REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.1489 OF 1999

PETER NGANGA NJONGE...PLAINTIFF

VERSUS

EURO BANK LIMITED..1ST DEFENDANT

JOSEPH MURAGE GATEBU..2ND DEFENDANT

FELLY GATEBU...3RD DEFENDANT

MURIUKI NJAGAGUA..4TH DEFENDANT

JUDGMENT

(1) The Plaintiff's herein **PETER NJOROGE NGANGA** and **SARAH MWIHAKI NGANGA** (suing as the Administrators of the estate of the late **Nganga Njoroge**), instituted this suit by way of a Plaint dated **19th October 1999** which was later amended on **20th February 2000** and finally re-amended on **10th June 2004**. In the re-amended Plaint of **10th June 2004** the Plaintiffs prayed for judgment against the Defendants jointly and severally for:-

> **"a.A declaration that the charge in favour of the 1st Defendant over the Land known as Kiambaa/Waguthu/369 is null and void.**
>
> **b. An order that the suit premises be freed from any encumbrances pursuant to the said charge and a duly executed and stamped discharged of charge be delivered to the Plaintiffs for registration.**
>
> **c. SPENT.**
>
> **d. SPENT.**
>
> **e. SPENT.**
>
> **f. General damages.**
>
> **g. Costs**
>
> **h. Interest at Court rates on (f) and (g) above."**

(2) The 1st Defendant **EURO BANK LIMITED** opposed the suit by way of their Amended Defence dated **18th October 2004** in which they sought to have the Plaintiff's claim against the 1st Defendant dismissed with costs. The 1st Defendant also filed a counter-claim against the Plaintiffs in which it sought for the following reliefs:-

> **"(a) Kshs.25,546,754.60**
>
> **(b) Interest at 15% per annum from 30th September, 2004 until payment in full.**

(c) Costs."

The Plaintiffs thereafter filed a **REPLY TO AMENDED DEFENCE OF THE FOURTH DEFENDANT dated 1st November 2004.**

(3) The hearing of this suit which involved the Plaintiff and the 4th Defendant commenced on **4th February 2015** before **Hon Lady Justice Kamau.** The Honourable Judge heard the Plaintiff's case. Following her transfer from Commercial & Tax Division of the High Court **Hon Lady Justice Olga Sewe** took over the matter but no witnesses testified before her. It was not until **6th February 2019** that the hearing proceeded before me and I concluded the Defendant's case. The Plaintiffs called two (2) witnesses in support of their case while the Defendant called one (1) witness.

(4) **PW1 PETER NJONGE NGANGA** who relied entirely on his witness statement dated **7th January 2015** was a son to the late **NGANGA NJONGE** (hereinafter "**the deceased**") who was the registered proprietor of the parcel of land known as **Land Reference Number Waguthu Kiambaa/369 and L.R 150/18 Limuru East** (hereinafter the "**charged property"**).

(5) **PW1** testified that in the year **1997** the health of his late father began to decline and as such the deceased executed a Power of Attorney dated **16th September 1997** authorizing **PW1** to handle all matters relating to the charged property as well as over the deceased's bank account **No.[….]** held at **Barclays Bank Harambee Avenue** Branch in Nairobi. The said **Nganga Njonge** eventually passed away on **7th November 1999**. The Plaintiff's case is that sometime in the year **1996 KIMUGA SAW MILLS** a Company associated with the Plaintiff's took a loan of **Kshs.1,500,000.00** from **MONITOR PRESS** a business owned by the 2nd and 3rd Defendants. **Kimuga Saw Mills** faithfully made payments to **Monitor Press** in order to offset this loan by making deposits into the current bank account **No. [….]** held by **Monitor Press** with **EURO BANK LIMITED** (the 1st Defendant) at their Hamilton House Branch.

(6) It later became difficult for **Kimuga Saw Mills** to reconcile their accounts with **Monitor Press** and to trace the repayments they were making towards the loan as the account held by **Monitor Press** at Euro Bank was a current account involving several other transactions. The Plaintiff through his son (**PW1**) (who held a Power of Attorney) and his daughter-in-law **PW2** approached the 1st Defendant seeking to be granted a facility of **Kshs.3,200,000** to enable them pay off the sum of **Kshs.477,728/=** being the loan amount outstanding with **Monitor Press** and the balance was to utilized by the Plaintiffs as capital in their logging business.

(7) **PW1** stated that on **14th May 1999** he went to Euro Bank Offices together with his mother and his wife where they met a **Mr Nganga** an employee of the Bank. The said **Mr Nganga** led the Plaintiffs to an office and produced some documents which he instructed **PW1** to sign. **Mr. Nganga** did not explain to **PW1** the content of said documents but **PW1** testified that amongst the documents was a Land Control Board application form which he did not sign. **PW1** signed the documents and left to await the processing of their loan.

(8) The loan processing took an inordinately long time thus **PW1** wrote to the Bank asking that the Original Title Deed to the charged property which they had deposited with the Bank be returned to him. The Bank did not return the title Deed as requested.

(9) Sometime in **September 1999, PW1** was alerted by a friend that the charged property was in the process of being auctioned by the 1st Defendant in order to recover moneys which had been advanced to 2nd and 3rd Defendants. The Plaintiffs rushed to the Kiambu Lands Registry where they discovered that indeed a charge had been registered in favour of the 1st Defendant bank for an amount of **Kshs.3,200,000**, which had been advanced to the 2nd and 3rd Defendants. Upon perusing the documents **PW1** noted that the application for Land Control Board consent had been signed by one "**MURIUKI NJAGAGUA**" Advocate yet none of the Plaintiffs had instructed this "**Muriuki Ngagagua**" to sign the said application for Land Board Consent on their behalf. The Plaintiffs contend that their land was fraudulently charged by the 1st defendant Bank to secure monies advanced to the 2nd and 3rd Defendants. That all this was done without their knowledge, consent and/or authority. In order to prevent the unlawful sale of the charged property the Plaintiffs filed the present suit.

(10) **PW2 HANNAH NYAGICHUHI NJONGE** is the wife to **PW1.** She relied entirely on her witness statement dated **7th January 2015**. **PW2** confirms that her late father in-law had before his death executed a Power of attorney in favour of **PW1** over land Reference number **Waguthu/Kiambaa/369 and LR 150/18 Limuru East. PW2** told the Court that she worked as a cashier at **Kinuga Saw Mills** which was the family business. She confirms that **Kimuga** had obtained a loan of **Kshs.1,500,000** from **Monitor Press** a company run by the 2nd and 3rd Defendants.

(11) **PW2** confirms that she accompanied her husband **PW1** to the bank on **14th May 1999** where they met and were attended to by a **Mr Nganga**. She states that the said **Mr Nganga** produced some documents and told **PW1** to sign them without explaining to the Plaintiffs what the documents were. That **Mr Nganga** also gave **PW1** a Land Control Board Consent application form and advised them to go and obtain consent from the Land Control Board.

(12) **PW2** stated that sometime in **September 1999** a **Mr Ngunjiri** gave her an unsigned letter dated **3rd September 1999** in which letter the 1st Defendant Bank threatened to sell the charged property in order to realize a loan advanced to the **Monitor Press**. Upon carrying out investigations at the **Kiambu Lands Office** the Plaintiffs to their shock realized that indeed their land had been fraudulently charged to secure a sum of **Kshs.3,200,000** advanced to **Monitor Press**. They then filed the present suit.

(13) **DW1 ADAM BORU MOHAMED** is a Liquidation Agent appointed by the Deposit Protection Fund Board (hereinafter "**DPF**") as the liquidators of **Euro Bank Limited** the 1st Defendant herein. **DW1** relied entirely upon his written statement dated **28th June 2012. DW1** told the Court that from the records held with the '**DPF'** he was able to ascertain that on **9th September 1999,** one **Peter Nganga Njonge (PW1)** executed a charge in favour of the 1st Defendant Bank over **LR NO.KIAMBAA/WAGUTHU/369** in consideration for an advance of **Kshs.3,200,000/=** with interest and on terms as embodied in the charge documents. **DW1** maintain that the Bank dealt with the matter above board. He vehemently denies the allegations made by the Plaintiffs of fraud, negligence and/or unethical conduct on the part of the Bank.

(14) **DW1** states that at the time this suit was filed, an amount of **Kshs.25,546,745.00** was still owing on the loan account and this sum is claimed by the 1st Defendant together with interest and costs in its Amended counterclaim dated **18th October 2004. DW1** urges the Court to allow the 1st Defendant's counterclaim and to dismiss the Plaintiffs suit with costs.

(15) Upon conclusion of the hearing parties were invited to file their written submissions. The Plaintiffs filed their written submissions on **11th March 2019** whilst the 1st and 4th Defendant filed their submissions on **15th April 2019**.

ANALYSIS AND DETERMINATION

(16) I have carefully considered the evidence adduced before the Court in this matter, the written submissions filed by both parties as well as the relevant law. At the outset it is important to note that the law places the burden of proof upon the party who asserts the existence of a particular fact or set of facts. This rule is embodied in **Section 107** of the **Evidence Act, Cap 80, laws of Kenya** which provides:-

> **"107.(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."**

The following are the issues that arise for determination in this case.

(i) Whether the suit property **LR NO. Kiambaa/Waguthu/369** was properly and legally charged to the 1st Defendant Bank in the amount of **Kshs.25,546,745.60.**

(ii) Whether the Plaintiff owes the 1st Defendant the sum of **Kshs.25,546,754.60** as claimed in the Counter-Claim dated **18th October 2004.**

(i) Validity of the Charge

(17) **Section 2** of the **Land Act 2012** defines a "**charge**" in the following terms:-

> **"Charge" means an interest in land security the payment of money or moneys worth or the fulfilment of any condition, and includes a sub charge and the instruments creating a charge including-**
>
> **(a) An informal charge, which is a written and witnessed undertaking the clear intention of which is to charge the chargor's land with the repayment of money or moneys worth obtained from the charge and**
>
> **(b) A customary charge which is a type of informal charge whose undertaking has been observed by a group of people over an indefinite period of time and considered as legal and binding to such people."**

(18) The 1st Defendant claims that **PW1** voluntarily and intentionally charged the land in question to secure a facility for **Ksh.3,200,000/=.** It is the evidence of **DW1** that **PW1** acting on the Power of Attorney granted to him by his late father visited the premises of the Bank and on **9th September 1999** executed a legal charge in favour of the Bank to secure the sum of **Kshs.3,200,000** to be paid to the 2nd and 3rd Defendants T/a **Monitor Press** who were the borrowers. According to **DW1** the facility was repayable at an interest rate of 39%. A copy of the charge dated **9th September 1999** is annexed at page 5 of the Defendant's Bundle of Documents filed in court on **29th June 2012**. The document indicates that the property being charged is **Kiambaa/Waguthu/369.** The principal amount secured by the charge is indicated as an overdraft of **Kshs.3,200,000** payable at an interest of 39% and the Borrowers are named as **Joseph Murage Gatebu** (2nd Defendant) and **Felly Gatebu** (the 3rd Defendant) T/A **Monitor Press**. The document bears the signature of **PW1** as the Chargor. At page 27 of the Defendants bundle the Certificate to the Charge indicates that the Chargor **PW1** executed the charge in the presence of **Muriuki Nyagagua Advocate** (the 4th Defendant).

(19) At first glance and on the face of it the charge documents appears genuine. Indeed, the general rule is that a party will be bound by his/her signature on a document. In **JOSEPHINE MWIKALI KIKENYA –VS- OMAR ABDALLA KOMBO & ANOTHER [2018] eKLR**, it was held thus:-

> **"The general rule is that a party of full age and understanding is normally bound by his signature to a document, whether he reads it or not. See Levison Vs Patent Steam Carpet Cleaning Co. Ltd [1977] 3 All ER 498. Putting it another way, he is estopped by his/her signature thereon from denying his consent to be bound by the provisions/terms contained in that document."**

(20) However, **PW1** whilst not denying that his signature appears on the charge document vehemently denies having signed the document with the intention of securing an overdraft facility for the 2nd and 3rd Defendants. **PW1** and **PW2** both state that their intention in going to the offices of the 1st Defendant Bank on **9th September 1999** was to negotiate a loan facility for their family business **Kimuga Saw Mills**. They sought a facility of **Kshs.3,200,000/=** intending to utilize the funds to pay off an outstanding loan with **Monitor Press** and the balance to be injected into the said family business. **PW1** and **PW2** vehemently deny having visited the Bank with the intention of charging their property in order to secure an overdraft facility in favour of the 2nd and 3rd Defendants.

(21) It has not been explained why **PW1** would be so generous as to charge prime family property to secure an overdraft for **Monitor Press**. Neither the 2nd nor 3rd Defendant the proprietors of **Monitor Press** testified in this case to explain what relationship they had with **PW1** or his late father. **PW1** and **PW2** told the Court that they had obtained a loan from **Monitor Press.** The fact of having secured a loan from **Monitor Press** is not in my mind sufficient reason for the Plaintiffs to charge their property in favour of the Proprietors of **Monitor Press**. In any event **PW1** and **PW2** have explained that their plan was to secure a loan from the 1st Defendant Bank in order to pay off the debt of **Kshs.477,728** owed to **Monitor Press** and the balance to be utilized to build up the family business. This sounds like a logical explanation for their visit to the bank.

(22) **PW1** and **PW2** state that whilst at the Bank they met a **Mr Nganga** who told **PW1** to sign certain documents. The import of those documents were not explained to **PW1** and he did not read the said documents as he is illiterate. I note that while testifying in this matter **PW1** required the services of a Kikuyu interpreter implying that he may not have been entirely fluent in the English language. The said **Mr Nganga** who attended to the Plaintiff whilst at the Bank was not called as a witness. He was a bank employee and nothing would have been easier than for the 1st Defendant to call this person as a witness to counter the evidence of **PW1** and **PW2**. In the case of **Josephine Mwikali Kikenye [supra]** the Court went on to give the exception to the general rule that one is bound by his signature as follows:-

> **"Just like most general rules, there are exceptions to the aforementioned rule. <u>Of relevance to this matter is the doctrine of non est factum which arises where a party has been misled into executing a deed or signing a document which is essentially different from that which he intended to execute or sign</u>. See chitty on Contracts Vol.1 21st Edition, para 5-102. Basically, whenever a party raises the said defence he is saying that the document in question is not his."**[own emphasis]

(23) The court went on to state that:-

> **"Where, however, the plea of non est factum is available, the promises contained in the document are completely void as against the signatory entitled to plead the defence, no matter into whose hands that document may come. <u>The reason is said to be that the mind of the signatory did not accompany his signature, so that the mistake renders his consent, as represented by his signature, a complete nullity</u>."** [emphasis added]

(24) Similarly **Lord Denning in MR <u>Gallie Vs Lee & another [1969] 1 All ER 1062</u>** while discussing the "**non est factum**" rule:-

> **"<u>If the deed was not his deed at all, (non est factum) he is not bound by his signature any more than he is bound by a forgery. The document is a nullity just as if a rogue had forged his signature</u>. No one can claim title under it, not even an innocent purchaser who bought on the faith of it, nor an innocent lender who lent his money on the faith of it. No matter that this innocent person acted in the utmost good faith, without notice of anything wrong, yet he takes nothing by the document."**

(25) **PW1** and **PW2** also deny that they met Advocate **Muriuki Njagagua** who witnessed **PW1** signing the document. The certificate which appears at Page 27 of the Defendants Bundle of Documents filed on **29th June 2012** signed by a **Muriuki Njagagua** Advocate indicates that the Advocate **witnessed** the execution of the charge by the Chargor and that said Advocate confirmed that the Chargor (**PW1**) **understood** the contents of the document. It is telling that the said **Mr Njagagua** Advocate (the 4th Defendant) did not come to give evidence in this matter to confirm having witnessed **PW1** sign the charge document. Neither was the said advocate able to confirm to court that he had satisfied himself that (**PW1**) understood the nature and contents of the charge documents.

(26) The Charge document indicates that its purpose was to secure a further facility for **Monitor Press**. Ordinarily Banks are known to keep meticulous records. In the event of granting any facility to a Client/Customer the Bank should be in a position to produce all relevant documentation. This is not the case here. It strikes me as very strange that the 1st Defendant a Bank was unable to avail a copy of the application made by **PW1** to secure an overdraft facility on behalf of **Monitor Press**. What the Defendant has annexed Page 29 of its Bundle filed on **29th June 2012** is a letter dated **23rd May 1996** by which **J.M Gatebu** the (3rd Defendant) for Monitor Press sought from the 4th Defendant a loan facility of **Kshs.1.75 million**. This letter has nothing to do with the present transaction. Indeed **DW1** confirmed that the letter referred to an earlier facility granted by the Bank to **Monitor Press**. Further under cross-examination by counsel for the Plaintiff **PW1** admitted;

> **"I do not have in court a document requesting the overdraft." We do not have a letter of Offer to the 2nd and 3rd Defendant."**

(27) **PW1** and **PW 2** testified that after applying for a loan facility with the 1st Defendant they waited too long and eventually abandoned the idea in favour of seeking a facility with Barclays bank of Kenya. They then wrote to the 1st Defendant seeking to have the original Title Deed for the charged property returned to them. Evidence of this is provided by the letter dated **16th July 1999** at page 23 of the Plaintiffs bundle of Documents filed on **8th January 2015.** The said letter written by the Plaintiff's Advocate reads as follows:-

> **"Further to our letter dated 12th instant we have been instructed by our client to write as follows:-**
>
> **That you indicated to him that you would grant him loan facilities and requested him to deliver his title deed number Kiambaa Waguthu/369. That you later declined to grant the loan.**
>
> **Our client has negotiated a loan with Barclays Bank.**

Our instructions are therefore to forward to us the title document to enable us forward the same to the bank.

Your quick response will be highly appreciated.

Yours faithfully

K. MWAURA & COMPANY"

(28) Why would **PW1** be asking to have the Title Deed returned if the intention had been to secure a facility on behalf of the 2nd and 3rd Defendants. The letter refers to a loan facility to "**him**" meaning the Plaintiff himself. It does not refer to a loan facility to be granted to third parties.

(29) The other puzzling piece of this whole transaction was the issue of consent from the Land Control Board – **DW1** admits that the application for consent was signed by an Advocate on behalf of the land owner. The evidence on record shows that it was the 4th Defendant who applied for and obtained consent from the Land Control Board. A copy the said application is contained in the Defendant's supplementary Bundle of documents filed on **3rd December 2013**. The portion reserved for the signature of the Chargor or authorized agent is signed and stamped by this **Muriuki Njagagua** Advocate. The application bears no date. **PW1** is categorical that he never instructed the 4th Defendant to make the application on his behalf. Even **DW1** under cross examination admits that:-

> **"It is not procedural for the advocate for the bank to sign on behalf of a land owner…"**

(30) Again the failure of Advocate **Muriuki Nyagagua** to testify in this matter is very telling. If this was a genuine and bona fide transaction and if this Advocate had clear instructions to act for the Plaintiffs in the matter of obtaining consent from the Land control Board, nothing would have been easier than for the said **Mr Njagagua** to appear as a witness to confirm this position. As things stand the Plaintiffs averment that they never met this Advocate and never instructed him to act on their behalf has not been challenged and/or controverted.

(31) In my view this is a transaction that stinks to high heaven. **PW1** and **PW2** gave clear and consistent evidence regarding their interactions with the 1st Defendant Bank. Both witnesses remained unshaken under cross examination. On the other hand, I was able to observe the demeanour of **DW1** as he testified in Court. In my view he was evasive and was hesitant to answer questions put to him by Counsel for the Plaintiffs. My assessment is that this witness was not being entirely honest with the Court.

(32) The failure of key material witnesses such as the 2nd, 3rd and 4th Defendants to testify in this suit raises a lot of questions and leaves the court with several unanswered questions. I have no reason to disbelieve the evidence of the Plaintiffs. I find that they have proved on a balance of probability that there was something untoward about this transaction. I therefore grant the orders prayed in terms of prayers (a) and (b).

(33) The Plaintiff has sought to be awarded General Damages as a result of the misuse and fraudulent charging of this Title Deed by the Defendants. **Black's Law Dictionary 10th Edition** defines "**General Damages**" as:-

> **"Damages that the law presumes follow from the type of wrong complained of, specifically compensatory damages for harm that so frequently results from the tort which a party has sued that the harm is reasonably expected and need not be alleged or proved."**

(34) In the case of **VICTORIA LAUNDRY (WINDSOR) LTD –VRS- NEMAN INDUSTRIES LTD: COULSON & CO. LTD (THIRD PARTIES) 1949 KB 528,** it was held:-

> **"It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position so far as money can so as if his rights had been observed."**

I am satisfied that the Plaintiff has proved on a balance of probability that the Defendants acting in concert fraudulently charged his Title Deed in order to secure an overdraft facility for the 2nd and 3rd Defendants. The Plaintiff is in my view entitled to damages. I therefore award to the Plaintiff general damages of **Kshs.1,000,000/=.** Costs of this suit as well as interest at court rates are awarded to the Plaintiff from the date of this judgment until payment in full.

(ii) <u>Counterclaim</u>

(35) The 1st Defendant filed a counterclaim seeking judgment against the Plaintiff in the amount of **Kshs.25,546,754.60** and interest at 15% per annum from **30th September 2004** until payment in full and costs of the counterclaim. The 1st Defendant claims that this sum is the aggregate due to the Bank arising from the failure of the 2nd and 3rd Defendants to repay the overdraft facility granted to them by the bank.

(36) The facility granted to **Monitor Press** was an overdraft facility. This means that the 2nd and 3rd Defendants were authorized to draw down this amount of **Kshs.3,200,000**. The 1st Defendant claims that these monies were duly disbursed to the 2nd and 3rd Defendants and that there has been default in repaying that overdraft facility.

(37) In his testimony before court **DW1** refers to the Statement of Account **No.[….]** in the name of **Monitor Press** (Page 9-22 of the

Statement of **DW1** filed in Court on **29th June 2012**). **DW1** states that the said account was non-performing and had an outstanding balance of **Kshs.20,107,050.85** which remains unpaid and said outstanding balance continues to accrue interest at the rate of 15% per annum.

(38) However under cross-examination by counsel for the Plaintiff **DW1** admits that there is no documentary evidence of any application made by **Monitor Press** seeking an overdraft facility from the 1st Defendant Bank. Similarly **DW1** admits that no letter of Offer to the 2nd and 3rd Defendants relating to this overdraft facility exists. The only document **DW1** is able to show the court is a letter dated **24th August 1995** which was in respect of an overdraft of **Kshs.1,750,000/=** granted to the 2nd and 3rd Defendants in the year **1995**. **DW1** states as follows:-

"I do not have in my bundle an application or a letter of Offer for an overdraft of Kshs.3.2 Million…"

(39) I reiterate once more that Banks are known to keep records meticulously. It cannot be that no documentation at all exists to support this overdraft facility of **Kshs.3.2 Million** allegedly granted to **Monitor Press** nor is there is any letter from **Monitor Press** seeking to restructure their earlier loan facility.

(40) Further **DW1** told the Court that **Monitor Press** defaulted in repaying the first facility of **Kshs.1,750,000.000** granted to them in **1999**. It is highly unlikely that a Bank would proceed to grant a facility of a higher amount to a borrower who is in active default of an earlier facility granted to them. **DW1** under cross examination states as follows:-

> **"Thus in 1998 Monitor Press was in default of a facility. Even so Euro Bank proceeded to grant an additional facility to Monitor Press in 1999…"**

This does not strike me as sound banking practice on the part of the 1st Defendant.

(41) Again **DW1** under cross examination states:-

> **"The Charge document secures an overdraft facility to a maximum of a principal sum of Kshs.3.2 Million. The bank statement will show how much was drawn down in favour of Monitor Press. At Page 22 of my statement shows an outstanding balance of Kshs.20,107,005.85. The balance indicated in the statement is the amount withdrawn. Interest would accrue as soon as the account is overdrawn. The first interest entry charged on that facility was on 30/11/1995 for Kshs25,975.50. this was four (4) years before the facility of 3.2 million was granted to the 2nd and 3rd Defendants.."**

(42) It boggles the mind that, as admitted by **DW1** under cross-examination, interest was charged on this overdraft facility for **Kshs.3.2 Million** on **30th November 1995**. This means that interest was being charged on this overdraft facility four (4) years prior to the year **1999** when the said facility was allegedly granted to the 2nd and 3rd Defendants. This is a clear evidence of the suspicious nature of this entire transaction.

(43) The charge which was to secure this overdraft facility of **Kshs.3.2 Million** is dated **9th September 1999** and the same was registered on **14th September 1999**. A charge will take effect from the date on which it is registered in line with **Section 65(3)** of the **Registered Land Act** (now Repealed). **DW1** told the Court that the Account statements supported their counterclaim. The said statements appear in the 1st and 4th Defendants Supplementary List of Documents filed on **3rd December 2013**. A keen perusal or the said statements show that no draw down was made by the 2nd and 3rd Defendants against this overdraft facility of **Kshs.3.2 Million** after the charge was registered. The Statement shows that the last transaction undertaken by the 2nd and 3rd Defendant was on **11th January 1999** a full eight months before the registration of the charge on **14th September 1999**. How in these circumstances can the Bank claim unpaid arrears in respect of a facility that was never utilized. It is clear that this counterclaim by the 1st Defendant is entirely fictious. The Counterclaim has no basis at all and I dismiss the same in its entirety and award costs of this counterclaim to the Plaintiffs.

Dated in **Nairobi** thi **30th** day of **June 2020**.

..

Justice Maureen A. Odero