IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, LAKHA & OWUOR JJ A)

CIVIL APPEAL NO 100 OF 2001

BETWEEN

KENYA COMMERCIAL FINANCE COMPANY LTD.....APPELLANT

AND

KIPNG'ENO ARAP NGENY.....1ST RESPONDENT

JOHN H. A. WILLIAM.....2ND RESPONDENT

(Appeal from the Judgment, Orders and Decree of the High Court at Nakuru, Rimita J, dated 23rd March 2001

in

HCCC No 314 of 2000)

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JUDGMENTS

Gicheru JA.Principally, this appeal turns on the validity of the charge documents to the 1st respondent's leasehold for a term of 99 years from 1st October, 1974 to a piece of land situate in Kericho town containing in measurement 0.9229 of a hectare or thereabout and registered as title Number I.R. 30445/1 and to the 2nd respondent's land parcel Number Nakuru/Thigiu/1 containing in measurement 48.5 hectares. F

rom the letter of offer by the appellant to the 2nd respondent dated 8th September, 1993, it would appear that the 2nd respondent had in an application dated 2nd April, 1993 applied to the appellant for a loan facility of Kshs.45,500,000/- for the purpose of procuring imported horticultural machinery and equipment. This loan facility was approved by the appellant and was to be repaid in equal instalments of Kshs.1,212,000/- over a period of 60 months inclusive of interest following a grace period of six months. Interest was to be paid monthly during the grace period and was to be charged at the rate of 20% per annum for the time being and calculated and compounded daily and debited monthly. But the appellant reserved the right to charge such rate(s) or assess such charge(s) as it may within its sole discretion from time to time decide and was not required to advise any such change in the rate of interest and/or charges and failure to so advise was not to prejudice the appellant's right to recover interest and/or charges accruing subsequent to such change. A standing order for Kshs.1,212,000/- per month was to be established in favour of the appellant six months after the drawdown and was to run until the debt was

repaid in full. The Kenya Commercial Bank Limited was to avail upfront a special operating account for Kshs.12,000,000/- to the 2nd respondent through which the project's related costs would be disbursed. All payments were to be made against authenticated expenses on the project. But before any disbursement, security documentation had to be finalized. These securities were:

i) A legal charge for Kshs.45,500,000/- over land parcel Number Nakuru/Thigiu/1 in the name of the 2nd respondent ranking *pari passu* with that of the Kenya Commercial Bank Limited for Kshs.12,000,000-

ii) A legal Charge of Kshs.45,500,000/- over a piece of land situate in Kericho Town registered as title Number I.R. 30445/1 in the name of the 1st respondent ranking *pari passu* with that of the Kenya Commercial Bank Limited for Kshs.12,000,000/- and valued at Kshs.87,278,400/- on 19th May, 1993.

iii) A debenture for Kshs.45,500,00/- over the existing and future assets of the 2nd respondent ranking *pari passu* with that of the Kenya Commercial Bank Limited for Kshs.12,000,000/-.

iv) A guarantee by the 1st respondent for Kshs.45,500,000/-.

Besides, a resolution of the board of directors of the 2nd respondent authorizing the borrowing and execution of the relevant security documents together with letters of deposit – OD 12, OD 13 and set – off, OD 20 – were to be executed/provided in support of the securities set out above.

This letter of offer which was in duplicate and duly signed by the appellant's Senior Accounts Officer, Advances Manager and Chief Operating Manager required the 2nd respondent to return to the appellant the duplicate copy of the same, duly signed in acknowledgement of the 2nd respondent's understanding and acceptance of the terms and conditions governing the loan facility applied for. The two directors of the 2nd respondent, Kipng'eno Arap Ng'eny and John Harry Allan Williams, signed the duplicate copy of the letter of offer confirming their understanding and acceptance of the terms and conditions governing the loan facility the 2nd respondent had applied for.

In a meeting of the directors of the 2nd respondent held in Nairobi on 16th August, 1994, it was resolved that the arrangements made with the appellant for a loan facility of up to Kshs.45,500,000/- be approved and as a cover for the facility, the 2nd respondent be authorised to execute a debenture for Kshs.45,500,000/- and a legal charge over the 2nd respondent's property registration Number Nakuru/Thigiu/1 in favour of the appellant ranking *pari passu* in all respects with the Kenya Commercial Bank Limited charges and that such documents be executed under the 2nd respondent's common seal and be witnessed by the 1st respondent who was a director and chairman of the 2nd respondent and Mr. John Harry Allan Williams, a director of the 2nd respondent. The resolution was signed by the two directors of the 2nd respondent as are referred to above. Subsequent thereto and respectively pursuant to Article 20 and Clause b of the 2nd respondent's Articles and Memorandum of Association, the 2nd respondent on 14th October, 1994 executed a debenture for Kshs.45,500,000/- in favour of the appellant and for Kshs.12,000,000/- in favour of the Kenya Commercial Bank Limited. This debenture adopted the appellant's letter of offer and acceptance as amended by a letter dated 27th July, 1994 addressed to the 2nd respondent by the appellant and the same were annexed thereto to form an integral part of the debenture and marked Appendix A. Under clause 4 of the debenture, the 2nd respondent was to execute a first legal charge in favour of the appellant and the Kenya Commercial Bank Limited over the immovable property specified in the First Schedule to the debenture and the 1st respondent as the guarantor to the 2nd respondent was to execute a first legal charge in favour of the two lenders above mentioned over the immovable property specified in the Second Schedule to the debenture. According to clause 5 of the debenture, the said debenture and the first legal charges to be executed in accordance with provisions of clause 4 of the debenture were to be a continuing security for the repayment of the aggregate sum of Kshs.57,500,000/- advanced to the 2nd respondent by the two lenders referred to above together with interest and/or any other indebtedness. The immovable property in the First Schedule to the debenture was all that parcel of land known as Nakuru/Thigiu/1 and the immovable property in the Second Schedule to the debenture was all that piece of land situate in Kericho Town containing in measurement 0.9229 of a

hectare or thereabout and comprised in a grant registered at the Land Titles Registry at Nairobi as Number I.R. 300445/1. This debenture was registered in the Companies Registry pursuant to section 96 of the Companies Act, Chapter 486 of the Laws of Kenya on 8th November, 1994.

The first legal charges over the two immovable properties referred to above were accordingly executed in favour of the appellant and the Kenya Commercial Bank Limited on 14th October, 1994 with the charge over the immovable property in the First Schedule to the debenture – land parcel Number Nakuru/Thigiu/1 – being registered and entered as an encumbrance Number 1 (ONE) to the said title on 14th November, 1994 at the Nakuru District Land Registry while the charge over the immovable property in the Second Schedule to the debenture – Title Number I.R. 30445/1 – was registered at the Nairobi Land Titles Registry as Number I.R. 30445/7 on 5th December, 1994 at 11.00 a.m. Unfortunately, while the preamble to the charge over the latter property referred to the correct date of the debenture, that is to say, 14th October, 1994, the preamble to the charge over the immovable property Number Nakuru/Thigiu/1 erroneously referred to the date of the debenture as 14th November, 1994. This latter date, which was handwritten, was clearly a clerical error as the charge over this immovable property was executed on 14th October, 1994 and was supplemental and collateral to the debenture executed on the even date and under clause 4 of the said debenture was part of the same. Shorn of a warped sense of justice therefore, it cannot be gainsaid that the charge over the immovable property Number Nakuru /Thigiu/1 was part of the debenture executed by the 2nd respondent on 14th October, 1994. It is more likely than not that the 14th November, 1994 being the date that the charge over the immovable property aforementioned was registered may have been inadvertently inserted on the relevant spaces in the preamble to the said charge in relation to the debenture executed on 14th October, 1994. Hence the application of section 119 of the Evidence Act, Chapter 80 of the Laws of Kenya. This of course is not to exonerate the draftsman of the charge over the above mentioned immovable property whose carelessness is to be deprecated.

In consonance with the letter of offer and acceptance referred to earlier in this judgment, on 14th October, 1994, the 1st respondent executed a guarantee for the loan facility of Kshs.45,500,000/-.

After the securities referred to above were executed and in terms of the agreement between the parties to this appeal as contained in the letter of offer and acceptance, the loan facility of Kshs.45,500,000/- was advanced to the 2nd respondent by the appellant. In due course, the loan repayment together with the accrued interest fell into arrears and as on 31st May, 1996 a sum of Kshs.71,608,773/75 was outstanding. As a result, the appellant served by registered post a statutory notice dated 12th June, 1996 upon the 1st and 2nd respondents requiring payment of the whole amount within a period of three months from the date of service of the notice failing which the appellant was respectively to exercise its statutory power of sale under section 69(1) of the Transfer of Property Act of India in respect of the 1st respondent's Kericho property as is referred to in this judgment under section 74 of the Registered Land Act, Chapter 300 of the Laws of Kenya in regard to the 2nd respondent's land parcel NumberNakuru/Thigiu/1. Nothing much happened and as on 30th April, 2000 a sum of Kshs.93,894,770/95 loan repayment together with accrued interest was outstanding. The appellant therefore decided to realise its securities and by a letter dated 21st June, 2000 it instructed Deligent Auctioneers to sell by public auction the charged properties registration Numbers I.R. 30445/1 and Nakuru/Thigiu/1. This prompted the 1st and 2nd respondents' suit against the appellant in the superior court. That suit which was filed in that court on 18th July, 2000 sought judgment against the appellant for a permanent injunction restraining the appellant from realising its securities, an order for accounts to be taken, a declaration that the statutory power of sale had not arisen and that the charges over the appellant's securities were defective and therefore bad in law and in equity and that the same should be cancelled and/or discharged, that the interest rate chargeable by the appellant be fixed by the court and general damages for breach of contract.

The appellant's defence to the respondents' claim was that the charges over its securities were legally binding and enforceable and that it reserved its rights thereunder including its statutory powers of sale but without prejudice to any other rights conferred upon it to recover monies due from the respondents by any other legal process after the 2nd respondent fell into arrears in the repayment of the loan facility accorded to it by the appellant. The appellant therefore counterclaimed against the 1st and 2nd respondents jointly and severally for the sum of Kshs. 102,304,229/95 being the amount due and owing from the 2nd

respondent and/or monies paid for and on behalf of and to the use of the 2nd respondent at its request together with the accrued interest thereon calculated upto the 30th day of September, 2000 full particulars whereof were from time to time supplied to the respondents in the form of statements of the 2nd respondent's Loan Account No. 212117053. According to the appellant's counterclaim, the sum of Kshs.102,304,229/95 continued to accrue interest at the agreed rate of 20% per annum until payment was made in full. In its defence and counterclaim therefore, the appellant sought to have the respondents' suit dismissed with costs and judgment be entered against the respondents jointly and severally on the counterclaim for the sum of Kshs.102,304,229/ 95 together with interest accruing therefrom at the rate of 20% per annum with effect from 1st October, 2000 until payment in full.

At the hearing of the respondents' suit against the appellant in the superior court, the 1st respondent testified that the appellant's claim of Kshs.102,304,229/95 was shocking to him and to his people. According to him, the project for which the loan facility was sought and obtained from the appellant totally failed due to either hailstorms, floods or drought and therefore no harvests were made. This was communicated to the appellant. The 1st respondent, however, acknowledged receiving statements of the 2nd respondent's loan account from the appellant which indicated that the loan facility advanced to the 2nd respondent by the appellant was not being properly serviced. But according to the testimony of the appellant's witness in the superior court, the loan disbursement was as requested by the 2nd respondent and the amount disbursed was Kshs.45,800,000/-. The purpose of the loan facility was to make the 2nd respondent's new project of growing straw berries for export and for the local market successful and in due course be able to service the loan facility. In this connection, the appellant monitored the progress of the project and several visits were made to the 2nd respondent's farm consequent to which it was given indulgence in the servicing of the loan facility, particularly when the project produce could not be sold outside the country and when the crop was spoilt by the *El Nino* rains. The failure of the project not withstanding, however, the 2nd respondent was to look elsewhere for the servicing of the loan facility.

In his judgment dated and delivered at Nakuru on 23rd March, 2001 the learned trial judge erroneously held that the rate of interest on the loan facility accorded to the 2nd respondent was not agreed and that the principal charge documents did not provide for interest and therefore none was chargeable in reliance on those documents. A careful and judicious reading of the two charge documents reveal that interest at the rate set out in the debenture to which they were supplemental and collateral was provided for. The learned trial judge also held that there was no specific resolution of the 2nd respondent authorising the borrowing of Kshs. 45,500,000/- from the appellant and the execution of a debenture and charge over land parcel Number Nakuru/Thigiu/1. Yet, from the certified copy of the minutes of the meeting of the directors of the 2nd respondent held at Nairobi on 16th August, 1994 this is exactly what was resolved as is earlier referred to in this judgment. Finally, the learned trial judge concluded that the project from which the 2nd respondent would repay the loan facility advanced to it by the appellant failed because of *El Nino* and *La Nina* that hit this country at the material time which neither party had foreseen. Hence, according to him, the contract between the parties to this appeal was frustrated. Consequently, the learned trial judge gave judgment against the appellant for orders that there be a permanent injunction restraining the appellant from realising its securities and for a declaration that the appellant's statutory power of sale had not arisen and that the charges over its securities were defective, bad in law and in equity and that the same should be cancelled and/or discharged. He also awarded the costs of the suit before him to the respondents together with interest. Against this decision the appellant has appealed to this court putting forward 19 grounds of appeal the gravamen of which I have dealt with in the course of this judgment save for the frustration of the contract.

According to the 3rd Edition of *Words and Phrases Legally Defined,* volume 2 at page 296:

> "The doctrine of frustration operates to excuse from further performance of a contract where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available or that some future event which forms the basis of the contract will take place, and before breach, an event in relation to the matter stipulated (above) renders performance impossible or only possible in a very different way from that contemplated but without default of either party."

The letter of offer and acceptance severally referred to in this judgment was the basis of the contractual relationship between the parties to this appeal. Indeed, it was that letter that the set out the terms and conditions of that contractual relationship. In that letter there is no implication whatsoever that the loan repayment by the 2nd respondent was to be derived from the proceeds of sale of the produce from the project the 2nd respondent was undertaking and in respect of which the loan facility in question was sought and obtained from the appellant. Indeed, as indicated towards the beginning of this judgment, the loan repayment in equal instalments of Kshs.1,212,000/- over a period of 60 months inclusive of interest was to commence after a grace period of six months. This was without reference to the success or failure of the project the 2nd respondent was undertaking. To hold therefore that the contract between hte parties to this appeal was frustrated because of the failure of the project for which the 2nd respondent had sought and obtained loan facilities due to the onset of *El Nino* and *La Nina* in this country is to fundamentally alter their contract as encompassed in the letter of offer and acceptance and thereby imposing on them a new contract altogether. This, the learned trial judge had no legal authority to do.

In the result, I would allow this appeal, set aside the judgment of the superior court and in place thereof dismiss the respondents' suit in that court with costs to the appellant and enter judgment for the appellant as prayed in the counterclaim against the 2nd respondent. The appellant shall also have half the costs of this appeal. As Owuor JA agrees, there will be a majority judgment of this Court in these terms.

Owuor JA. This is an appeal from the Judgment of the superior court (Rimita, J.) dated and delivered at Nakuru on 23rd day of March, 2001 in which the learned Judge dismissed a counterclaim by the appellant, Kenya Commercial Finance Co. Ltd. and instead gave judgment for the respondents in terms of prayers (a), (b), (c) and (d) of the amended plaint. In that judgment the appellant was restrained by way of an injunction from selling all those parcels of land known as L.R 631/525 and Nakuru Thigiu/1. Secondly, that the statutory power for sale had not arisen and therefore the same could not be exercised by the appellant and finally, that the charges registered over the above parcels of land were defective, bad in law and in equity.

The facts giving rise to this litigation are brief. The appellant (hereinafter referred to as the Bank) offered to advance a sum of Ksh.45,500,000/= to the 2nd respondent (hereinafter referred to as the Company) subject to terms and conditions contained in a letter of offer dated 8th September, 1993. This offer was accepted by the Company and signed by the Company's two directors namely Kipng'eno Arap Ngeny, 1st respondent and John H.A Williams Smith who was a director with no shareholding. The agreement was modified on 27th July, 1994 only as far as it related to one of the securities. This was in response to a request by the Company contained in a letter dated 3rd May, 1994.

The following are the securities for the loan taken by the 2nd respondent:-

1. A debenture dated 14th October, 1994 in favour of the Bank and Kenya Commercial Bank Ltd.

2. A Charge also dated 14th October, 1994 by the Company over property known as Nakuru/ Thigiu/1.

3. Charge by the 1st respondent also dated 14th October, 1994 over property known as L.R. No. 631/525 comprised in a grant registered as L.R 30445/1.

There was also a personal guarantee by the 1st respondent limited to Ksh.45,000,000/=. The loan in favour of Kenya Commercial Bank Ltd. appears to have been fully settled and apparently it has no further interest in the properties.

This money was loaned to the Company to start a project of irrigated strawberries production mainly for export. The Company did not do very well and by May, 1996 its indebtedness to the Bank was in excess of Ksh.70,000,000/=. The respondents' case before the superior court was that by then they had paid a sum in excess of well over Ksh.35,000,000/ = and only a sum of Ksh.9,000,000/= was still outstanding. In June, 1996 a demand was made by the Bank against the respondents by way of Statutory Notice of Sale for payment of the whole outstanding monies. The demand was not met. Instead the respondents

commenced proceedings by way of a plaint dated 18th July, 2000. They obtained an interim injunction restraining the sale of the properties pending the hearing of the application inter-parties. The plaint was by consent amended and on 26th October, 2000 was deemed to be duly filed. On 30th October, 2000, the appellant filed its amended defence and counterclaim denying the respondent's claim and setting up a counterclaim for the sum of Ksh.102,304,229.95. Defence to the counterclaim was filed on 9th of November, 2000 and thereafter on 7th of December, 2000 the suit proceeded to full hearing.

What were the salient claims and relief sought in the amended plaint? Firstly, that the debenture issued by the second respondents in favour of the Bank to secure the amount so advanced did not confer any rights in law to the Bank. Secondly, it was claimed by the 2nd respondent that since the loan was advanced to it, it had made substantial payments to the Bank. But the Bank had charged unconscionable and illegal rates of interest thus making it impossible to ascertain how much money has been paid and how much is due. Thirdly, and more important, the statutory power of sale had not arisen because the said charges were defective, bad in law and in equity.

Finally that:

> "The plaintiffs aver that the payment have been made in good faith and an effort to redeem the loan account but frustrate such effort and good faith the defendant intends to advertise and sell the said charged properties on 31st August, 2000 and 1st September, 2000".

It was on this basis that the declarations alluded to above were sought as well as damages and other ancillary relief.

At the trial in the superior court the respondents called two witnesses, 1st respondent himself and a manager of the 2nd respondent. The 1st respondent confirmed that he had indeed executed the debenture and both the charges over the two properties, Nakuru/Thigiu/1 and L.R No. 631/ 525 Kericho. Prior to executing the charges, he had signed a letter of offer dated 8th September, 1993 which formed the contract between the parties. The manager's evidence was that he had worked out all the accounts and found that the whole loan had been repaid save for a sum of Ksh.9,918,758/=. As for the appellant, it called one witness who produced all the documents executed by both parties and correspondence exchanged between the parties. There were no issues agreed or framed with the result that each counsel made his submission based on what they perceived to be the issues and hence the complaint that the learned Judge made some findings on issues that were neither pleaded or canvassed before him. I will revert to this later on in this judgment. That notwithstanding, the learned Judge in his judgment made the following findings:

> 1. Both the charges and the debenture were defective. a) In as far as the charge over L.R Nos. Nakuru/Thigiu/ 1 was concerned it did not comply with the mandatory provision of section 65(1) of the Registered Land Act, Cap 300 of the Laws of Kenya. In that
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> "it did not contain the acknowledgment that the chargor understood the effects of section 74 of Cap 300. The charge does not exclude the application of section 65 (1) of the Act".
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> 2. In as far as the Kericho property was concerned, it was defective in that: "It deviates from the specified format in that it does not on its own specify the interest payable on the loan. This is shown in form J(1) and J(2).
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> 3. In as far as the debenture is concerned: "There is no specific resolution to show that the Company resolved to borrow the sum of Ksh.45,500,000/= or the sum of Ksh.57,000,000/=. There is also no specific resolution to show that the Company resolved that it creates a debenture and charge over its property L.R No. Nakuru/Thigiu/1.

Therefore the two charges and the debenture cannot be relied upon by the Bank to exercise its power of sale.

4. Further all the security documents did not provide for the rate of interest therefore none should have been charged. Finally and most important, the contract between the parties was frustrated because the rains called

> *"El nino" "La nina"* hit the country at the material time... hence the project from which the loan was to be repaid from failed for no fault of any of the parties".

5.In view of the above findings, the counterclaim did not succeed and was dismissed with costs. The main thrust of attack in this appeal as can be seen from the memorandum of appeal filed herein and the submission of counsel made to the court by Mr. Ojiambo on behalf of Bank and Mr. K'Owande for both the respondents is on the security documents, which I will now deal with.

It is clear that the principal document is the debenture of 14th October, 1994. The 1st respondent in his evidence in cross-examination admitted having executed the debenture. The document is being challenged mainly on the ground that the date of the resolution is not stated on it. The learned judge having found that the debenture was properly executed went on to hold that the same was invalid because the date of the resolution for the Company to borrow the money was not stated on the debenture and therefore the debenture and the charge on the company property were *ultra vires.*

The learned judge had the following to say:

> "I can only say from the reading of Exhibit Q there was no resolution to create a debenture and legal charge in favour of the defendant. Whatever was done by the second plaintiff was *ultra vires*".

This point was not pleaded nor was it made an issue, canvassed by both sides and thereafter left to the learned Judge for determination. See *Odd Jobs v Mumbia* [1970] EALR Page 476) as well as *Kenya Commercial Bank Limited vs Mwanzau Mbaluka* 2. *Lazarus Kititi Vetu* C.A No. 274 of 1997).

That left aside, I am satisfied that the learned Judge came to the wrong conclusion for the following reasons: There was sufficient evidence before the court in the form of minutes confirming that a meeting of the Board of the Company was held on 16th August, 1994. That the arrangements made with Kenya Commercial Finance Limited for a loan facility up to the extent of Ksh.45,500,000 agreed by the Bank be approved and as cover for the facility the Company be authorized to execute a debenture for that amount and a legal charge over the Company's property L.R No. Nakuru/Thigiu/1 in favour of the Bank ranking *pari passu* in all respect with Kenya Commercial Bank Charges and further that such documents to be executed under the Company's common seal. The same to be witnessed by the two directors, Mr. Kipng'eno Arap Ngeny and Mr. John H. A. William.

From the evidence there was only one loan for the sum of Ksh.45,500,000 and that is the one comprised in the letter of offer of 8.9.1993 duly accepted by the Company. The minutes confirmed and authorized the Company to execute the debenture and the legal charge over the Nakuru property. These minutes were accordingly signed by the two directors at that meeting.

Minutes generally are a true reflection of what has been resolved at board meetings and general meetings. This minute is no different. There was no evidence to indicate that the document was a forgery or had been fabricated. The minutes read in conjunction with the debenture clearly shows that the Company had on 16.8.1994 resolved to execute the debenture. The mere fact that the date does not appear on the debenture does not nullify the document. Nor does it mean that the Company acted outside its powers. The doctrine of *ultra vires* is very clear and only applies where a Company engages in an activity which is not permitted by its articles of association or where the directors exceed their powers.

In this case, there was no evidence led to show that the Company was not permitted to borrow such sums of money by its articles. The rule in the case of *Royal British Bank v Turquand* (1856) 6 E&B 327 applies in situation where once a company has held out that a meeting of the board had in fact taken place, a third party dealing with the Company is not obliged to inquire, if indeed a meeting did take place and the

internal requirements of the Company in relation to the quorum etc. had been met.

Further in this case where the two directors did sign the minutes they would now be estopped from denying that such a meeting did take place.

Having found that the debenture is valid and properly issued, it is clear that it incorporates at page 2 the letter of offer dated 8th September, 1993, as amended by the letter dated 27th July, 1994. The letter of offer stipulates the rate of interest to be 20% p.a. The debenture itself at page (4) clause 1(i) provides for payment of interest to the Bank at the rate of 20% p.a. The 1st respondent's evidence was that the interest rates were between 8- 12% and that was the assumption upon which he signed the documents. This evidence, no doubt, contradicts the documentary evidence that I have referred to above. Lord Morris in the case of *Bank of Australasia v Palmer* [1897] AC 540 at Page 545 stated clearly that:

> "[P]arol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract".

The Company cannot now come to court and state orally that the interest rate was to be at 8-12% p.a. when there is no documentary evidence to support that assertion.

The Company had exchanged a lot of correspondence with the Bank in particular its letter of 13th July, 1998. It sought a waiver of penal interest. If the interest had been agreed at 8-12% p.a., what would have been simpler than the matter be raised at that time?

As a general rule, courts will not interfere where parties have contracted on arms length basis. However, by its equitable jurisdiction this Court has the power and will set aside any bargain which is found to be harsh, unconscionable and oppressive or where having agreed to certain terms and conditions thereafter imposes additional terms upon the other party then the course of equity can and may intervene to relieve the party upon which those additional obligations have been imposed by setting the same aside.

It suffices here to say that I do not find the rate of interest at 20% p.a. to be harsh, unconscionable or oppressive.

I will now deal with the charge over L.R No. Nakuru/Thigiu/1 executed on 14th October, 1994. The document as stated earlier has been challenged on the ground that it does not contain a rate of interest and thus no interest is payable and further that it offends the provisions of the Registered Land Act.

This charge was stated to be supplementary to a debenture. The debenture referred to in the charge document is said to be dated 14th November, 1994. This is clearly a wrong date. There could not have been a debenture in existence dated 14th November, 1994 when the charge was executed on 14th October, 1994. The Company was aware that it had issued only one debenture dated 14th October, 1994. The human error in inserting a wrong date of the debenture in the charge document does not in my view nullify the charge document.

The debenture provides a covenant by the Company at clause 4 to execute a first legal charge. The Company pursuant to the covenant has executed a first legal charge which is specified to be supplementary to the debenture.

Where a document is said to be supplementary to another, then the same must be read jointly with the principal document, in this case the debenture. This was clearly stated by Lord Fletcher Moulten LJ. in *Marks v Whiteley* [1912] 1 Ch 735 at page 754:

> "Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purpose such as relevant to the case as if they were one deed".

The debenture incorporated the letters of offer and both the letters of offer and the debenture provide for

the rate of interest at 20%. It therefore falls that interest is payable at this rate.

The charge has also been challenged on the ground that it is not in the prescribed form.

Section 108(1) provides:

> "Every disposition of land, a lease or a charge shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve and every person should use a printed form issued by the Registrar unless the Registrar otherwise permits".

It is clear from the wording that the Registrar has power to approve other formats. There is a certificate at the top of the charge document stipulating that this form has been approved by the Registrar on 28.10.1985. If the format had not been approved, the same would have been rejected by the Registrar, instead of registering the same on 14th November, 1994.

In my view, the most valid complaint against this charge is that it does not comply with the mandatory provision of section 65(1) of the Registered Land Act, Cap 300 Laws of Kenya. In that it does contain an acknowledgment that the charger understood the effect of section 74. Mr. Ojiambo has conceded, and in my view rightly so, that the charge does not consist of the acknowledgment, therefore the Bank cannot exercise any of its rights under the provisions of section 74.

However, this does not nullify and make void the Bank's security. Further and in any event, the Bank would be entitled to claim an equitable charge over this title which comes into existence by deposit of the Title document with the Bank by application of the common law of England in terms of section 163 of the Registered Land Act, Cap 300 Laws of Kenya.

As regards L.R No. 631/525 comprised in the grant registered as L.R.30445/1, for the reasons given earlier in this judgment, I find no difficulty in holding that the charge is valid and as it incorporates the Bank's power of sale under section 69 of the Indian Transfer of Property Act, the Bank is at liberty to dispose of this property.

Now to briefly consider Ground 5 of the memorandum of appeal:

> "The learned Judge erred in holding that the doctrine of frustration applied to vitiate the contract of lending between the appellant and the 2nd respondent purportedly on the grounds of force Majeure and misapprehended the scope of the said doctrine of frustration".

The learned Judge made a categoric finding that the contract between the parties had been frustrated. In doing this, he placed great emphasis on the case of *Howell v Conpland* [1874-1880] ALL E.R. Page 878. I am of the view that the two cases are easily distinguishable. Further and as indicated above this issue was not pleaded.

A party who wishes to rely on a frustrating event cannot as in this case simply mention it in passing as was done in paragraph 11 of the Amended Plaint that I have set above. Particular facts which they seek to rely on resulting in the frustration of the contract must be clearly set out in the pleadings to enable the other side to prepare and defend the same. This not having been done, the learned Judge was clearly wrong.

Finally, there is the issue of the 1st respondent's personal guarantee raised in paragraph 15 of the memorandum of appeal in that:

> "The learned Judge erred in law and fact in entirely failing to consider and give effect to the written instrument of guarantee dated 14th October, 1994 and admittedly executed by the 1st respondent and in failing to consider the appellant's submission with respect to the enforceability of the same."

While it is true that the learned Judge made no finding in respect of the 1st respondent's personal guarantee, it is equally true that no demand was made to the 1st respondent to pay up the money he had guaranteed, nor was this issue pleaded in the counterclaim. The two letters addressed to the 1st and 2nd respondents on 15th January, 1996 were clearly marked and did amount to "Statutory Notices" that the appellant's statutory right for sale in respect of the two properties in issue had arisen. This cannot be construed by any stretch of imagination as demand on the 1st respondent to meet his obligation as a guarantor. I find no merit in this claim.

For the reasons I have given above, I am satisfied that the learned Judge was clearly wrong, in my view, to dismiss the counterclaim notwithstanding the fact that sufficient evidence had been put before him.

In conclusion therefore and save that the Bank cannot exercise its statutory power of sale under section 74 of the Registered Land Act, Cap 300 in so far as it relates to L.R. No. Nakuru/Thigiu/1, I would propose the following orders:-

1. The appeal succeeds to the extent that the counterclaim be and is hereby reinstated and judgment be entered for the appellant against the 2nd respondent.

2. All other orders granted by Rimita, J. are hereby set aside.

3. That the appellant shall be entitled to costs in the superior court but only half the costs in the appeal.

Lakha JA (*Dissenting*):

Introduction

This appeal is an appeal by the defendant from a decision of the superior court (Rimita J.) given on 23 March 2001 whereby the learned judge issued an injunction restraining the defendant from selling all those parcels of Land known as L.R. 631/525 and Nakuru Thigiu/1 (suit property). He also ordered that the statutory power of sale had not arisen and cannot be exercised and that the charges registered over the suit property were defective, bad in law and equity. He further dismissed the defendant’s counterclaim with costs. The decision followed the trial on 7 December 2000 and 8 February 2001 of a number of issues when three witnesses testified.

The outline facts

In 1993 Berry Farmers Limited, (the Company) a limited liability company incorporated in the Republic of Kenya, the second plaintiff herein, applied to the Kenya Commercial Finance Company Limited (the Bank) for a loan of Kshs.45 million to start a project of irrigated strawberry production. The necessary security documents were prepared by the Bank. They consisted of the charges of the suit property i.e. all that parcel of land known as L.R. 631/525 and Nakuru Thigiu/1 of which the Company and the first plaintiff were at all material times their registered owners respectively. There was also a personal guarantee by the first plaintiff limited to Kshs.45,500,000/= and finally there was a debenture by the Company.

The Company did not prosper and by May 1996 its indebtness to the Bank was claimed to be in excess of Kshs.70,000,000/=. It was the plaintiffs’ case that only about Kshs.9 million remained unpaid. In June, 1996 demand was made against the plaintiffs not under the first plaintiff’s guarantee but under the charges by way of a statutory notice. When the demand was not met, proceedings were commenced by the plaintiffs by a plaint dated 18 July 2000 against the Bank (with an Amended Plaint dated 16 October 2000) seeking in the main a declaration that the statutory power of sale had not arisen because the said charges were defective, bad in law and in equity, damages and ancillary reliefs. By its amended defence the Bank denied the plaintiffs’ claim and set up a counterclaim claiming Kshs.102,304,229.95 against the plaintiffs.

The judgment below

There were no agreed issues and none were framed. The learned judge, however, made the following findings:-

> (1) The charge on L.R. Number Nakuru/Thigiu/1 is defective as it did not comply with the mandatory provisions of section 65(1) of the Registered Land Act, Cap 300, Laws of Kenya in that it did not contain an acknowledgement that the chargor understood the effect of section 74 thereof. The charge does not expressly exclude the application of section 65(1) of the said Act. This charge cannot be relied on by the defendant to exercise its power of sale.
>
> (2) The Charge on L.R. No. 631/525 – Kericho was also defective as it deviates from the specified format in that it does not on its own specify the interest payable on the loan and cannot be relied upon by the defendant to exercise its power of sale.
>
> (3) There was no specific resolution to show that the Company resolved to borrow the sum of Kshs.45,500,000/= or the sum of Kshs.57,000,000/= or that it should create a debenture and charge over its property L.R. No. Nakuru/Thigiu/1.
>
> (4) The principal documents did not provide for the rate of interest and none should be chargeable.
>
> (5) The contract between the parties was frustrated.
>
> (6) The counterclaim did not succeed.

The submission of the parties

It was in the light of the trial judge's findings as above that the advocates of the parties made their respective and rival submissions to this court. Mr. Ojiambo, advocate for the Bank who did not appear before the superior court, criticised and attacked the learned trial judge's findings. For the plaintiffs, on the other hand, Mr. Kowade who also did not appear before the superior court supported all the findings of the trial judge as set out above. I do not propose to add to the length of this judgment by setting these submissions in detail. Suffice it to say that I have carefully considered all the submissions and the authorities with no disrespect intended for failing to refer to any one in particular.

My decision on appeal

The charges

Having carefully considered the plaintiffs' claim it appears to me that it was designed principally to obtain a declaration that the two charges were not available to the defendant to exercise its power of sale of the charged properties. The invalidity and unenforceability of the two charges are the crux of the plaintiffs' case.

I now turn to consider the two questions of general importance which this appeal raises. The first is whether the two charges over the plaintiffs' suit property complied with the relevant statutory provisions and the second is the effect of a failure, if any, to comply with them.

As for the charge over L.R. No. Nakuru/Thigio/1 it is clear that it does not comply with the mandatory provisions of section 65(1) of the Registered Land Act, Cap.300 Laws of Kenya in that it does not contain an acknowledgement that the chargor understood the effect of section 74 thereof. The charge has not expressly excluded the application of section 65(1) of the Act. It follows that it is defective.

Mr. Ojiambo for the Bank in a helpful submission freely conceded that for the reasons given the charge is defective.

As for the charge over L.R. No. 631/525 Kericho is concerned, the learned trial judge held it was defective because it deviates from the specified format in that it does not of its own specify the interest payable on the loan. Mr. K'owade for the plaintiffs submits as follows. He refers to section 46 of the Registration of Titles Act, Cap. 281, Laws of Kenya which provides:-

> "46. (1) Whenever any land is intended to be charged or made security in favour of any person other than by way of deposit of documents of title as provided for by section 66, the proprietor or lessee or, if the proprietor or lessee is of unsound mind, the guardian or other person appointed by the court to act on his behalf in the matter shall execute a charge in form J (1) or J(2) in the First Schedule which must be registered as hereinbefore provided."

It is mandatory that the charge shall be executed in form J (1) or J (2) in the First Schedule which in turn requires the rate of interest to be specifically stated. The charge in the instant case omits to state the rate of interest rendering the charge defective. With respect, I agree.

As to the second question, Mr. Ojiambo for the Bank did not submit for a moment that the failure to comply with the statutory provisions was of no effect. He, however, referred to Section 72 of the Interpretation and General Provisions Act, Cap. 2 (reproduced as follows) as a possible answer:-

> "72. Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation there from which does not affect the substance of the instrument or document, or which is not calculated to mislead."

In my view, however, the departure from the prescribed statutory provisions is substantive dealing with a provision of interest in a mortgage and the right of sale; surely; they cannot be unimportant provisions not affecting the substance of the document. For these reasons, which are substantially the same as those given by the trial judge in his brief and admirable judgment, I am clearly of the view that the plaintiffs are entitled to the declaration they are seeking. The effect of the failure to comply with the mandatory statutory provisions is, in my judgment, to render the charges unable to provide a basis for an exercise of statutory power of sale under the charges relied upon by the defendant.

Other Findings

On these points I can be brief.

> (a) No Company Resolution In the circumstances, it is unnecessary to deal with the further point relied upon by the plaintiffs of there being no valid resolution to support a debenture (as found by the trial judge).
>
> (b) Frustration and Bank's Lien None of these points was pleaded. It is a fundamental principle, now long established, that they were not open to the learned trial judge to deal with. As was said in *Captain Harry Gandy vs. Caspar Air Charters Limited* (1956), 23 E.A.C.A. 139 at page 140:-
>
> > "Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the Judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course".
>
> (c) Interest

The learned trial judge expressly held that interest was not payable as the principal documents did not provide for interest and none should be chargeable. He said,

> "I must observe at this stage that no interest is payable under common law on money lent."

With respect, I do not agree. The correct position appears to be that it is well established as a matter of banking law and practice that where a customer opens a current account with no express agreement with the bank, and the customer draws a cheque on the account which causes the account to go into overdraft, the customer has by necessary implication requested the bank to grant an overdraft of the necessary amount on its usual terms as to interest and other charges and in deciding to honour the cheque, the bank has by implication accepted the offer. It follows that in the instant case, on the facts of the case, the plaintiffs had remained liable to pay the usual standard rate of interest to the Bank. But in view of my findings above, as to the status of the charges, there is no occasion to lay down any rule so that it is unnecessary for the purpose in hand to make any such determination and is not necessary for the decision of the case– it would be *obiter*, so to say.

Guarantee

It was contended that the learned trial judge erred in failing to grant to the defendant relief on the basis of a personal guarantee executed by the first plaintiff. With respect, I find this argument without merit. No demand was made or pleaded under the guarantee for the sum due. In this case, it was suggested that the demand was infact made by the defendant's letters of 12 January 1996. With respect, these notices of demand were made by way of statutory notice under the two legal charges of the suit property. One of them was to the second plaintiff which is a limited liability company which had not executed any guarantee. Yet judgment was sought against the plaintiffs jointly and severally.

I reject the defendant's claim allegedly under the guarantee as a sum not due under or within the meaning of the guarantee. On this footing, the alleged claim under the guarantee fails, as rightly held by the learned trial judge.

Counterclaim

It follows therefore that the defendant's other claims made under the amended defence for interest and costs must also fail. In my view, the learned trial judge was fully justified in dismissing the counter-claim.

Generally

It must be borne in mind that this action by the plaintiffs was basically to decide on the status of the suit property and ultimately whether the Bank's right to a statutory sale of the suit property had arisen. The gist of such an action is a valid and enforceable legal charge. Once the trial judge (with whose conclusions on this issue I respectfully agree) held that the charges are defective they could not provide the basis for an exercise of a statutory power of sale of the suit property and the plaintiffs were entitled to succeed. That is not to say, nor does it mean, that the Bank did not lend or advance the sums of money or that it was irrecoverable or lost– only that the Bank did not sue the plaintiffs for repayment or return of the loan by way of a simple debt. In the latter case the validity of the charges would not be an issue and the Courts would not appear to have allowed the plaintiffs to get away. It all depends on the correct or expedient cause of action on which the Bank's advocates advised their clients. In the present day and age as claims become larger and business transactions complicated, it is all the more necessary to exercise caution. I would like to conclude by adapting the following words of Lord Griffiths in *Kettemen v. Hansel Properties Ltd* [1988] 1All ER at p.62 as they are apposite and as I could not equal its clarity of thought and language:-

> "Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than……..".

Conclusion

For my part, I would dismiss this appeal with costs.

Dated and delivered at Nairobi this 19th day of April, 2002

J.E GICHERU

.....

JUDGE OF APPEAL

A.A LAKHA

.....

JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL