IN THE COURT OF APPEAL

AT NAIROBI

(CORAM; KARANJA, OKWENGU & GBM KARIUKI, JJ.A)

CIVIL APPEAL NO. 124 OF 2008

MWANIKI WA NDEGWA ……..……APPELLANT

AND

NATIONAL BANK OF KENYA LTD…...…….1ST RESPONDENT

MARY MBUKI MUGAMBI ……2ND RESPONDENT

(*Appeal from a judgment/decree of the High Court of Kenya at Milimani Commercial Courts, Nairobi (M.J Anyara Emukule, J) dated 4th April 2008 and delivered in Meru*

in

H.C. Civil Case No. 86 of 2000)

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JUDGMENT OF THE COURT

[1] **Mwaniki wa Ndegwa**, who is the appellant in this appeal, is aggrieved by the judgment of the High Court (Emukule, J), in which a suit he had filed against National Bank of Kenya Ltd (hereinafter the **1st respondent**) and Mary Mbuki Mugambi (hereinafter the **2nd respondent**) was dismissed. As per the amended plaint filed on 18th July 2002, the applicant's suit sought *inter alia* orders of permanent injunction restraining the 1st respondent from advertising or selling the appellant's property known as LR No. 3734/198 (‘***the suit property’***); a declaration that the Charge created over the suit property is invalid and of no effect and an order for immediate discharge of the suit property; and a declaration that any amount due to the 1st respondent in respect of the Charge is owed by the 2nd respondent as the appellant has fully paid his share of the loan.

[2]. The 1st respondent filed an amended defence to the appellant's claim in which it contended that the appellants willingly charged the suit property; and denied that the appellant had made any substantial payment towards the secured debt. In addition the 1st respondent maintained that payments towards the debt were made by a company, Mary Mbuki Distributers Ltd., (*hereinafter referred to as ‘**the company’***), and denied that the appellant had settled its liability, or that the 1st respondent was obliged to pursue the 2nd respondent for any outstanding sum. The 1st respondent therefore urged the Court to dismiss the appellant's suit.

[3] The 2nd respondent also filed a statement of defence in which she admitted that she was running a business in the name and style of "**Mary Mbuki Distributors** Ltd" jointly with the appellant, and that the appellant agreed to have credit facilities given to the company secured by a charge over the suit property. The 2nd respondent maintained that the appellant was the one solely running the business until the business became insolvent in 1986 due to mismanagement. The 2nd respondent denied any liability for payment of the debt and contended that there was no cause of action against her in relation to the 1st appellant's intention to exercise his statutory power of sale. The 2nd respondent therefore prayed for dismissal of the appellant's suit.

[4] During the hearing of the appellant's suit in the High Court, the main issue before the trial judge was the validity or otherwise of the Charge and further Charge. In his judgment delivered on 4th April, 2008, the learned judge dismissed the appellant's claim and held *inter alia* that the Charge and further Charge were valid, and that the 1st respondent was at liberty to follow up any of the guarantors or Chargors including the appellant. However, the learned judge found that there was no valid subsisting statutory notice served on the appellant and therefore held that the 1st respondent had no right to sell the suit property without complying with the law.

[5] Being aggrieved by the judgment of the High Court the appellant lodged this appeal. Before the appeal was heard the 1st respondent served a statutory notice on the appellant for the sale of the suit property. The appellant filed an application under **rule 5(2)(b)** of the **Court Rules** for an order of interlocutory injunction to stop the intended sale. Nonetheless the sale took place before the application could be heard. The appellant then amended his application bringing on board the purchaser of the suit property as the 3rd respondent to the interlocutory application. That application was subsequently heard and orders issued restraining the transfer of the suit property pending the hearing of the appeal on condition that the appellant pays a sum of Kshs. 150,000/= per month in an interest earning account in the joint names of the appellant's counsel, the 1st respondent's counsel and the counsel of the 3rd respondent in the application; in default, of payment of any one instalment the application was to stand dismissed.

