA and KBS. There was no time in 1999 that KBS stated it had not received the 24 vehicles.”

36. We have re-evaluated the evidence on record and examined the letters dated 12th October 1998; 30th November 1998 and the Sales Invoice No. 1570 dated 13th November 1998. We have also re-examined the breakdown of the unit price of a single completely built bus with body and seats. From all these documents, it is clear that what was to be delivered was a complete 55 seater bus with body and seats. The unit price of Ksh. 5,070,000/= is broken down as Ksh. 2.5 million for the chassis and the balance being for fabrication of the body and seats. The trial judge properly evaluated these items of evidence at paragraphs 16 and 17 of the judgment and we are satisfied that the court did not err in arriving at the conclusion that what was to be delivered was 24 buses complete with body and seats and not chassis only.

37. We have considered the ground of appeal on the alleged delay on the part of the 1st respondent to make a claim for non-delivery of the seven (7) buses. The issue of delay was not pleaded in the defence. Delay can only be relevant if it goes towards limitation period and in this case, limitation was neither pleaded nor urged as a ground of appeal. It is our finding that the submission on the issue of delay is not meritorious and even if it were to be considered, the delay, subject to the limitation period, does not discharge the obligations due under the performance bond that was executed by the appellant.

38. The appellant further contends that the primary contract the subject of performance bond was varied and altered by KBS and the 2nd respondent with the legal result that it was discharged as surety under the bond. In our view, performance bond is subject to privity of contract between the appellant and the 1st respondent. Any variation of the primary contract done by persons who were not party to the bond left the appellant's surety status and obligations under the bond unaltered. We reiterate the dicta in the case of **Sztejn (supra)** where it was stated that a performance bond is independent of the primary contract of sale between the buyer and seller.

39. On the issue of 18% interest, this Court has often times stated that the award of interest and the rate thereof is at the discretion of the trial court. (See **Yousuf Abdulla Gulamhusein -v- The French Somaliland Shipping Co. Ltd. 1959 EA 25**). Courts have discretion to determine whether interest is to be awarded, the period of interest and the rate of interest. In **B.P. Exploration Co (Libya) Ltd v Hunt (No.2) [1979] 1 WLR 783, [1982] 1 All ER 925**, it was

stated that the fundamental and overarching purpose of judicial discretion on the award and rate of interest is to compensate the claimant for not having the sums owed from the date the loss is suffered and to enable the claimant to be compensated fairly in the circumstances of the case. In **Mohammed s/o Mohamedi -v- Athmani Shamte (1960) EA 1062**, it was held that the court may or may not at its discretion award the contractual rate of interest between the date of institution of the suit and judgment, and whether it does so or not depends upon whether the rate is reasonable.

40.As per the amended plaint in this case, the 2nd respondent prayed for interest at the rate of 18% per annum. In the amended plaint at paragraph 3 thereof, the rate of 18% is made up of 12% per annum on the principal amount of the loan and an additional ½ % per month (6% per annum) by way of liquidated damages in respect of the amount due and unpaid. It is manifest that the additional 6 % per annum is additional interest. In our view, the 6% is a penalty and or default interest.

41.In **Practice Note 1** dated 16th March 1982 cited in **(1982) KLR 495**, it is stated that in the absence of a valid reason for ordering a higher or lower rate of interest, interest is payable at court rates. The trial court neither gave reasons for departing from this practice nor explained why additional default late payment interest at the rate of 6% per annum was payable. In the absence of reasons for departure and justification for default interest rate, we find that the trial court erred in awarding interest on the judgment sum at 18% per annum. To this extent, we allow the ground of appeal relating to the rate of interest. We set aside the rate of 18% per annum and substitute the same with judgment in the sum of Ksh. 35,490,000/= with interest at court rates with effect from the date of the judgment on 24th April, 2014.

42.In our consideration of this appeal, we have made a finding that the trial court erred in not considering and making a determination on the Third Party Notice and the claim for indemnity and counter indemnity between the appellant and the 2nd respondent. We hereby remit for re-trial the Third Party Notice and the claim for indemnity and counter-indemnity between the appellant and the 2nd respondent. For the avoidance of doubt, the judgment entered in favour of the 1st respondent against the appellant is hereby affirmed and upheld and interest on the judgment sum shall be at court rates with effect from 24th March 2003 till payment in full.

43.Except as stated above, this appeal is partially successful and each party is to bear its own costs.

Dated and delivered at Nairobi this 22nd day of April, 2016.

M. KOOME

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JUDGE OF APPEAL

G.B.M KARIUKI

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this

is a true copy of the original.

DEPUTY REGISTRAR