Gakenga v Consolidated Bank of Kenya Limited & 2 others (Civil Case 13 of 2018) [2022] KEHC 436 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KEHC 436 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL CASE 13 OF 2018

FN MUCHEMI, J

APRIL 28, 2022

BETWEEN

JANE WANJIKU GAKENGA ..... PLAINTIFF

AND

CONSOLIDATED BANK OF KENYA LIMITED ..... 1ST DEFENDANT

RACHEL MUTAHI T/A TOP LINK AUCTIONEERS ..... 2ND DEFENDANT

JOSEPH KIMWEA MAINA ..... 3RD DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 21st September 2015. It was amended on December 10, 2015 and further amended on April 26, 2016. The Further Amended Plaint seeks for orders that this Honourable Court do issue a declaration that the exercise of the 1st defendant's power of sale pursuant to the charge dated December 14, 2011 as founded in the statutory notice dated March 16, 2015 is contra-statute and illegal and an order seeking for damages for conversion and detinue of the security LR No. Nyeri/Waraza/1244. The plaintiff also prayed for delivery of the accounts by the 1st delivery in respect of the charge dated December 14, 2016

2. The 3rd defendant did not enter appearance or file a statement of defence and interlocutory judgment was entered against him on 27/4/2021.

The Plaintiff's Case

3. The plaintiff adopted the witness statement filed on 21/9/2015 and states that she is the registered owner of land parcel LR No. Nyeri/waraza/1244 and in November 2011, the 3rd defendant, who held an account with the 1st defendant, approached her to guarantee him for a loan of Kenya Shillings Three Hundred Thousand Only (Kshs. 300,000/) by having her property used as security. She testified that the 3rd defendant applied for the said loan which was granted and they executed a charge dated 14th

December 2011. She testified that she was not aware of the letter of offer dated 15/10/2012 attached to the 1st defendant's witness statement and she was seeing it for the very first time. Additionally, she testified that she did not see the charge document allegedly attached to the letter of offer according to the defendant.

4. It is the plaintiff's case that on 16th March 2015, she received a demand notice from the 1st defendant informing her that the loan of Kshs. 300,000/- was in default, the outstanding principal sum, interest and arrears being Kshs. 423,329.05. However the 1st defendant required the plaintiff to settle an amount of Kshs. 2,206,371.10 within three months or the 1st defendant would sell her property by public auction.

5. PW1 further testified that she wrote to the 1st defendant on 13th March 2015 informing them that they had an agreement with the 3rd defendant that he would repay the loan within six months and that he had informed her that he did so in 2012. The plaintiff offered to repay to the bank Kshs. 300,000/- and the accrued interest of Kshs. 123,329/- however the 1st defendant declined the offer and through their letter dated 21/7/2015 they required her to settle the full amount of Kshs. 2,391,822.08/- in default, they would sell her property.

6. The plaintiff testified that she confronted the 3rd defendant wanting to know why he had lied to her, to which he disclosed that at the time of charging the security, he had outstanding loan facilities with the 1st defendant, which fell into arrears and hence the huge outstanding sum.

7. PW1 further testified that she received a Notification of Sale of her property on 20/8/2015 that was dated 27/7/2015 demanding Kshs. 2,391,822.10 in default of which, the 1st defendant would sell her property in the next 40 days. On 25/8/2015, she stated that she found a document in her residence dated 10/8/2015 by the 2nd defendant indicating that her property would be sold by public auction on 22/10/2015 and gave her 45 days to redeem her property.

8. The witness further testified that pursuant to the court orders of 22/10/2015, she paid the 1st defendant Kshs. 480,000/- paid in two instalments of Kshs. 280,000/- and Kshs. 200,000/-. The said sum was inclusive of Kshs. 30,000/- which was the 2nd defendant's fees.

9. The witness testified that on 17/9/2019, the 1st defendant attempted to sell the suit property but she states that she obtained orders for stay from the court. Further 0n 19/9/2019, she states that someone came to her land and informed her that he bought the land via auction.

10. On cross-examination, the witness stated that although she signed the charge, she did not read its contents. She states that she and the 3rd defendant did not sign separate charge documents. She further stated that she was unaware that the 3rd defendant had other existing loans as he did not bring them to her attention and neither did the 1st defendant.

The 1st & 2nd Defendants' Case

11. The 1st & 2nd defendants led evidence through Ms. Catherine Muthiani, who is a Recoveries Officer with the 1st Defendant and she relied on her witness statement filed on 9th July 2019 as her evidence.

12. It is the defendant's case that on 18/11/2011, the 1st defendant vide a letter of offer approved the 3rd defendant's application to restructure the loan facility of Kshs. 2,301,019/- to include a further Kshs. 300,000/- and to subsequently draw and register a charge in the 1st defendant's favour over all the property in LR No. Nyeri/waraza/1244 which was in the name of the plaintiff as security for the entire loan facility. A legal charge between the 1st defendant and the plaintiff was registered on December 14, 2011 to secure advances to the 3rd defendant.

13. DW1 testified that by a letter dated March 16, 2015, the 1st defendant issued to the plaintiff a statutory demand notice in respect of the charged property seeking that the plaintiff rectify her default payment of an outstanding balance of the principal sum, interest and arrears of Kshs. 423,329.05/- and the entire debt having amounted to Kshs. 2,206,371.10/- together with interest accruing at 18% per annum. The plaintiff responded to the 1st defendant's letter stating that she had guaranteed the loan would be cleared within a time period of six months by the 3rd defendant which was not reflected on the charge document thus she sought a discounted rate on the defaulted sum which request the 1st defendant declined to grant. The witness added that though the plaintiff had guaranteed the sum of Kshs. 300,000/- the 1st defendant held other existing securities. The plaintiff gave a guarantee of Kshs. 2,350,000/- as in paragraph 5(d) of the letter of offer and she was therefore aware of the amount guaranteed.

14. The witness testified that the 1st defendant thereafter issued a notice of sale of property on 27/7/2015 indicating that as a result of the plaintiff's default in payment of the debt due, the 1st defendant was intent on exercising its statutory power of sale over the security upon the expiry of forty days. Upon the expiry of 40 days, the 1st defendant engaged the services of the 2nd defendant to advertise and actualize the sale of the suit property.

15. DW1 further testified that it was an agreed term in the letter of offer between the 1st and 3rd defendant that the 1st defendant had a right to combine all or any accounts by the 3rd defendant to have the former's right to have the entire loan amount crystallize. The witness further testified that the 1st defendant neither knowingly nor willingly misrepresented to the plaintiff by not disclosing other existing encumbrances at the time of requesting for the loan facility by the 3rd defendant as the plaintiff voluntarily agreed to charge the suit property to secure advances made to the 3rd defendant.

16. On cross-examination, DW1 stated that the plaintiff was not a party to the letter of offer and the witness had nothing to show that she was aware of the contents of the said letter. She further added that the personal guarantee that the plaintiff executed made her aware of her responsibility.

17. The witness further testified on cross examination that the letter of offer gave 72 months for the repayment of the loan. Further, the witness testified that they never served the plaintiff with the account statement of the outstanding loan as she was not their customer. The witness testified further that the charge was specific that Kshs. 300,000/- was the maximum amount the plaintiff was to meet.

18. Parties hereby gave oral evidence in court based on their statements. This was followed by filing of submissions by all parties who participated in the hearing of the case.

Plaintiff's Submissions

19. The plaintiff observes that in their defence, the 1st defendant did not disclose to the plaintiff that the debtor had other debts owing to the bank at the time of execution of the charge. Further, the plaintiff submits that she has never been informed of the debtor's account with the bank and there is no evidence that she executed a personal guarantee for the amount on the debt indicated which was required by the letter of offer.

20. The plaintiff relies on the case of *Duncan Fox & Co v South Wales Bank* [1880] 6 AC 1 and submits that the relationship between her, the bank and the debtor is based on a contract of guarantee to arise in three instances, the relevant one herein being where there is an agreement creating the relationship of principal and surety to which the creditor is a party, making this a tripartite transaction.

21. The plaintiff submits that she is seeking to have the charge declared unforceable against her thus having her discharged from any liability flowing from it. She pleads misrepresentation by the 1st and 3rd defendants by failing to disclose to her that the debtor owed the bank more money than what she was charging her land for and that she entered into the contract on the belief that the debt she was guaranteeing was only the amount indicated on the charge. The plaintiff further submits that she was not a party to the loan agreement between the bank and the debtor and thus the whole transaction is unenforceable against her making the intended exercise of statutory power of sale of her land unlawful entitling her to damages.

22. The plaintiff further submits that her grounds for a declaration that the charge does not bind her as a guarantor is based on two undisputed features of the charge. Firstly, that she signed the charge without the knowledge of any other contract or dealings between the bank and the debtor which changed the position of the transaction from what she knew. Secondly, that what was concealed from her varied in a fundamental way, the attendant liability, which manifestly prejudiced her in that she was required to bear a debt she had not agreed to bear. The plaintiff relies on the principle of guarantee known as the doctrine of unusual features and submits that a creditor is obliged to disclose to a surety any contract or other dealing between the creditor or debtor which changes the position of the debtor from what the surety might naturally have expected. As such, failure to so disclose automatically discharges the guarantor from any liability. Furthermore, the plaintiff submits that the bank's attempt to hide behind the duty of confidentiality to the debtor fails from the onset since the guarantor was a party to the tripartite contract of guarantee, and based on the principle of consensus ad idem, failure to make the disclosures as admitted rendered the transaction unenforceable against the plaintiff and discharges her from any liability.

23. The plaintiff further relies on the doctrine of discharge by variation (the brunskill rule) and submits that the guarantee contract was varied without her consent which is sufficient to bring into operation the rule in *Holme vs Brunskill* [1878] 3QB; 495. The plaintiff further submits that as admitted by the 1st defendant and as indicated in the letter of offer, the terms therein greatly varied from the terms of the guarantee by a substantial increment of the extent of the debt sought to be guaranteed, and only the bank and the debtor are bound by those terms, thus satisfying the requirement to the effect that the variation must be binding as laid down in *Egbert v National Crown Bank* [1918] AC 903.

24. The plaintiff submits that on the brunskill's rule that any variation of the underlying contract, which is substantial and capable of prejudicing the guarantor will discharge the guarantee as was enunciated in the case of *Hackney Empire Ltd v Aviva Insurance Ltd* [2013] 1 WLR, 3400. As admitted by the 1st defendant and the letter of offer, the plaintiff submits that the terms in the letter of offer amounted to refinancing and making time by the bank in favour of the debtor. It gave the debtor more time to repay the existing loan balances and granted him additional debts. As such, the refinancing agreement discharged the guarantor from any liability as was demonstrated in the cases of *Marubeni Hong Kong & South China Ltd v Mongolian Government* [2004] EWHC, 472 [COMM], CIMC *Raffles Offshore (Singapore) Ltd v Schahum Holdings SA* [2013] 2 ALL ER [COMM] 760, *National Bank of Nigeria v Awolesi* [1964] 1 WLR, 1311 and Abraham Kiptanui v Delphins Bank Ltd [2000] eKLR.

25. The plaintiff relies on the case of *Polak vs Everett* [2013] 2ALL ER [COMM] 760 and submits that an agreement by the creditor to extend the time for performance by the debtor of his obligation under the main contract, releases the guarantor from any liability. The letter of offer gave the 3rd defendant 72 months to repay the debt, while the charge did not contain such a term on time for repayment, thus by that variation, the plaintiff submits that she was fully and automatically discharged from the guarantee ab initio.

26. The plaintiff further relies on the doctrine of privity of contracts and submits that anything done behind a guarantor's back discharges him from and does not bind him to the tripartite guarantee. Not being a party to the debt agreement as contained in the letter of offer, the plaintiff submits that she cannot be bound by the terms thereof in respect of repayment of the debt amount or at all, hence any attempt to execute any liability flowing from it against her is illegal. Further, the 1st defendant admitted in evidence that to perfect the charge, the plaintiff had to sign an agreement of guarantee as required by the letter of offer. The plaintiff submits that this was not done and as such she cannot be a party to the debt agreement as was observed in *Allan George Njogu Residence Ltd v NBK Ltd* [2013] eKLR.

27. The plaintiff further submits that she is entitled to restitutory and compensatory damages. She expounds that she seeks a refund of Kshs. 453,329/- which she paid to the 1st defendant pursuant to the court order issued on October 21, 2015. She further prays for compensatory damages for conversion and relies on the case of *AGN Residences Ltd v NBK Ltd* [2013] eKLR to support her contention. The plaintiff submits that the instant claim was prompted by a threat of sale of her land which threat has subsisted for 10 years since the charge was registered on December 14, 2011. The plaintiff further states that the defendant did not remove the threat even after the enforced payment of an excess of the amount was made. Moreover, despite the subsisting court orders, the 1st defendant still pursued auctioning the suit property. As such, the plaintiff prays for an award of damages of Kshs. 5M as the threat to her land has been and is still much greater than the one faced in the case of *AGN Residences Ltd*.

28. The plaintiff states that she has sought from the 1st defendant, provision of the accounts for the debt account. However, she states that if the foregoing claims are granted in her favour, such accounts would be unnecessary. In the event the court finds otherwise, the plaintiff submits that as of right, she is entitled to a full disclosure of the accounts. As such, the plaintiff prays that her claim be allowed as prayed.

1st & 2nd Defendants' Submissions

29. The defendants reiterate what she stated in her oral evidence and witness statement and submits that although the plaintiff denied any knowledge of any present or future indebtness by the 3rd defendant, she admitted during cross-examination that she never actually read the entire agreement. As such, the defendants submit that she only has herself to blame for missing out on the salient features of the charge that intimated of the existence of present or future indebtness. The defendants indicate that paragraph 7 of the charge document is of much prevalence as the provision intimates that the plaintiff having signed the document is liable for any anticipated, past, present and futuristic obligations on the 3rd defendant. To support their contention, the defendants rely on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR.

30. The defendants submit that the guarantee should not be declared null and void ab initio because the plaintiff was negligent in not perusing the charge and getting competent advice on the implication of the terms of the charge. Further, the defendants submit that the plaintiff is estopped, based on her representations and conduct, from rendering the guarantee null and void and also from asking for a refund. The defendants state that the plaintiff all along admitted the existence of at least Kshs. 300,000/- security and based on that, the bank made deliberate and positive actions towards advancing the sums to the borrower. To support this contention, the defendants rely on the case of *Titus Muiruri Doge v Kenya Canners Ltd* [1988] eKLR and submit that the plaintiff cannot renege her contractual undertakings after making the bank believe that she was playing ball, after not only surrendering her title to the bank but also executing a charge.

31. The defendants submit that the plaintiff has not put herself within the purview of definition of conversion as enunciated in the *Halsbury's Laws of England, 4th Edition* pg 355 para 548. The defendants further submits that they have demonstrated that her property was not utilized by the bank in a manner inconsistent with her rights as she knew all along about the guarantee and is therefore estopped by her conduct. The defendants further submit that the authority cited by the plaintiff is distinguishable as in that case the bank had cautioned the property as opposed to the instant case where only a charge had been registered. As such, the defendants state that the plaintiff's suit lacks merit and ought to be dismissed with costs.

Issues for Determination

32. On perusal of the pleadings and submissions of the parties herein as well as listening to the oral evidence of both parties the following are the issues that arise for determination:-

    a. Whether the charge and the guarantee should be declared null and void ab initio and the title issued following sale by public auction should be cancelled

    b. Whether the plaintiff is entitled to compensatory damages for conversion.

    c. Whether the 1st defendant should be ordered to provide the plaintiff with the accounts in respect of the charge dated 14th December 2016.

The Law

Whether the guarantee should be declared null and void ab initio and the title issued following sale by public auction should be cancelled.

33. It is the plaintiff's case that she was never aware of the other existing indebtness by the 3rd defendant and thus she should not be compelled to settle the arrears. Further, she stated that she never signed any letter of guarantee and therefore the guarantee is void ab initio. The 1st and 2nd defendants on the other hand argue that the plaintiff did sign a letter of guarantee and that she admitted during cross examination that she never actually read the entire agreement.

34. He who alleges must prove. This degree of prove is well enunciated in the case of *Miller vs Minister of Pensions* [1947] cited with approval in *D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati* [2014] eKLR. The court stated:-

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', thus proof on a balance or prepondence of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

35. Further, Section 107 of the *Evidence Act* Cap 80 places the burden of proof on the party who wants the court to rely on the existence of any set of facts to make a finding in his favour, to prove those facts.

36. It is not in dispute that the plaintiff and the 3rd defendant on one part and the 1st defendant on the other part executed the charge in respect of a facility of Kshs. 300,000/- whereas the plaintiff guaranteed the facility using her land L.R. Nyeri/Waraza/1244 as security. What is in dispute is the amount secured

and whether the charge was valid or not in view of the alleged variation, non-disclosure of material particulars.

37. The defendant witness referred to the letter of offer in her written statement which it was not produced in evidence. The witness further admitted in cross examination that she did not produce any letter of guarantee although she claimed that the plaintiff had signed one. The essence of a guarantor is to discharge liability when the principal debtor fails to honour his duty. This principle was enunciated in Geraldine Andrews & Richard Millet in "*The Laws of Guarantees*" at page 156 as herein under:-

> A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point.

38. By its very nature, a guarantee is distinct from the agreement which gives rise to the obligation guaranteed. The principal debtor is neither a party to the guarantee nor considered as one with the guarantor. See *Moschi v Lep Air Services Ltd* [1972] ALL ER 393. Consequently, the rights and/or obligations of a guarantor as against the creditor accrue to him/her from the relationship created by the guarantee as was held by the Court of Appeal in *Robert Njoka Muthara & anotherv Barclays Bank of Kenya Limited & another* [2017] eKLR.

39. In my view, the letter of guarantee was so crucial to the 1st defendant's case that it ought to have been produced as proof that the plaintiff had guaranteed the 3rd defendant's facility. The failure to produce the said guarantee leads to only one conclusion, that no guarantee was signed between the parties as required by law.

40. Nevertheless, it is admitted by the plaintiff that she signed the charge. The charge was a tripartite agreement between the plaintiff, the principal debtor and the 1st defendant that the plaintiff had surrendered her land L.R. Nyeri/Waraza/1244 as security for the loan advanced to the 3rd defendant. It provided in Clause B:-

> The Bank has at the request of the chargor and the borrower agreed not to call in or sue for or require the immediate repayment of any existing indebtness due to it from the chargor and the borrower or others for whom the chargor and the borrower are surety and has agreed to grant to Jane Wanjiku Gakenga and Joseph Kimwea Maina (hereinafter called the 'chargor' and the 'borrowers' which expression shall where the context so requires, includes his personal representatives, heirs and permitted assigns) financial accommodation by way of loan, time credit, banking facilities, overdraft advances and other financial facilities from time to time to an aggregate maximum principal amount (exclusive of interest and other charges, costs and expenses as hereinafter provided) of up to Kenya Shillings 300,000 (Three Hundred Thousand Shillings Only) or the equivalent in whatever currency denominated (hereinafter referred to as the "Maximum Principal Amount") or such lower limit as may for the time being and from time to time be fixed by the Bank.

41. The effect and purport of the terms and conditions as stipulated in the above clause is that the plaintiff provided her property as security for the loan amount of Kshs. 300,000/. Though the 1st defendant argues that the plaintiff by signing the said charge, was liable for any past, present and future obligations

of the 3rd defendant. I seek to adopt the reasoning of the court in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd* [2002] 2 EA 503 where the court stated:-

> A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regards to the terms of the charge. As was stated by Shah JA in the case of *Fina Bank Ltd vs Spares and industries Ltd* [2000] 1 EA 52: "It's clear beyond peradventure that save those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.

42. The charge forms the basis of the contract between the plaintiff, the 1st and 3rd defendant which stipulated that the obligation of the plaintiff was to make good the debt of the 3rd defendant in the event that he defaulted in payment. This amount of Kshs. 300,000/- was to include interest at the agreed rate of 18% per annum, penalties and other expenses. An official search on L.R Nyeri/Waraza/1244 dated November 10, 2011 shows an encumbrance of Kshs. 300,000/- only was registered in favour of the 1st defendant.

43. The 1st defendant relied on Clause 7 of the charge arguing that the plaintiff by executing the charge had bound herself to pay all the outstanding loans of the 3rd defendant whether advanced before or after the execution of the charge. Clause 7.1 provides that that when the following events happen, they will be taken as default. I find the following relevant in this case:-

44. Clause 7.1.1 which provides:-

The Chargor and/or the Borrowers fail to pay on the due date any money or to discharge any obligation or liability payable by the Chargor and/or the Borrowers to the Bank or fails to comply with any term, condition, covenant or provision of this Charge or to perform any obligation or liability of the Chargor and/or the Borrowers to the Bank under this Charge or if any representation, warranty or undertaking from time to time made to the Bank by the Chargor and/or the Borrowers is or becomes incorrect or misleading; or

45. Clause 7.1.2:-

The Chargor and/or the Borrowers defaults under any loan agreement, facility letter or other agreement or obligation relating to borrowing (which expression includes all liabilities in respect of any type of credit and accepting, endorsing or discounting any notes or bills and all unpaid rental and other liabilities, present and future under hire purchase, credit sale, conditional sale, leasing (whether finance or operating) and similar agreements or under any guarantee (which expression includes all contingent liabilities undertaken in respect of the obligations or liabilities of any third party including all guarantees, indemnities or bonds whether constituting primary or secondary obligations or liabilities) or if any borrowing becomes or is capable of being declared payable prior to its stated maturity or is not paid when due or if any mortgage, charge or other security now existing or hereafter created by the Chargor and/or the Borrowers becomes enforceable;

46. My reading of the two sub clauses does not bind the plaintiff in any way in regard to loans that existed before or after she executed the charge. If the 1st and 3rd defendant wanted the plaintiff to extend her guarantee to cover more than Kshs. 300,000/- she had committed in the charge, the 1st defendant ought to have called the parties into another agreement in order to validate any recoveries that would be made against them in the future. In the absence of any such agreement, the 1st defendant could not have lawfully exercised its statutory powers beyond the Kshs. 300,000/- together with interests and expenses

contained in Clause B of the charge which was also noted in the encumbrance section of L.R Nyeri/ Waraza/1244.

47. The 1st defendant said that the variation of the agreement was done through the letter of offer whereas the plaintiff was not a party to that contract. The doctrine of privity of contract demands that a contract can only be enforced between the parties. The plaintiff was not a party to the letter of offer which I believe was meant to bind only the 3rd defendant on the facility granted by the 1st defendant. The plaintiff complained that the 1st and 3rd defendant failed to disclose to her that there were existing facilities or that the 3rd defendant was to get a top up after the execution of the charge document. When she inquired from the 1st and 3rd defendants separately upon being served with the requisite notices, each of them admitted that there was a top-up that was transacted after the plaintiff signed the charge. The top up and the said existing loans inflated the amount demanded from the plaintiff from Kshs.423,329 to Kshs. 2,206,372.10/-

48. It is clear from the evidence that the plaintiff never at any one time denied that she had guaranteed the 3rd defendant for Kshs. 300,000/- plus interest at the agreed rate. The plaintiff stated that 1st defendant denied the plaintiff the statement accounts on the loan upon demand. As she went to court, the plaintiff was in the dark about the figures of the top up or the prior outstanding loans. The parties signed a consent in court that the plaintiff pays Kshs. 423,329/- and auctioneers fees of Kshs. 30,000/- pending the hearing and determination of this suit for the auction of her land to be stopped temporarily.

49. In conclusion, I find that the 1st defendant altered and varied the terms of contract that the plaintiff had signed on 14th December 2011 through subsequent documents which were not produced in evidence. It is my considered view that the plaintiff was bound by the original contract but not by the alteration terms through the letter of offer to which she was not a party. However, I am not convinced that the plaintiff should be discharged from the contract due to the alterations that came after she executed the charge. In my view, the contract signed on December 14, 2011 between the plaintiff and the 3rd defendant on one part and the 1st defendant on the other part is valid and binds the plaintiff to the amount calculated by the 1st defendant and which she paid amounting to Kshs. 423,329/- through the consent order recorded in court on October 21, 2015

Whether the plaintiff is entitled to compensatory damages for conversion.

50. The plaintiff seeks refund of Kshs. 453,329/- pursuant to the consent order of 21st October 2015 and damages for conversion amounting to Kshs.5,000,000/=. The defendants argue that the plaintiff has not fully satisfied that her property underwent conversion and as such she is not entitled to the compensatory damages.

51. The primary issue herein is whether the plaintiff has proved her case for conversion. Conversion is a common law remedy for the unlawful interference with the goods of another. Winfield and Jolowicz on *Tort 15th Edn* page 588 provides that conversion may be committed by wrongfully taking possession of goods, by wrongfully disposing them, by wrongfully destroying them or simply refusing to give them up when demanded.

52. According to the *Black's Law Dictionary 9th Edition*, conversion is defined as the act of appropriating the property of another to ones benefit or to the benefit of another.

53. The *Halsbury's Laws of England, 4th Edition* at page 355 para 548 defines conversion that exists in three forms as follows:-

> To constitute the first form of conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights and an intention in doing so to deny the owner's rights or to assert a right inconsistent with them. This inconsistency is the gist of the action. There need not be any knowledge on the part of the person sued that the goods belong to someone else; nor need there by any positive intention to challenge the true owner's rights. Liability in conversion is strict and fraud or other dishonesty is not a necessary ingredient in the action.
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> A second form of conversion is committed where the goods are detained by the defendant. A wrongful detention gave rise to an action for detinue before detinue was abolished (by the Torts Interference with Goods Act 1977) and now gives rise to an action in conversion. The normal method of establishing a wrongful detention is to show that the claimant made a demand for the return of the goods and that the defendant refused after a reasonable time to comply with the demand.
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> The third form of conversion lies for the loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor.

54. Thus to succeed in her claim, the plaintiff must establish that the 1st defendant unlawfully took possession of her property with the intention of asserting a right over it inconsistent with hers as the owner of the property, or that the property though lawfully taken was later converted in a manner inconsistent with the rights of the plaintiff. It is important to note that the plaintiff voluntarily and willingly executed the charge document which she offered as security over the loan amount of Kshs. 300,000/-. To that extent the 1st defendant registered a charge over her property which was within its legal purview to do so.

55. As long as the facility of Kshs. 300,000/- with interests as agreed by the parties remained outstanding, the defendant lawfully and legally held onto the security as authorised by the charge executed on December 14, 2011. The act of the 1st defendant was legal since it was based on a valid contract.

56. However, the plaintiff paid Kshs. 423,329/- when she entered into a consent with the 1st defendant being the outstanding loan with interests accrued at the agreed rate and further paid Kshs. 30,000/- being auctioneers fees. From the evidence presented by the plaintiff, she had discharged her responsibility on the charge of Kshs. 300,000/- up to the point of demand. Having settled the said amount the security ought to have been released to her at that stage. The 1st defendant has held on to the security for a period of over six (6) years after the plaintiff paid the amount owed to it.

57. The reason for the plaintiff filing this suit was because the 1st defendant demanded Kshs. 2,391,822/- which was over and above the contract between the parties. From the time the plaintiff paid the outstanding balance under the contract, her security ought to have been discharged. During the intervening period, the plaintiff has suffered loss in that she could not as the proprietor exercise her legal rights in respect of the property. Had the 1st defendant exercised due diligence in granting the 3rd defendant the top up loan which amount it did not disclose, these proceedings would have been avoided. The defendant also failed to manage the existing loans of the 3rd defendant and acted ultra vires in lumping up all the outstanding sums against the 3rd defendant to be covered by the plaintiff's security outside the agreement. The 3rd defendant ought to have been called upon to provide guarantors for his other loans.

58. I am of the considered view that the plaintiff suffered loss and damage by the act of the 1st defendant holding her security beyond the payment of the outstanding sum and as such ought to be compensated. Apart from being denied the use of her security as the proprietor, the plaintiff had to incur expenses in regard to court proceedings as well as other incidental expenses.

59. In the persuasive decision of *John Chumia Nganga v Attorney General & another* [2019] eKLR the court made reference to the case of *Peter Ndungu v Ann Waithera Ndungu & 2 others* where the court stated:-

> The issue then that follows for determination is on the question of damages to be awarded to the plaintiff. In determining this question, I am guided by the passage in *Halsbury's Laws of England* at pg 389 para 616 on the measure of damages. The authors state:-
>
> > Nominal measure of damages: In general, damages in conversion are compensatory, their object being to repair the actual loss which the claimant suffers by reason of the conversion. This conforms to the general rule that damages in tort must (so far as money can do so) put the person whose right has been invaded in the same position as if it had been respected. Accordingly, an award of damages in conversion must operate neither by way of penalty to the defendant not by way of windfall to the claimant. In general, there must also be a casual connection between the act of conversion and the loss sustained, and proof of actual loss.
> >
> > Conventional measure: value of goods. The conventional measure of damages in conversion is the value of the goods converted together with any consequential loss which is not too remote. That measure normally applies where the conversion takes the form of a wrongful deprivation or misappropriation and the goods are not later returned.

60. Consequently, I enter judgment in favour of the plaintiff against the 1st defendant in the following terms:-

    a. That a declaration is hereby issued that the 1st defendant exercise of the chargee's powers in regard to the statutory notice issued on March 16, 2015 was illegal null and void to the extent of any demand exceeding the amount specified in the charge executed on December 14, 2011.

    b. General damages of Kshs. 3,000,000/- for conversion and detinue of title for L.R. Nyeri/Waraza/1244 are hereby payable to the plaintiff

    c. An order that the 1st defendant do provide the plaintiff with the accounts in respect of the charge dated December 14, 2011.

    d. The 1st defendant do meet the costs of the suit in favour of the plaintiff.

61. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 28 TH DAY OF APRIL, 2022.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEOLINK THIS DAY OF 28TH APRIL, 2022