IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 271 OF 2005

BETWEEN

PAUL ODHIAMBO EDWARD GONDI ……..……...……..... APPELLANT

AND

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

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Emukule, J.) dated 13th April, 2005

in

H. C. C. C. No. 1938 of 2000)

****

JUDGMENT OF THE COURT

1. The appellant herein is the registered proprietor of L. R Nakuru Municipality/ Block 5/169 (suit property) which has been charged to secure several financial facilities granted by the respondent. Initially by a charge dated 28th September, 1982 the appellant charged the suit property as security for the repayment of advances and/or other financial accommodation not exceeding Kshs.150,000/= granted by the respondent to Cholaco Tools Limited. Thereafter, by a variation of charge dated 28th October, 1986 the terms of the initial charge were varied to the effect that the charge would be a continuing security for advances and other financial accommodation not exceeding an aggregate of Kshs.150,000/= to be granted to the appellant and Cholaco Tools Limited jointly and severally.

2. On 13th November, 1989 a debenture was executed between the respondent and Blowmocans Limited (the principal borrower) wherein the principal borrower charged all its undertaking, goodwill and assets in favour of the respondent. The debenture was security for sums limited to Kshs.150,000/=. By a further charge dated 30th November, 1989 the appellant charged the suit property once again as security for provision of financial accommodation to the principal borrower for sums not exceeding Kshs.4,000,000/=.

3. Subsequently, by a notification of sale dated 27th April, 1998 the appellant was informed of the respondent's intention to sell the suit property by way of public auction in the event he failed to pay Kshs.45,377,567.85/= which was due as at 31st May, 1997. The appellant through his advocates protested

that the notification of sale was a nullity having been issued before the mandatory statutory notice under ***section 74*** of the Registered Land Act (repealed). Thereafter, the intended sale was called off. The appellant through several correspondences requested a statement of account in respect of the principal borrower and an account of sale proceeds of the principal borrower's assets which had been sold by the receiver appointed by the respondent. According to the appellant, the said accounts were never furnished.

4. On 25th January, 2000 the respondent demanded payment of Kshs.392,340.20/= from the appellant on account of his personal account. The appellant intimated his willingness to pay the said sum against the discharge of the suit property. Again the appellant was served with a notification of sale in the event he failed to pay the aforementioned amount. Consequently, the appellant's advocate gave an undertaking to the respondent to pay the amount within three days of registration of the discharge. By a letter dated 10th July, 2010 the respondent informed the appellant that it could not discharge the title to the suit property until the principal borrower's debt which stood at Kshs.80,194,265.95/= as at 10th July, 2010 was paid. In the appellant's view the same was a calculated step by the respondent to clog his right of redemption.

5. Ultimately, the appellant filed suit seeking various injunctive and declaratory orders. The appellant alleged that the second charge was a nullity for non-compliance with the law; the respondent had breached the terms of the charge by allowing the principal borrower to overdraw its account beyond the agreed limit hence his liability under the charge had been discharged. In the alternative the appellant's liability was limited to a maximum Kshs.150,000/= by the charge. He also imputed fraud on the part of the respondent. He alleged that the respondent's conduct was a calculated intention to convert him into the principal borrower by pressurizing him to pay Kshs.80,194.265.95/= contrary to the law.

6. In its statement of defence, the respondent averred that the securities in question had been executed and registered in accordance with the law. The respondent denied the allegations of fraud and breach of contract on its part. It averred that the title to the suit property could only be discharged once the advances made to the appellant and the principal borrower were paid in full.

7. In his evidence, the appellant testified that he held a personal account with the respondent wherein he had an overdraft facility of Kshs.150,000/= which was increased to Kshs.500,000/= upon his request. The overdraft facility was secured by a charge on the suit property. He admitted to executing the further charge which was a guarantee of advancements granted to the principal borrower by the respondent not exceeding Kshs.4,000,000/=. He also admitted to having executed a guarantee dated 22nd July, 1989 for Kshs.2,000,000/= in favour of the principal borrower. However, he maintained that his liability towards advances to the principal borrower was to a total aggregate of Kshs.4,000,000/=. The appellant contended that he never authorized the respondent to disburse moneys to the principal borrower in excess of Kshs.4,000,000/=. According him, the respondent never explained how the figure of Kshs.80,194,265.95/= which was allegedly due was computed.

8. He testified that the respondent had appointed receivers over the principal borrower on 14th April, 1993. Since then the receivers had neither furnished the appellant with any statement of accounts nor filed returns to the Registrar of Companies. Further, the principal borrower was a going concern and therefore the receiver ought to have realized proceeds after the sale of the company. The appellant maintained that he never authorized the respondent to open a letter of credit in the amount of Kshs.19 - 25 million for importation of machinery in favour of the principal borrower. Consequently, he was not liable for the sum of Kshs.19,901,987.70/= claimed by the respondent from the importation. The total value of the imported machinery was £stg. 850,000 equivalent to Kshs.17,000,000/=. He was not aware whether during the period of receivership the imported machinery had been sold and proceeds applied towards the reduction of the amount owing. The appellant maintained that he was at all material times ready and willing to pay Kshs.396,340.20/= which related to the variation of charge but the respondent declined to receive the same.

9. Mr. Goerge Kipkoech Ruto, the then Accounts Manager gave evidence on behalf of the respondent. He testified that he was familiar with the appellant's and the principal borrower's accounts. He stated that the sum secured by the charge was Kshs.4,150,000/=. According to him, the appellant's liability in respect of

the principal borrower was Kshs.2,000,000/= under the personal guarantee dated 22nd June, 1989 and Kshs.4,150,000/= under the further charge making it a total of Kshs.6,150,000/=. The respondent demanded payment upon realization that the overdraft facility had been exceeded. The amount owing under the appellant's personal account was Kshs.393,720.20/= and the same was still outstanding. The respondent declined to discharge the suit property because the same was security for other outstanding debts. As at November, 1999 the amount owing under the principal borrower's account was Kshs.80,194,265.95/=. With regard to the company's assets, he testified that the receiver was not able to get any assets the same having been removed from the company premises. It was his evidence that Valley Auctioneers broke into the premises, took and sold the assets. The receiver sued the auctioneers in H.C.C.C No. 2513 of 1993 and were awarded Kshs.8,500,000/= as the value for the assets which were taken vide a decree dated 18th May, 1994. At the hearing of the suit the said decree had not been executed.

10. On cross examination, Mr. Ruto admitted that the guarantee of Kshs.2,000,000/= was not part of the further charge. The respondent neither sued under the guarantee nor filed a counter claim on the same. The amount of Kshs.2,000,000 was included in the amount allegedly owing under the third charge despite the same not having been secured thereunder. He confirmed that some sheets were missing in the copy of statement of accounts produced by the respondent. Hence he was not able to give an explanation of escalation of figures therein. He testified that the figure of Kshs.80,194,265.95/= included sums which were not secured under the further charge.

11. After taking into consideration the foregoing the trial court vide its judgment dated 13th April, 2005 held that the appellant's suit had failed substantially and issued the following orders: -

i. ***The plaintiff (appellant) shall pay to the defendant (respondent) the sum of Kshs.393,537.20/= (not Kshs. 383,532.20/= as repeatedly stated) on account of the plaintiff's personal account number 001-043-806 together with interest thereon @ 15.5%***

a. ***from 1.11.2000 till the date of filling suit and***

b. ***interest on the said principal sum together with interest thereon aforesaid (first aggregate sum) from the date of filing suit till the date of judgment, (the second aggregate sum), and***

c. ***interest on the second aggregate sum from the date of judgment till payment in full.***

ii. ***There shall also be judgment for the defendant in the sum of Kshs. 4,150,000/= together with interest thereon @ 15.5% p.a.***

a. ***from 1.02.1990 (the registration of the charge) to the date of filing suit on the said principal sum and interest,***

b. ***on the said principal sum as aforesaid (the first aggregate sum), from the date of filing suit till the date of judgment,***

c. ***interest on the said first aggregate sum from the date of judgment at the said rate till payment in full.***

iii. ***Upon payment of the moneys set out in paragraphs 1 and 2 aforesaid the defendant shall discharge the suit property forthwith.***

iv. ***It is declared that no valid statutory notice was served upon the plaintiff by the defendant, and consequently no statutory power of sale had arisen, and no valid auctioneer's notice of sale could be served upon the defendant.***

v. ***It is declared that the plaintiff is not liable for the Blowmocans debt in excess of the sum secured under the variation of charge and further charge.***

12. Aggrieved with that decision the appellant filed the appeal herein predicated on 70 grounds set out in the memorandum of appeal which in our view is long-winded and repetitive. ***Rule 86 (1)*** of the ***Court of Appeal Rules*** stipulates in mandatory terms the contents of a memorandum of appeal thus;

> ***?A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make.?***

(Emphasis added).

13. In ***Abdi Ali Dere -vs- Firoz Hussein Tundai & Others - Civil Appeal No. 310 of 2005*** this Court expressed itself as follows;

> ***?The appellant filed a long-winded and repetitive memorandum of appeal raising 26 grounds of appeal. With all due respect to the appellant who appeared to labour under the false impression that prolixity and repetition of issues would enhance the chances of his appeal, this appeal, in our view, turns on the following five issues only….?***

Parties in an appeal ought to endeavor to set out the grounds of appeal concisely without repetition or arguments. The 70 grounds can be aptly summarized as follows:- The learned Judge erred;

i. ***By failing to appreciate the relationship between the respondent and Blowmocans Limited on one hand and the appellant on the other;***

ii. ***In holding that the issue of guarantee was not pleaded nor was there any relief sought in relation to any guarantee;***

iii. ***By failing to appreciate that the further charge was void for want of consideration and being in breach of Section 71 of the Registered Land Act;***

iv. ***By failing to find that the respondent allowed Blowmocans Limited to overdraw its account in excess of the amount guaranteed by the appellant;***

v. ***By failing to find that the respondent's conduct which was in breach of the guarantee discharged the appellant of all liability in respect of advances to Blowmocans Limited;***

vi. ***By failing to find that the respondent had totally failed to recover the outstanding sums from the Blowmocans Limited;***

vii. ***By failing to appreciate that the respondent had not given full accounts of the operations of the receivership over Blowmocans Limited;***

viii. ***By failing to appreciate that the maximum rate of interest under the charge and further charge was 15.5%;***

ix. ***By failing to grant a mandatory injunction to the effect that the suit property be discharged upon payment of the sum of Kshs.393,720.70/= which was outstanding in the appellant's personal account;***

x. ***By failing to appreciate that the respondent had not filed a counter claim against the appellant.***

14. This Court vide Civil Application No. Nai. 122 of 2006 issued an order of stay of execution of the impugned judgment and decree pending the hearing and determination of this appeal.

15. The appeal was disposed by way of written submissions and oral highlights by the parties counsel.

Mr. James Ochieng Oduol appeared for the appellant while Mr. Wambua Kilonzo together with M/s Okimaru appeared for the respondent. The appellant condensed its grounds under the memorandum of appeal and set out the following as issues arising for determination:-

i. ***Whether the variations of charge and further charge dated 28th October, 1986 and 30th November, 1989 were invalid, null and void for want of consideration and compliance with Sections 71 and 110 of the Registered Land Act and Rule 7(2) of the Registered Land Rules;***

ii. ***Whether there was a guarantor-creditor relationship between the appellant and the respondent and whether the same was pleaded and relief sought in respect thereof;***

iii. ***Whether the respondent acted in breach of the terms of the charge and guarantee instruments and whether the respondent's breach aforesaid discharged the appellant from all liability in respect of advances made to Blowmocans Limited;***

iv. ***Whether the respondent is guilty of clogging the appellant's equitable right of redemption;***

v. ***Whether the appellant proved its case to the required standard and was entitled to the grant of the prayers sought in his plaint dated 1st November, 2000; and***

vi. ***Whether the Court was right to enter judgment in favour of the respondent herein without a counterclaim.***

16. The appellant faulted the learned Judge (Emukule, J.) for finding that the further charge was valid. It was Mr. Ochieng's contention that ***section 110 (1) & (2)*** of the Registered Land Act (repealed) provided that a chargor executing a charge ought to appear before the Registrar or an advocate who should explain the legal effect of the contents of the charge and ascertain whether the chargor freely and voluntarily executed the same. The appellant testified that he did not appear or execute the variation of the charge before Mr. Rachuonyo advocate. By a letter dated 30th June, 1986 the respondent's then advocates forwarded the further charge to the respondent to procure the appellant's signature and then return the executed charge. Notwithstanding the fact that the appellant signed the further charge the import of the charge was never explained to him.

17. Under ***section 71*** of the Registered Land Act, a charge becomes effective on the date of registration. In this case, the further charge was registered on 1st February, 1990 and became effective from that date. It was submitted that the further charge was not supported by any consideration because the respondent had allowed the principal borrower to overdraw its account by Kshs.4,245,488.25/= before the registration of the further charge. The respondent's witness gave evidence that the money may have been disbursed on the same date that the further charge was executed. If there was any consideration the same was past consideration which is not sufficient. To buttress the foregoing the appellant relied on ***Chitty on Contract*** at page 232 paragraph 3-026 which states,

> ***?The consideration for a promise must be given in return for the promise. If the act or forbearance alleged to constitute the consideration has already been done before, and independently of, the giving of the promise, it is said to amount to ?past consideration'; and such past acts or forbearance do not in law amount to consideration for the promise.?***

18. It was the appellant's contention that the relationship between himself, the respondent and the principal borrower was set out by the three instruments. The first being the guarantee dated 22nd June, 1989 wherein the appellant guaranteed financial accommodations granted by the respondent to the principal borrower. The second is the debenture dated 13th November, 1989 between the respondent and the principal borrower. The third is the further charge dated 30th November, 1989 made pursuant to clause 5 (a) of the debenture between the appellant, the respondent and the principal borrower. The charge was security for the financial accommodation of the principal borrower by the respondent for an aggregate amount not exceeding Kshs.4,000,000/=. From the aforementioned instruments the relationship

between the appellant and the respondent was one of a guarantor and guarantee and not a chargor and chargee as held by the trial Judge. The appellant maintained that the issue of a guarantee was pleaded by the appellant in his plaint; the guarantee relationship and the respondent's obligation thereunder were clearly spelt out. Further, Mr. Ruto who testified on behalf of the respondent admitted that the appellant was a guarantor.

19. It was submitted that the respondent owed the appellant the following obligations under the further charge and guarantee: -

a. ***Keeping the appellant posted of the status of Blowmocan's account at any given time;***

b. ***Ensuring Blowmocan's accommodation would not exceed the sum of Kshs.4,000,000/=;***

c. ***The respondent and the principal borrower would not enter into any other arrangements affecting his guarantee without notice to him and his consent being obtained;***

d. ***One account would be maintained by the company with the respondent;***

e. ***Being a guarantor, his guarantee could be called upon only upon the principal borrower being unable to pay;***

f. ***The guarantee would become due upon the respondent issuing a notice and the notice period expiring; and***

g. ***The principal borrower's account would be responsibly, prudently and diligently maintained by the parties, especially the respondent.***

20. According to the appellant, the respondent had breached the above mentioned obligations. Placing reliance on the decision of ***Rees -vs- Berrington (1795) 2 Ves 510; 30 E.R. 652*** it was argued that a guarantor is deemed discharged if he/she is not kept posted on the status of the debt and account guaranteed. The appellant argued that he was also discharged on account of the respondent allowing the principal borrower to exceed the guaranteed amount and issuing a letter of credit in favour of the principal borrower without his consent. The appellant contended that the variation of the terms of borrowing between the principal borrower and the respondent without the consent of the appellant completely discharged the appellant's liability under the further charge.

21. The appellant faulted the learned Judge for failing to appreciate that the respondent had failed to pursue the principal borrower for recovery of any money before pursuing the appellant and hence converted the appellant into the principal debtor. Relying on the case of ***Pollack & Another -vs- Everett 1. Q.B.D. 991*** it was submitted that respondent breached the terms of the guarantee by delaying to call up the amount due from the principal borrower until it ceased operation hence denying the appellant an opportunity to mitigate his losses by pursuing the principal borrower.

22. The appellant argued that the respondent had by its conduct clogged his right of redemption by first, declining to discharge the suit property despite his willingness to pay Kshs.393,537.20/= which was outstanding on account of his personal account. Second, by consolidating the charge with respect to facilities granted to the appellant personally and facilities granted to the principal borrower contrary to ***section 84*** of the Registered Land Act. Third, by demanding payment of sums not secured by the further charge.

23. It was further submitted that the respondent had altered the interest rate under the instruments without the notice or consent of the appellant. In the appellant's view he had proved his case to the required standard. Lastly, Mr. Ochieng submitted that the learned Judge erred in entering judgment in favour of the respondent yet the respondent had not filed a counterclaim. In his view the learned Judge ignored a cardinal principle of law, that is, that a court can only determine issues raised by pleadings filed by parties. He argued that it was misdirection for the learned Judge to hold that the appellant prayed for the

determination of the ultimate liabilities of parties.

24. Mr. Kilonzo, in opposing the appeal, argued that the trial court's judgment was unimpeachable. The respondent's submissions were based on 14 broad thematic areas which were in line with the issues identified for determination by the trial court. It was submitted that the further charge was properly executed by the appellant because he admitted in his own testimony that he read and agreed with the terms therein by signing the same. It was the respondent's contention that the variation of charge was executed by the appellant in the presence of Mr. Rachuonyo Advocate while the further charge was executed by the appellant in the presence of one S. K. Chepkonga Advocate. According to the respondent, the trial Judge correctly found that it did not consolidate charges contrary to ***section 81*** of the Registered Land Act (repealed) since there was only one charge in this case. Relying on the decisions of this Court in ***Lalchand Fulchand Shah & Another -vs-Investments & Mortages Bank Limited 2000 eKLR*** and ***Mrao Limited -vs-First American Bank of Kenya Ltd & 2 others (2013) eKLR*** Mr. Kilonzo argued that the appellant should not be allowed to escape liability on allegations that the executed instruments were invalid.

25. With regard to consideration in the further charge, it was the respondent's position that the request by the appellant to the respondent not to call for immediate repayment of the principal moneys and interest secured under the charge is an act of future, not past, hence there was adequate consideration. The request made was intended to create legal relations between the parties and it is the basis upon which the respondent acted.

26. It was submitted that the failure to comply with ***section 74*** of the ***Registered Land Act*** was not fatal because the same could only attract a declaration that the respondent could not exercise its statutory power of sale until a proper and valid statutory notice is issued.

27. Mr. Kilonzo maintained that the appellant's right of redemption was not clogged by the respondent because he still had not paid the outstanding debt which was secured by the suit property. The appellant in his own evidence had admitted his liability in respect of the further charge as limited to Kshs.4,000,000/= plus interest. In the circumstances the appellant had not suffered any loss or damage. He submitted that the trial court was correct in holding that the issue of a guarantee had not been pleaded by the appellant and that the respondent had not departed from the terms of the charge. The issue of a guarantee arose for the first time during oral submissions in the trial court by Mr. Ochieng who tried to change the course of the case. He referred to a guarantee agreement whereas there was no such agreement. According to Mr. Kilonzo, the learned Judge correctly exercised his discretion in granting the orders he did. In Mr. Kilonzo's view the issue of a counter claim was a red-herring and the same was not raised in the memorandum of appeal. He argued that there was no reason for this Court to interfere with the trial court's orders. Finally, the respondent contended that the costs for the High Court suit and the appeal herein ought to be borne by the appellant.

28. Rule 29 (1)(a) of the ***Court of Appeal Rules*** provides:-

> ***?29 (1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—***
>
> ***a) to re-appraise the evidence and to draw inferences of fact; …***

Bearing in mind our duty on a first appeal, we have considered the record, submissions by counsel and the law. We are of the view that the following issues arise for determination**:-**

i. ***What was the nature of the relationship between the appellant and the respondent vis-à-vis the principal borrower?***

ii. ***Whether the variation and further charge were valid.***

iii. ***Whether the respondent breached the terms of the charge and if so, what was the consequence of***

such breach?

iv. ***Whether the respondent was guilty of clogging the appellant's right of redemption.***

v. ***Whether the trial court erred in entering judgment in favour of the respondent.***

29. In determining the nature of the relationship between the parties regard has to be given to the construction of the necessary instruments. The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement. In ***Ford -vs- Beech (1848) 11 QB 852*** at 866:

> ***?The common and universal principle ought to be applied: namely that (a contract) ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties to be collected from the whole agreement, and that greater regard is to be had to the clear intention of parties than to any particular words which they may have used in the expression of their intent.?***

This Court in ***Savings & Loan Ltd -vs- Mayfair Holding Ltd – Civil Appeal No. 152 of 206*** held,

> ***?The object of construction of terms of a written agreement is to establish therefrom the intention of the parties to the Agreement which must be approached objectively. The question in this appeal is not what the appellant or the respondent meant or understood by the words used but the meaning which the particular clause would convey to a reasonable person having all the background information that was available to the parties at the time of the contract (See Investors Compensation Scheme Ltd. -vs- West Bromwich Building Society (1998) 1 W.L.R at 912).?***

30. It is our considered view that the necessary documents which establish the relationship in question are the initial charge dated 28th September, 1982, the variation of charge dated 28th October, 1986, and the further charge dated 30th November, 1989. In the above documents the appellant is referred to as the chargor while the respondent is referred to as the lender. We find and hold that if the words used in the agreement are clear they should be construed in their ordinary meaning so as to establish the intention of the parties. In ***Shore -vs-Wilson (1842) 9 CI & Fin 355,*** 565 Tindal C.J. held:

> ***?The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such a case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible..... The true interpretation, however of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated , that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for both reason and common sense agree that by no other means can language of the instrument be made to speak the real mind of the party.?***

31. Having perused the charge instruments we note that the appellant stood in the position of a chargor by providing the suit property as security for financial accommodations granted to the principal borrower. We agree with the trial court that the appellant's case was based on restraining the respondent from enforcing its rights as a chargee and discharge of the charge over the suit property. We further concur with the trial court that the issue of the appellant being a guarantor had not been raised in the pleadings

and could not be considered. See ***Nairobi City Council -vs- Thabiti Enterprises Ltd – Civil Appeal No. 264 of 1996***. Therefore, the relationship between the appellant and the respondent was that of a chargor and chargee.

32. On the validity of the variation of charge and the further charge, the appellant argued that he did not execute the variation of charge in the presence of Rachuonyo Advocate hence the mandatory provisions of ***section 110 (1) & (2)*** of the Registered Land Act (repealed) were not complied with. ***Section 110*** provided,

> ***"110 (1) Subject to subsection (3), a person executing an instrument shall appear before the Registrar or such public officer or other person as is prescribed and, unless he is known to the Registrar or the public officer or other person, shall be accompanied by a credible witness for the purpose of establishing his identity.***
>
> ***(2) The Registrar or public officer or other person shall satisfy himself as to the identity of the person appearing before him and ascertain whether he freely and voluntarily executed the instrument, and shall complete thereon a certificate to that effect.***

33. We note that the appellant in his own evidence did admit to having read and agreed with the terms of the variation of charge and subsequently executing the same. As to whether he appeared before an advocate wherein the legal import of the charge was explained, we agree with the following observation by the trial Judge: -

> ***?However upon cross-examination the plaintiff confirmed that he indeed executed the charge, the variation of charge and further charge. As to whether he did not execute those instruments before an advocate who gave the verification certificate, the plaintiff failed, in my view, to discharge that burden or onus. His statement that he did not know which of the two Rachuonyos before whom he may have executed those instruments suggests to me, that the effect of those instruments was explained to him by an advocate called ? Rachuonyo' but that his only problem was merely that he could not remember which one of them gave the verification certificate.***
>
> ***I reject this contention. Firstly, the charge (of 28.09.1982) was executed before one Njage N. Nganga Advocate. Secondly, the instrument of variation of charge (of 28.10.1986) was executed before C. O. Rachuonyo who also witnessed the signatures of the defendant's attorney who executed the variation of charge. Thirdly, the variation of charge and further charge (of 30.11.1989) was executed by the plaintiff before one S. K. Chepkonga, Advocate who also verified the execution and rendered his certificate.?***

34. Shah, J.A (as he then was) in ***Lalchand Fulchand Shah & Another -vs- Investments & Mortgages Bank Limited (2000) eKLR*** held,

> ***?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… 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.?***

35. The appellant also argued that the further charge was not valid due to lack of consideration because the amount secured was disbursed to the principal borrower before the charge was registered. It was the appellant's contention that the further charge was executed on 30th November, 1989 and registered on 1st February, 1990. Under ***section 71*** of the ***Registered Land Act*** the further charge took effect on the date of registration. It was argued that from the statements of account the principal borrower's account had been overdrawn by Kshs.2,643,132.40/= at the time of execution and a day after the amount had escalated to Kshs.6,888,620.25/=. From the record and statements provided there is no proof that the amount of

Kshs.4,000,000/= which was the subject of the further charge was credited into the principal borrower's account or that it formed part of the Kshs.6,888,620.25/= which was overdrawn as at 1st December, 1989. Further, as pointed out by the learned Judge there was no evidence of a drawdown of the secured sum on 1st December, 1989.

36. ***Chitty on Contracts, Vol. 1, 29th Edition, at paragraph 3-004*** defines consideration as follows:-

> ***?The traditional definition of consideration concentrates on the requirement that 'something of value' must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller's promise to deliver and can be described either as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer. It should be emphasized that these statements relate to the consideration for each promise looked at separately. For example the seller suffers a 'detriment' when he delivers the goods and this enables him to enforce the buyer's promise to pay the price.?***

37. We find that the further charge was supported by consideration as set out in the recital as follows: -

> ***?The lender has at the request of the chargor agreed not to call for the immediate repayment of the principal moneys interests and other moneys secured by the existing security and has further agreed to make advances to the principal borrower by way of loan/overdraft by permitting the principal borrower to overdraw the principal borrower's account with the lender or granting the principal borrower other financial accommodation from time to time to an aggregate amount not exceeding Kenya shillings four million (Kshs.4,000,000/=) or such lower limit as may from time to time be fixed by the lender and upon having the same secured in a manner hereinafter appearing.?***

38. It was submitted on behalf of the appellant that the respondent had breached the terms of the charge and as such the appellant was discharged from any liability therein under. From the further charge it is clear that the amount secured was a maximum of Kshs.4,150,000/= together with interest thereon. The relevant extract of the further charge is set out herein below:-

> ***?PROVIDED ALSO that the total moneys for which this instrument constitutes a security shall not at any one time exceed the sum of Kenya Shillings four million (Kshs.4,000,000/=) (hereinafter called the additional charge debt) (making with the existing charge debt an aggregate maximum of Kenya shillings four million one hundred and fifty thousand (Kshs.4,150,000/=) together with interest ..?*** *Emphasis added.*

39. Therefore, the respondent in demanding Kshs.80,194,265.95/= breached the terms of the charge. Firstly, the respondent breached the said terms by allowing the principal borrower to exceed the secured limit. Secondly, by issuing the principal borrower with a letter of credit without the consent of the appellant and thirdly by incorporating the sum of Kshs.2,000,000/= which had been secured by a guarantee dated 22nd July, 1989 since the same was not secured under the further charge. What then was the consequence of the said breach? We concur with the following findings of the trial court: -

> ***?For my part I am satisfied that the Defendant Bank owes a duty of care to its customer, the plaintiff. There is no explanation as to the opening of the letter of credit far in excess of the secured debt of Kshs.4.0 million. In my view, the plaintiff will not be held liable for that recklessness in lending and absolute lack of follow up of the decree obtained in H.C.C.C. No. 25137 of 1993 for Kshs.8.5 million and thereafter running Blowmocans account to Kshs.80,194.265.25/=, well beyond the assets of Blowmocans. The defendant will bear the loss and damage of its recklessness.?***

We find that the appellant's liability could not exceed beyond the limit secured by the further charge.

40. The appellant contended that the respondent had clogged his right of redemption by firstly, consolidating the charge with respect to facilities granted to the appellant personally with the charge in respect of facilities granted to the principal borrower contrary to ***section 84*** of the Registered Land Act which provided:-

> ***?A chargee has no right to consolidate his charge with any other charge unless the right is expressly reserved in the charges or in one of them and is noted in the register against all the charges so consolidated.?***

41. The variation to the charge indicates that it is supplemental to the initial charge wherein the appellant had charged the suit property as security for financial facilities granted to Cholaco Tools Limited. The further charge also indicates that it is supplemental to the initial charge and the variation of charge. Consequently, this is not a case of three separate charge instruments but variations of the terms of the initial charge wherein the appellants liability is extended to an amount not exceeding Kshs.4,150,000/=. We find that the respondent did not consolidate separate charges and therefore ***section 84*** was not applicable.

42. The appellant also contended that the respondent clogged his right of redemption by declining to discharge the title to the suit property upon payment of Kshs.393,537.20/= which was outstanding in his personal account. Clause 2 of the further charge states,

> ***?The Chargor HEREBY DECLARES that the premises comprised in the above mentioned title and charged by the Chargor shall henceforth be a security for and stand charged with the repayment to the bank of the additional charge debt together with interest thereon at the rate aforesaid and for the better securing to the bank repayment thereof. HEREBY CHARGE the chargor's interest in the land compromised in the above-mentioned title TO THE INTENT that the said premises shall not be redeemed or redeemable until the additional debt with interest thereon as aforesaid together with all other moneys which may be payable by the Chargor to the Bank in respect of this security in addition to the existing charge debt an all other moneys secured by the Charge shall have been fully paid and satisfied.?*** Emphasis added.

Based on the foregoing it is evident that the overdraft on the principal borrower's account which had been secured by the further charge had not been paid. Therefore, the title to the suit property could not be discharged even on account of an undertaking by the appellant's counsel of payment of the amount overdrawn in the appellant's personal account.

43. Lastly, it is trite that a court can only determine issues raised before it by way of pleadings. In ***Nairobi City Council -vs- Thabiti Enterprises Limited (supra)*** it was held,

> ***?It is now settled that the only way to raise issues for determination by the court is through pleadings and it is only then that a claimant will be allowed to proceed to prove them. See the case of Charles C. Sande -vs- Kenya Cooperative Creameries Ltd. – Civil Appeal No. 154 of 1992 (unreported). In this instance compensation was never pleaded and should not have been tried. The court was obligated to dismiss that relief.?***

However, the exception to the foregoing was set out in ***Odd Jobs -vs- Mubia (1974) EA 476*** wherein it was held that a court may base its decision on an unpleaded issue where it appears from the course followed at the trial, that the issue has been left to the court for determination.

44. In this case as pointed out by the appellant the respondent never filed a counterclaim or prayed for an order that the appellant satisfy his liability under the further charge, and accordingly the exception set out in the ***Odd Jobs case (supra)*** does not apply. The course that the suit at the trial court took was in respect of determination of whether the charge in question was valid and whether the appellant had been

discharged from liability under the further charge. Consequently, and in the absence of a counter-claim, we find that the learned Judge erred in entering judgment in favour of the respondent in the sum of Kshs.4,150,000/= together with interest, and in awarding the respondent the sum of Kshs.393,537.20/=. Accordingly, we hereby set aside that part of the High Court's Order awarding the respondent the sum of Kshs.393,537.20/=. The final order we make is that the appellant's suit in the High Court being H. C. C. C. No. 1938 of 2000 is dismissed with costs to the respondent. As this appeal partially succeeds, we order that the appellant shall meet half of the respondent's costs in the appeal.

Dated and delivered at Nairobi this 11th day of December, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

H. M. OKWENGU

…….…….

JUDGE OF APPEAL

J. MOHAMMED

…….……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original**.**

DEPUTY REGISTRAR