[6]. It is not disputed that the appellant failed to pay a total of 10 instalments as a result of which the suit property was transferred to the successful purchaser upon payment of the full purchase price. The appellant filed an interlocutory application seeking to set aside the transfer, but that application was dismissed and the purchaser took possession of the suit property.

[7]. In the meantime directions were given for the hearing of the appellant's appeal to proceed by way of written submissions. Counsel for the appellant and the 1st respondent filed written submissions, but there were no submissions filed on behalf of the 2nd respondent. When the matter came up for highlighting of submissions, Mr. Maina Mbuthia counsel who was holding brief for the advocate on record for the 2nd respondent unsuccessfully applied to have the matter adjourned on the grounds that they had not been able to trace their client. Hearing of the appeal therefore proceeded and the written submissions were highlighted.

[8]. For the appellant it was reiterated that the appellant and the 2nd respondent who was her sister were operating the company which was a beer distribution business; that the business was a flourishing business until the 2nd respondent started diverting funds from the company into her own personal ventures; that protests by the appellant resulted in the 2nd respondent kicking him out of the business premises and changing the business name to "**Jomaki Distributors**" Ltd.

[9] It was maintained that from the facts and evidence it was clear that the appellant was not the principal borrower but was a guarantor; that the appellant and the 2nd respondent signed guarantees of Kshs.5 million each as directors of the principal borrower, (which was the company); that the principal debt was Kshs.5 million; that in December 1996, the appellant deposited amounts totaling to Kshs.7.6 million into the principal borrowers account in the 1st respondent bank; and that the 1st

respondent bank declined the appellant's request to split the debt liabilities between the appellant and the 2nd respondent as guarantors.

[10] Further it was contended that the Charge document did not bear any specified interest rates and that the Charge and the guarantee documents though duly signed by the appellant and the 2nd respondent were not attested by the advocate. This raised the issues as to whether the 1st respondent could make the appellant liable for interest and charges which were variable and applicable between the bank and the principal borrower, and which the Charge document and the guarantee executed did not specify; secondly whether the payments by the appellant to the 1st respondent of Kshs.7.6 million after the principal debtor defaulted, discharged him from his liabilities and finally whether the Charge and guarantee documents were properly executed and attested.

[11] The trial judge was faulted for accepting the testimony of Maina Wachira advocate that he was present when the appellant and 2nd respondent executed the documents, as this was not consistent with the fact that the signatures were on the wrong column. In addition, the learned judge's finding, that the appellant was merely putting his money into a bottomless pit was faulted, it being contended that the appellant had deposited money into the principal debtor's account and that this was acknowledged by the 1st respondent. It was argued that the actions of the 1st respondent amounted to clogging the appellant's right of redemption, and that this Court as a court of justice must rise up to the occasion and grant remedies or relief as may be appropriate.

[12] For the 1st respondent, it was submitted that the court was right in holding that the appellant was not discharged from liability because the credit facility advanced to the principal borrower that was guaranteed by him was attracting interest; that **clause 2(i)(ii)** of the **Guarantee** provided that the appellant would be liable for interest on the amount at rates prevailing from time to time, and also the costs and charges. The court was urged to reject the appellant's attempts to rewrite the contract, which he had voluntarily bound himself to. The case of **Shah vs Guilders International Bank Ltd [2003] KLR** 8 was cited for the proposition that if the parties by their agreements have fixed the rates of interest payable, then the Court has no discretion in the matter and must enforce the agreed rates unless it is shown that the agreed rates are illegal or unconscionable or fraudulent.

[13]. In regard to the validity of the Charge, it was submitted that the requirements of **section 58** of the **Registration of Titles Act** (*repealed)* had been complied with as the documents were attested by an advocate; and that the advocate complied with **section 69 (1)** and **100A** of the **Transfer of Property Act**, and that the appellant being a former employee of the 1st respondent understood the nature of the instruments. Finally, it was concluded that the appellant was served with a proper notice of sale as required by law; and that the suit property has already been sold to a third party who has not been enjoined to the appeal. The case of **Tanzania National Roads Agency vs Kundan Singh Construction Limited [2014] eKLR** was cited in support of the contention that the appeal had already been overtaken by events and should therefore be dismissed.

[14]. This is a first appeal and the duty of the 1st appellate court as was summarized by the East African Court of Appeal in **Selle versus Associated Motor Limited company [1968] EA 123**, is 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 that 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 inconsistence with the evidence in the case generally."***

[15] With the above in mind we have carefully considered the evidence, the respective submissions by learned counsel, and the authorities cited. We note that various facts are undisputed. For

instance the following facts are not in dispute: that the appellant and 2nd respondent who are siblings are directors of Mary Mbuki Distributers Ltd., the 1st defendant company; that a loan and further loan were advanced to the company at the request of the appellant and 2nd respondent; that the two loans were secured by a Charge and a Further Charge on the appellant's property; that the appellant consented to his property being charged and the Charge documents were duly signed by the appellant.

[16] In his judgment, although the learned Judge considered several issues he identified the main issue in the suit as the validity or otherwise, of the Charge and Further Charge. We concur that that was the main issue in the suit. In considering this appeal we revisit this issue from three angles: First, whether the Charge and the Guarantee signed by the appellant were valid documents, and if they were not valid documents what remedy if any is available to the appellant; secondly, whether the credit facility given to the Company and the consequent debt incurred can be apportioned between the appellant and the 1st respondent; and finally, whether the appellant is entitled to the difference between the purchase price paid for the suit property at the auction and the outstanding loan balance as at the date of the auction, and what the fate is of the funds held in the escrow account.

[17] As regards the first issue, the appellant argued that the Charge documents and the Guarantee were invalid because of two main reasons. First, that the Charge and the Guarantee did not specify the rate of interest although the 1st respondent charged interest. Secondly, that the Charge document was invalid as it was improperly executed. For the 1st respondent it was argued that the Charge documents provided that the interest rates chargeable would be at the ruling rates for bank advances in Kenya as revised from time to time, and that this was sufficient to determine the interest.

[18] We have examined the Charge and the Further Charge documents both of which were produced in evidence in the trial court and form part of the record of appeal. We note that the appellant's complaint was not that the interest rate was high or that the same was unconscionable, but that the same was not specified in the security documents. In this regard **clause 1(a)** of each of the two documents has an identical provision that obligates the borrower to pay the principle sum:

> ***"together with interest at such rate or rates as the bank shall in its sole discretion from time to time decide with full power to the bank to charge different rates for different accounts…"***

[19] Similarly an examination of the Guarantee document reveals **clause 2(i)** that makes provision for the payment of interest as follows:

> ***"Such interest (in the absence of any agreement to the contrary) shall be calculated with the usual rests and at the Ruling Rates from time to time for Bank advances in Kenya."***

[20]. 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. The appellant herein was no stranger to the security documents, as he had previously worked as a banker (at one time with the 1st respondent). 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. For the appellant to now turn round and assert that lack of a specified rate of interest invalidates the documents is not tenable.

[21]. Besides, the appellant had previously serviced the loan amount including payment of interest, without raising any issue regarding the lack of a specified rate of interest. We restate the position taken by this Court in **Ajay Indravadan Shah v 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."

[22] 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 v 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. Accordingly the Respondents had not made out a case for injunctive relief in their favour and the order of the

High Court had no sound basis."

[24] The appellant argued that the advocate who attested the security documents was an advocate of the 1st respondent and not his independent legal counsel, and that the said advocate was not present when he was executing the documents. **Section 58 (1**) of the **Registration of Titles Act** (*Repealed)* provided for category of persons who could attest documents for registration under that Act.

One of such category of persons is an advocate. It was not disputed that one Maina Wachira, an advocate who is also indicated as having prepared the security documents, attested the signature of the appellant in the security documents. It was the contention of the appellant that the said advocate was the advocate of the 1st respondent and not an independent legal counsel of the appellant. However, we are not aware of any legal requirement that a Chargor's signature must be attested by an independent legal counsel nor did the appellant provide any such authority to us.

[25] In **Noorbegum Fazal (suing as a holder of power of attorney in favour of Nadra Hussein Fazal) v Diamond Trust Bank [2015] eKLR,** the High

Court rendered itself as follows:

"The court thus found itself in agreement with the Defendant that the new assertion of the invalidity of the Charges was merely an afterthought as the Plaintiff ought to have demonstrated that she had raised the issue previously or at all the material times she had sought to stop the sale of the subject property by way of public auction.

Alleging that the Chargor was not present at the time the Charges were executed was not enough particularly after the Borrower had enjoyed the benefit of the financial accommodation that was accorded to her by the Defendant. If indeed, the Charges were not validly executed, the Borrower ought not to have taken the loan, which has been outstanding since 2009. Abetting an illegality would not confer any benefit or defence upon a person who would want to avoid the consequences of his default.

Indeed, the onus was on the Borrower to demonstrate that the Chargor could not have been present at the time the said Charges were being executed. Her acquiescence of the alleged illegality, if at all the same was true, amounted to a waiver to object and for which the court could not be persuaded to grant an injunction on this ground."

[26]. We are entirely in agreement with the position taken by the High Court and would find that the same holds true for the appellant herein. It is evident that the issue of attestation was an afterthought because the appellant never raised this issue during all the times that he was negotiating with the 1st Respondent on the mode of payment of the loan.

[27]. Similarly in **Lalchand Fulchand Shah & Another v Investments & Mortgages Bank Limited [2000] eKLR,** A.B. Shah JA (as he then was) dealing with an appeal anchored on a similar issue, had this to say:

> ***"If a document which is ex-facie totally valid and properly attested, a party to be charged therewith cannot simply get away from it by stating that an advocate did not attest it. Quite obviously if the Shahs had called upon Mr. Sheth to say that he appended his signature and placed his stamp in the absence of the Shahs, Mr. Sheth would deny the allegation. It would be very simple for any Chargor to postpone an auction sale by simply saying that the Charge is not properly attested. If such a state of affairs was allowed to be taken cognizance of there would be no end to the Chargors streaming to courts to stop an auction sale on that ground. If the Shahs were serious about what they say in regard to attestation they ought to have filed a declaratory suit to avoid the Charge by making the Bank, the borrower and Mr. Sheth defendants to that suit. Alternatively they could have added Mr. Sheth and the Borrower as co-defendant in the suit they have filed. If Mr. Sheth acted wrongfully he would possibly face the consequences. I also note that no irregularity is alleged against the Bank. None is pleaded or particularized. Even if I were to assume that the Charge was not attested by Mr. Sheth, the Bank upon receiving the document was not required to inquire into the authenticity of the attestation. If a banker is presented with a Charge ex-facie valid he is not put on any inquiry to ascertain if the advocate had signed in the presence or in the absence of the Chargor. I agree entirely with the observations of the learned Judge when he says that in all circumstances the credibility of the Shahs is very doubtful.***
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> **…….**
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> ***The fact of attestation or non-attestation is a fact peculiarly within the knowledge of the Shahs. General rule of evidence is that if a negative averment is made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative, is to prove it, and not he who avers the negative. It was therefore for the Shahs to positively prove the same at least to establish a prima-facie case with a probability of success. They could not do so by a mere assertion. As I pointed out earlier they ought to have made Mr. Sheth and the***
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> ***Borrower parties to the suit."***

[28] On the above premises, we find, that the Charge documents and the Guarantee are explicit that the parties did agree on how the rate of interest was to be determined, and that the appellant failed to establish that these security documents were not properly executed. We therefore have no hesitation in rejecting the appellant's contention that the security documents were not valid.

[29] On the question whether liability in regard to the credit facility could be apportioned between the appellant and the 1st respondent, the appellant strongly submitted both in the High Court and before this Court that having paid more than the amount of Kshs 5,000,000/- that he personally guaranteed, he ought to have been discharged from the obligation to pay any further amounts to the 1st respondent because he was only a guarantor and not the Principal Borrower. This submission by the appellant formed the 1st - 4th grounds of appeal.

[30] .Having considered these grounds and the evidence that was before the trial Judge, we find that the evidence was crystal clear that the appellant herein being the owner of the suit property executed the Charge and the Further Charge as the Mortgagor and covenanted with the 1st respondent to pay all the amounts payable by the Principal Borrower to the Bank. By executing the Charge and Further Charge the appellant agreed to pay the loan amount given to the Principal Borrower together with all the charges including interest.

[31]. The appellant cannot turn round and claim that he is only liable for payment of only the

amount he guaranteed. Indeed the appellant's liability was twofold: First as mortgagor having charged his property to secure the loan advanced to the Principal Borrower, and secondly as a Guarantor having signed a guarantee for the repayment of the advances made to the Principal Borrower. He can therefore only be discharged from his liability if the entire amount due under the charge document is paid in full. Although the Guarantee provided that the total amount recoverable "**shall not exceed Kshs. 5,000,000/=**", **clause 2** of the **Guarantee** provided for payment of interest on that amount. Therefore in addition to the amount of Kshs 5,000,000/- the appellant also guaranteed payment of interest on the credit facility and his liability cannot therefore be limited to KShs. 5,000,000 where interest levied by the 1st respondent has accrued.

[32] In **Ebony Development Company Ltd v Standard Chartered Bank Ltd [2008] eKLR,** the High Court stated the following regarding the obligation of a guarantor:

> ***"The obligation of guarantor is clear. It (sic) becomes liable upon default by principal debtor…… It is not guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum"***
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> **Halsbury's Laws of England 4th Edition Vol 20 para 194** page 124 puts the obligation clearly and succinctly as follows:
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> *"**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, without being entitled to require either notice of the default or previous recourse against the principal....."***

[33] In our view the appellant as mortgagor and guarantor was liable to the 1st respondent under the security documents for the total amount due under the mortgage including interest, and the 1st respondent is not under any obligation to discharge the appellant or apportion the debt arising from the credit facility between the appellant, the 2nd respondent and the Principal Borrower.

[34] . As already noted the 1st respondent has sold and transferred the suit property to a third party. The suit property was sold for Kshs. 47,000,000/= whereas the outstanding loan amount at the time of the sale was KShs. 21,561,563/=. The appellant has urged this court to order that the balance thereof being Kshs. 25,438,437/= after offsetting the outstanding loan be released to him. The 1st respondent on the other hand did not make any submissions with regard to this issue. We note that this issue arose after the appellant had filed his memorandum of appeal and therefore this issue does not comprise his grounds of appeal. This issue was therefore not canvassed in the High Court. On our part we take the view that the appellant should make his claim for that amount in the High Court so as to not only give a chance to the 1st respondent to respond but also for that issue to be dealt with in the High Court where the matter was dealt with in the first instance.

[35] On the issue of the fate of the funds held in the joint account we note from paragraph 6 at page 4 of the appellant's submissions, that the funds in the joint account are subject of an application filed in ***Civil application No 141 of 2009*** which is still pending in this Court. We also note that the 1st respondent did not address the Court on this issue. Therefore we are of the view that this issue should be best dealt with in ***Civil Application No. 141 of 2009*** where the Court would have the benefit of hearing submissions of all the parties. We would therefore make no orders in regard to the funds in the escrow account.

The upshot of the above is that this appeal fails. It is accordingly dismissed with costs to the first respondent.

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

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR