

perfecting the securities in favour of the 1st Defendant to sufficiently cover the total debt outstanding in the accounts of the 1st and 2nd Plaintiff.

5. The 1st Defendant admits the contents of paragraph 8 and 9 of the Plaint and avers that the Plaintiffs together with the “Co-Chargor” duly executed the Charge document dated 13th May, 1998 in respect of the three suit properties and the Charge was duly registered as required by the law.
6. The contents of paragraph 10 are admitted but the 1st Defendant contends that the Supplemental Debenture was the main security whereas the Charge document dated 13th May, 1998 was a collateral security in terms of the Letter of Offer executed between the Plaintiffs and the 1st Defendant. The Defendants further contend that each document (the Supplemental Debenture and the Charge) contained separate and distinct terms thereof and each forms an enforceable security by its own right.
7. The 1st Defendant admits having debited the account of the Plaintiffs with Advocates fees and registration charges as pleaded in paragraph 11.
8. The 1st Defendant admits the contents of paragraph 12 of the Plaint in so far as the charges in respect of plot No. Kilifi/Mavueni/,,,,,, and Kilifi/Mavueni/Block 3”A”/,,,,,, were not and have not been registered to-date but denies the wrong connotation attributed to the 1st Defendant’s lawyers letter dated 27th August, 1999 and puts the Plaintiffs to strict proof thereof. The 1st Defendant further contends that the said letter dated 27th August, 1999 is privileged information exchanged between the Advocate and a client and the Plaintiffs are not competent or entitled to tender any evidence pertaining to the contents thereof.
9. The Defendants deny the allegations of paragraph 13 of the Plaint that the Supplemental Debenture was illegal, null and void and contends the said

Debenture was not complimentary to the Charge intended to be created on the Kilifi properties mentioned in paragraph 12 of the Plaint. The Supplemental Debenture is valid security by its own terms and the same is enforceable as against the Plaintiffs. The Defendants reiterate the contents of paragraph 6 hereinabove.

10. Further to paragraph 9 above the Defendants aver that lack of registration of the Charge document does not in any way render the same null and void as alleged by the Plaintiffs. The Defendants aver that the said Charge document was duly and voluntarily executed by the Plaintiffs and the ‘Co-Chargor’ pursuant to a Letter of Offer which was similarly executed. It was therefore the intention of the Chargors to offer the title of the said properties to the 1st Plaintiff as security for the outstanding debts of the 1st and 2nd Plaintiffs. The 1st Defendant therefore contends that it holds the Title Deeds in respect of the said properties lawfully and pursuant to the intention of the Chargors as more amplified in the terms of the Letter of Offer executed by the parties.
11. The Defendants deny the allegations of paragraph 14 and aver that the Debenture was properly executed by the persons authorised in law to do so and the Debenture is valid and enforceable as against the Plaintiffs.
12. The Defendants further aver that the Plaintiffs are not the registered owners of L.R. No. Mombasa/Block ,,,,,,/136 neither did they execute any Charge document in respect thereof. Accordingly, the Plaintiffs lack the *locus standi* to plead on behalf of the Chargor in any manner whatsoever in respect to this particular property. The Defendants shall apply to have struck off all the paragraphs and averments relating to this particular property at the time of hearing of this suit.
13. The 1st Defendant denies that it proposed the Agreement dated 9th June, 1998 as alleged in paragraph 15 and puts the Plaintiffs to strict proof thereof. The 1st Defendant avers that the said Agreement was initiated and entered into by the

Directors of the 1st and 2nd Plaintiffs herein independently and the said Directors subsequently approached the 1st Plaintiff with a view to requesting a restructuring of the accounts of the 1st and 2nd Plaintiffs which were already in arrears in Order to give effect to the terms of the said Agreement.

14. Further to paragraph 13 above the 1st Defendant admits that it agreed all the properties charged under the earlier Debentures to be discharged and a new Debenture and Charges to be created merely for the sake of ensuring that it was properly covered after the split of the business of the 1st and 2nd Plaintiffs and to give effect to the terms of the Agreement dated 9th June, 1998 separating the two companies.
15. The 1st Defendant denies that it agreed to extend to the 1st and 2nd Plaintiff any new facility for the sum of 196 million as alleged in paragraph 16 and puts the Plaintiffs to strict proof thereof. The 1st Defendant reiterates paragraph 14 above and further avers that the sum of 196 million was the aggregate total outstanding debt in respect of the 1st and 2nd Plaintiffs accounts together with other affiliated Companies associated with the Plaintiffs. It was clearly understood between the parties and the 1st Defendant how the said sum of 196 million was arrived at and the purpose for which the restructuring of the accounts was required. The 1st Defendant will rely on the Agreement executed by the Plaintiffs on 17th July, 1998 in this regard.
16. The 1st Defendant avers further to paragraph 15 above that upon signing the Letter of Offer dated 17th July, 1998 all the parties started a new relationship on the terms of the said letter and the earlier security properties were to be discharged and charged afresh pursuant to the general understanding of the parties. For the above reason the 1st Defendant avers that all the matters pleaded in paragraph 4 to 14 of the Plaint are of no material value the same having been overtaken by the fresh terms of the said Agreement dated 17th July, 1998.

17. The 1st Defendant admits paragraph 17 of the Plaintiff but avers that the new Debenture dated 16th January, 1999 was not supplementary to the legal charges over the subject properties. The said Debenture is a valid and enforceable security by its own right by virtue of the provisions therein.
18. The 1st Defendant denies the allegations contained in paragraph 18 of the Plaintiff and puts the Plaintiffs to strict proof thereof. The 1st Defendant avers that it presented all the subject documents to the relevant Land Registries for the purposes of assessment of the Stamp Duty payable whereupon the 1st Defendant paid in full the required Stamp Duty as assessed and the requisite receipts were duly issued upon payment. The 1st Defendant therefore denies having engaged in any illegality and contends that the said legal charges are valid and enforceable against the Plaintiffs.
19. The 1st Defendant denies that the charges on the subject properties are illegal for failure to obtain the Land Control Board Consent and puts the Plaintiffs to strict proof thereof. In the alternative but without prejudice to the foregoing, the 1st Defendant avers that the said properties were not subject to the provisions of the Land Control Act (cap 302 of the Laws of Kenya) and it was not necessary to obtain the Land Board Consent.
20. The 1st Defendant denies the contents of paragraph 20 of the Plaintiff and avers that a legal Charge in respect of Mombasa Block ,,,,,, /316 was executed by the Chargor on 16th January, 1999 and registered on 23rd August, 1999 and the said Charge is valid and enforceable as against the Chargor. The 1st Defendant further avers that the Plaintiffs lack the *locus standi* to challenge any transactions relating to the subject property since they are not the registered owners and reiterates the averments of paragraph 12 hereinabove.

21. The 1st Defendant avers further to paragraph 20 above that the 3rd Plaintiff voluntarily executed Charges in respect of Kilifi/Mavueni/,,,,,, and Kilifi/Mavueni/Block 3"A" ,,,,,, pursuant to the Letter of Offer dated 17th July, 1998. The 1st Defendant avers that by the very act of execution the 3rd Plaintiff intended to create valid securities in favour of the 1st Defendant pursuant to the terms of the Letter of Offer dated 17th July, 1998. The 3rd Plaintiff is therefore bound by his intention and the 1st Defendant avers that the said Charges are valid and enforceable notwithstanding that the same were not registered against the Title.
22. In the alternative but WITHOUT PREJUDICE to paragraph 20 and 21 above the 1st Defendant avers that the said Charges are still valid for registration subject to payment of penalties for late registration as per the provisions of the Stamp Duty Act and the Registered Land Act Cap 300 of the laws of Kenya and the 1st Defendant reserves the right to have the Charges registered at any time.
23. The 1st Defendant denies having acted in any dishonest and/or tricky manner as alleged in paragraph 21 or the Plaint and puts the Plaintiffs to strict proof thereof. The 1st Defendant avers that all the transactions and intention of the parties were clearly set out by Letter of Offer dated 17th July, 1998 which was voluntarily executed by the Plaintiffs upon reading and understanding the contents thereof.
24. The 1st Defendant denies the contents of paragraph 22 and puts the Plaintiffs to strict proof thereof.
25. The 1st Defendant avers that all and the transactions with the Plaintiffs were discussed and agreed upon and were normal banking transactions. The 1st Defendant denies having ever contravened the Banking Act (cap 488 of the Laws of Kenya) in the manner alleged in paragraph 23 or in any other manner whatsoever and puts the Plaintiffs to strict proof thereof.

26. The Defendants deny the contents of paragraph 24 of the Plaintiff and aver that the 1st and 2nd Plaintiffs have filed HCCC No. ,,,,,, of 1999 against the 1st Defendant. The 1st Defendant avers that this suit and HCCC No. ,,,,,, of 1999 relate to the same subject matter. The said HCCC No. ,,,,,, of 1999 is currently part heard before Justice Mwera and the 3rd Plaintiff continues to testify on behalf of the Plaintiffs. For these reasons, the 1st Defendant avers that this suit is a blatant abuse of the process of this Honourable Court and shall apply to have the same struck off with costs.
27. The Defendants aver that this Honourable Court lacks the jurisdiction to try this suit for the reasons stated in paragraph 26 above and by virtue of the provisions of section 6 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

REASONS WHEREFORE the Defendants pray that the Plaintiff's suit be dismissed with punitive costs assessed on the higher scale.

DATED at Nairobi this day of 2002.

**XXX AND COMPANY
ADVOCATES FOR THE DEFENDANTS**

DRAWN AND FILED BY:-

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TO BE SERVED UPON:-

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