REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 37 OF 2019

(Formerly Eldoret ELC No. 9 of 2015)

WILLIAM KIMUTAI KANDIE (suing through JOHN KAMAR)…...PLAINTIFF

VERSUS

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

PROTUS WANGA T/A TIMELESS DOLPHIN

AUCTIONEERS.....2ND DEFENDANT

JUDGMENT

[1] Upon being duly authorized by the plaintiff herein through an instrument of Power of Attorney, **John Kamar** filed this suit on behalf of the plaintiff, **William Kimutai Kandie**, on **19 January 2015** through the law firm of **Wambua Kigamwa & Company Advocates**. The plaintiff's cause of action was that the 1st defendant unlawfully instructed the 2nd defendant to sell his parcel of land known as **ELDORET MUNICIPALITY/BLOCK 14/255**, measuring about 0.4047 Hectares, in disregard of the terms and limits prescribed by the Charge. Thus, the plaintiff moved the Court for relief and asked for the following orders vide his Amended Plaint filed on **6 December 2017:**

> **[a]** A declaration that the 1st defendants' intended exercise of the statutory power of sale is a nullity and a perpetual injunction restraining the defendants jointly and severally from selling, transferring or in any manner whatsoever dealing with the land parcel known as **ELDORET MUNICIPALITY/BLOCK 14/255**;
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> **[b]** A declaration that the acts of the 1st defendant in observing the guarantee agreement in breach of the law and its terms amount to a discharge of the guarantee agreement, hence the charge created in favour of the 1st defendant as entry No. 3 in the Encumbrance Section of the register of the land parcel known as **ELDORET MUNICIPALITY/BLOCK 14/255** be discharged and the original title to the said parcel be returned to the plaintiff.
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> **[c]** Costs of the suit and interest.

[2] Contemporaneously, the plaintiff filed an interlocutory application under **Order 40 Rule 1** of the **Civil Procedure Rules, 2010**, for a temporary injunction to restrain the defendants from selling, advertising, transferring or in any manner whatsoever dealing with the land parcel known as **ELDORET MUNICIPALITY/BLOCK 14/255** (hereinafter, **"the suit property")** pending the hearing and determination of the suit. That application was disposed of on **22 January 2016** in the plaintiff's favour and the suit progressed to hearing after the close of pleadings. The defendants denied the claim and filed a joint Statement of Defence on **9 February 2015** and asserted that the plaintiff is truly indebted to the 1st defendant to the tune of **Kshs. 64,960,523.16**, having willingly offered the suit property as a security for a loan. The Defence was thereafter amended on **26 July 2017** to include an averment in Paragraph 8A thereof that the declarations sought by the plaintiff comprise an attempt to unilaterally vitiate a contract freely entered into by the parties.

[3] At the hearing, **John Kibet Kamar** testified on the plaintiff's behalf as **PW1**. He adopted his witness statement dated **19 January 2019** and confirmed that the plaintiff is well known to him; that he sold to him the suit property; and that he got to know afterwards that the property had been charged to the 1st defendant for **Kshs. 13,000,000/=.** He consequently obtained Power of Attorney from the plaintiff to institute this suit for the purpose of asserting the plaintiff's rights thereto. He produced the Power of Attorney as the **Plaintiff's Exhibit 1** herein. **PW1** further told the Court that he only got to learn through the newspapers that the property had been put up for sale by public auction; and that when he notified the plaintiff thereof, the plaintiff denied having been served with any of the requisite notices. He

accordingly prayed for the plaintiff's plaint to be allowed and for the orders sought therein to be granted. He produced the original documents comprising plaintiff's List and Bundle of documents in support of his testimony, and they were marked the **Plaintiff's Exhibits 1, 2, 3, 4A and 4B herein.**

[4] In cross-examination, **PW1** conceded that he was served with the Redemption Notice dated **10 June 2014**; but posited that he had no right to take any legal action because he was yet to be given the Power of Attorney by the plaintiff. He also conceded that he signed both the Charge and Guarantee on behalf of the plaintiff. He mentioned that the address used in the Redemption Notice was not the same address used in the Charge instrument, which he admittedly signed. **PW1** also admitted that the loan for which the Guarantee had been furnished is yet to be repaid by the Borrower, **Lomsons Enterprises Ltd**.

[5] On behalf of the defendants, evidence was called from **Benard Javan Oliko (DW1)**, an employee of the 1st defendant. **DW1** adopted his witness statement dated **5 February 2020** as part of his evidence in chief and confirmed that the plaintiff was one of the guarantors to **Lomsons Enterprises Ltd**. He further confirmed that **John Kamar (PW1)** signed the Guarantee and Charge on his behalf for some **Kshs. 76,023,660/=** and that as security for the loan, the plaintiff offered his title for the suit property. Thus, **DW1** concluded his evidence by stating that, following the borrower's default in servicing the loan, the 1st defendant had every right to advertise the suit property for sale in realization of its statutory power of sale. He, likewise, produced the defendants' List and Bundle of Documents as the **Defendants' Exhibits 1 and 2** herein.

[6] At the close of the defence case, directions were given on **26 February 2020** for the filing of closing submissions. To that end, **Mr. Kigamwa** filed his written submissions dated **4 June 2020** and invited the Court to be guided by **Halsbury's Laws of England**, 5th edition, Volume 49 at page 561 for the proportion that a guarantor will be discharged from his obligations if the creditor acts in bad faith towards him, or connives at the default of the principal debtor in respect of the guarantee. He highlighted the fact that a restructure was done by which the period of the guarantee was extended from 12 to 60 months without the knowledge or consent of the plaintiff and submitted that this, of itself, amounts to an unfair dealing with the plaintiff's security and therefore completely absolves the plaintiff from his responsibilities under the guarantee.

[7] **Mr. Kigamwa** also relied on **Holme vs. Brunskill** [1878] 3 QBD 495; **Co-operative Bank of Kenya Limited vs. Washington Otieno Ogindo** [2012] eKLR; **David Harris vs. Middle East Bank Kenya Limited & 3 Others** [2019] eKLR, and **Law of Financial Institutions** in Kenya published by LawAfrica Publishing (K) Ltd at page 178, to support his argument that any variation by a creditor of his specific contract with the principal debtor or with any other co-guarantor releases the guarantor from liability.

[8] According to **Mr. Kigamwa**, the plaintiff's obligation, based on the Charge, was limited to **Kshs. 13,000,000/=;** and that since the bank statement of the principal debtor shows the 1st defendant has received over **Kshs. 19,753,834.44** by way of repayment from the principal debtor, the plaintiff is under no duty to make any further payments to the 1st defendant. On the intended exercise of the statutory power of sale, **Mr. Kigamwa** submitted that for the chargee to be entitled to exercise its statutory power of sale, it must be established that the chargor and the principal debtor have outstanding indebtedness which arises out of the default of the charge and the guarantee agreement. He added that although the chargee alleged in paragraph 4B of the Amended Defence that the plaintiff's outstanding indebtedness as at the month of **June 2017** was **Kshs. 21,338,158.17,** no efforts were made by the chargee to establish the said averment.

[9] Counsel further submitted that, whereas the uncertified account statement of the principal debtor showed **Kshs. 65,953,176.16** as the debit balance, the 1st defendant's witness statement indicated that the outstanding balance was **Kshs. 6,792,497.90**. Counsel also took issue with the fact that no Certificate of Balance was produced in evidence to demonstrate with certainty that the plaintiff's arrears as at **31 January 2014** was **Kshs. 6,792,497.90;** or that the said amount was indeed outstanding for purposes of **Clause 30.7** of the Charge and **Clause 11** of the Guarantee. Accordingly, **Mr. Kigamwa** submitted that the 1st defendant failed in discharging the duty imposed by **Section 112** of the **Evidence Act, Chapter 80** of the **Laws of Kenya;** and invited the Court to be guided by **Munyu Maina vs. Hiram Gathiha Maina** [2013] eKLR and find that the defendants had prematurely commenced the process of sale of the suit property.

[10] **Mr. Kigamwa** also submitted that the intended recovery flouts the *in duplum* principle. He urged the Court to note that the 1st defendant was demanding **Kshs. 72,228,217.60** as at **31 January 2014,** yet the maximum principal amount due on the Charge, vide Clause B is only **Kshs. 13,000.000/=.** Hence, Counsel posited that the sums demanded are way above the principal sum, and therefore unrecoverable. He urged the Court to find that the claim is unlawful from the standpoint of **Section 44A** of the **Banking Act, Chapter 488** of the **Laws of Kenya.** To buttress this submission, **Mr. Kigamwa** relied on the case of **Pius Kimaiyo Langat vs. Co-operative Bank of Kenya** [2017] eKLR wherein the Court of Appeal held that:

> **"…the unwritten terms of lending in relation to the overdraft in this matter which appears to have emboldened the bank to run amok in its interest charges up to 71% p.a. bear the hallmarks of an unconscionable transaction, and we so hold. Having so found on the relevant issues it only remains to make the orders which we now do that the appeal is allowed and the judgment together with it all consequential orders of the High Court is set aside and substituted with an order dismissing the respondent bank's case…"**

[11] With regard to the statutory notices, **Mr. Kigamwa** placed reliance on the provisions of **Sections 90** and **96** of the **Land Act, No. 6** of **2012** and submitted that the **Kshs. 72,228,217.60** notice flouted **Section 90(2)** of the **Land Act** in that the chargor was not informed of the exact nature and extent of default by himself. Instead, the notice contained information about the extent of default by the principal debtor. He also thought it was significant that, according to the Certificate of Postage, the said notice was sent to P.O. Box 717 Eldoret instead of P.O. Box 817 Eldoret, which is the plaintiff's correct address. **Mr. Kigamwa** cited **Amina Hersi Moghe & 2 Others vs. Diamond Trust Bank (K) Limited & Another** [2019] eKLR and **Davis Gitome Kuhiguka vs. Equity Bank Ltd** [2013] eKLR and urged the Court to find that it was imperative for the 1st defendant to clearly state in the notice the amount that the plaintiff needed to pay to rectify his default under the Charge and the Guarantee; for which reason the **Section 96** notice was likewise of no effect. He also pointed out that that the Redemption Notice was also misleading in so far as it indicated that the proposed sale was in respect of funds lent by **Oriental Commercial Bank Limited** to secure a sum of **Kshs. 12,000,000/=;** which representation was untrue.

[12] With regard to **Section 97(2)** of the **Land Act**, **Mr. Kigamwa** urged the Court to note that no valuation notice was produced before the Court to demonstrate compliance. Lastly, it was the submission of **Mr. Kigamwa** that a personal guarantee is not enforceable by way of the statutory power of sale. According to him the remedy would involve the defendant filing a suit in the High Court to enforce any obligations arising from the guarantee. He added that in the absence of a suit or a counterclaim by the 1st defendant in this suit, the 1st defendant is precluded from purporting to exercise its statutory power of sale on the basis of the Guarantee.

[13] **Mr. Siboe**, learned counsel for the defendants, filed his written submissions dated **18 June 2020** contending that once a chargor is in default the only option available to avoid a sale is by exercising the chargor's equity of redemption as set out in **Section 89** of the **Land Act.** He made reference to **Halsbury's Laws of England**, Vol. 32, 4th Edition, paragraph 725 as his authority for the proposition. Counsel, likewise, urged the Court to find that there is no dispute as to the amount owing, granted that the sum of **Kshs. 66,673,424.60** that the 1st defendant asked for in the subject statutory notice is the total sum of what was owing from the principal borrower as supported by various guarantees; and which was due on the basis of the Letter of Offer dated **7 November 2012** to **Kshs. 76,023,660/=**. He therefore submitted that, as one of the guarantors, the plaintiff was duly notified of the correct extent of default by the principal borrower for purposes of rectification.

[14] It was further the submission of **Mr. Siboe** that, following the principal debtor's default in repaying the loan, the burden of repayment thereof automatically shifted to the guarantor. He relied on **Mwaniki Wa Ndegwa vs. National Bank of Kenya Ltd & Another** [2016] eKLR and **Ebony Development Company Ltd vs. Standard Chartered Bank Ltd** [2008] eKLR for the proposition that the primary duty of the guarantor is **not** to see to it that the borrower complies with the contractual obligation, **but** to immediately pay the sums due on the guarantee on demand without requiring notice of the default or previous recourse against the principal debtor. Accordingly, **Mr. Siboe** urged the Court to find that it has been amply demonstrated herein that the plaintiff was indebted to the 1st defendant in the prorated sum of **Kshs. 6,792,474.90** when the statutory notice was issued.

[15] On the issue of the impugned restructure, **Mr. Siboe** submitted that although the plaintiff offered the suit property to secure a loan for only **Kshs. 13,000,000/=**, his agent, **John Kamar**, signed a Guarantee to pay the whole amount advanced to the principal borrower. Counsel drew the attention of the Court to **Clause 2.1** of the Guarantee and Indemnity which makes reference to the plaintiff having committed himself to paying **"…all monies and discharge the debtor's obligations without deduction, setoff, or counterclaim together with interest thereon from the date of such demand and together also with Costs and Expenses…"**

[16] Thus, Counsel urged the Court to accept the explanation proffered by the 1st defendant that, upon realizing that the principal debtor could not provide enough securities to cover the entire amount of **Kshs. 175,000,000/=** applied for, the 1st defendant invited all the concerned parties for a restructure meeting for the purpose of reducing the facility from **Kshs. 175,000,000/= to Kshs. 76,023,660/=;** pursuant to which the Letter of Offer dated **7 November 2012** was issued. He also urged the Court to believe **DW1's** evidence that the plaintiff was indeed invited for the renegotiations but opted to neither avail himself nor participate therein; and pointed out that it was telling that the plaintiff did not raise any objection to his property being used as security nor ask for discharge of his security. Accordingly, counsel invited the Court to make the inference that the plaintiff was thus in full agreement with the terms set out in the Letter of Offer dated **7 November 2012.**

[17] **Mr. Siboe** also lauded that fact that the overall effect of the restructure was, not to enhance the debt or in any way prejudice the plaintiff, but worked towards his advantage and the advantage of his co-guarantors by reducing their liability from the initial loan sum of **Kshs. 175,000,000/=** to **Kshs. 76,023,660/=.** Counsel also urged the Court to take into account that the reduction was premised on the total value of the securities availed, which included the plaintiff's. He therefore posited that the new Letter of Offer could not have extinguished the Charge instrument as contended by the plaintiff, as a Charge can only be extinguished by discharge, redemption or sale.

[18] Consequently, **Mr. Siboe** took the posturing that the 1st defendant was perfectly entitled to apportion the amount outstanding amongst all the guarantors as it did; and that its interest was and still remains the recovery of the entire outstanding loan amount. He urged the Court to note that the plaintiff had admitted default in meeting his obligation under the Guarantee; and submitted that a dispute as to the amount due cannot be the basis for restraining a chargor from exercising its statutory power of sale. He cited the case of **Air Travel & Related Studies Ltd vs. Equity Bank (Kenya) Ltd** [2017] eKLR in support of his argument.

[19] On whether the sum apportioned to the plaintiff offends the *in duplum* principle as provided for in **Section 44A** of the **Banking Act**, **Mr. Siboe** urged the Court to note that, other than the total amount due on the loan, the defendants also set out the specific amount due from the plaintiff; namely, the sum **Kshs. 6,792,474.90**. He therefore urged the Court to reject the technical approach adopted by the plaintiff in impugning the statutory notices with a view of doing substantive justice to the parties. Counsel relied on **Article 159(2)(d)** of the **Constitution** and the case of **Independent Electoral and Boundaries Commission vs. National Super Alliance of Kenya (NASA) & 6 Others** [2017] eKLR to support his submission that the amount sought to be recovered from the plaintiff is not **Kshs. 72,228,217.60** as pitched by the plaintiff but only **Kshs. 6,792,474.90**, of which sum the plaintiff is fully aware; and therefore that the *in duplum* principle has not been flouted herein.

[20] **Mr. Siboe** also addressed the question as to whether the requisite statutory notices were issued at all by the defendants, and if so, whether they were compliant. He placed reliance on **Sections 90 and 96** of the **Land Act** and **Clause 30.5** of the Charge to support the argument that the defendants issued and sent the notices to the address given in the Charge, namely, P.O. Box 817-30100, Eldoret. He further pointed out that the plaintiff's agent, **John Kamar,** admitted before the Court that he signed the Charge on behalf of the plaintiff and that it bears his correct postal address. Thus, **Mr. Siboe** urged the Court to take a dim view of the fact that the plaintiff had falsely claimed that the notices were sent to P.O. Box 717-30100, Eldoret instead of P.O. Box 817-30100, Eldoret. He urged the Court to consequently find that, because of his conduct, the plaintiff approached the seat of justice with unclean hands and is therefore not entitled to the orders sought by him.

[21] Having given careful consideration to the pleadings filed herein, the evidence presented by the parties as well as the written submissions made by learned counsel, there is no dispute that the principal borrower, **Lomsons Enterprises Limited,** made an application to the 1st defendant for banking facilities. It is also common ground that the said application was favourably received by the 1st defendant; and

that the 1st defendant made an offer to advance to the principal borrower some **Kshs. 175,000,000/=,** which was to be secured by various titles, including the plaintiff's title for his property, more particularly known as **ELDORET MUNICIPALITY/BLOCK 14/255** (the suit property).

[22] Although neither the plaintiff nor the defendants produced the initial Letter of Offer, a copy of the plaintiff's Certificate of Lease in respect of the suit property was produced herein as one of the plaintiff's documents (the **Plaintiff's Exhibit No. 4A**). It confirms that the subject piece of land was, at all times material to this suit, the property of the plaintiff. The Charge, as well as the Deed of Guarantee, were also produced by the defendants as Documents No. 2 and No. 3 in their List and Bundle of Documents, marked the **Defendant's Exhibit No.2** herein, to prove that the plaintiff charged the suit property to the 1st defendant as security in respect of a borrowing by **Lomsons Enterprises Ltd**. It is also common ground that the Charge and the Guarantee by the plaintiff were limited to **Kshs. 13,000,000/=** only. Indeed, the Certificate of Official Search produced herein by the plaintiff as his **Exhibit No. 4B** also confirms that the property was charged to the 1st defendant for **Kshs. 13,000,000/=** only.

[23] The defendants adduced uncontroverted evidence to demonstrate that, in the process of perfecting the securities, the 1st defendant came to the conclusion that the principal borrower was unable to furnish acceptable security to cover the entire loan amount of **Kshs. 175,000,000/=.** Thereupon the borrower and its guarantors were invited for negotiations to have the principal sum commensurately reduced to attune it to the available security. Consequently, an agreement for the restructure of the loan was reached on the terms set out in the Letter of Offer dated **7 November 2012;** which is the 1st document in the Defendants' List and Bundle of Documents. The salient aspects of the said Letter of Offer are that the loan amount was reduced to **Kshs. 76,023,660/=;** to be repaid over 60 months in instalments of **Kshs. 1,972,096/=.** The letter also contains a raft of conditions that would henceforth govern the relationship between the parties.

[24] Needless to say that the principal debtor defaulted in servicing its obligations to the Bank; and that it was this default that set in motion the chain of events that culminated in the filing of this suit. In the premises, the issues for consideration herein, having taken into account all the foregoing factors as well as the issues proposed by learned counsel for the parties in their oral opening address and written submissions, can be summarized as follows:

> **[a]** Whether the 1st defendant's statutory right of sale had accrued; and whether the 1st defendant had acted prematurely in seeking to realize the subject securities before exhausting its remedies against the principal borrower;
>
> **[b]** Whether the plaintiff, as the chargor, was duly served with the requisite statutory notices;
>
> **[c]** Whether the Bank satisfied the legal requirement as to valuation of the charged property for purposes of **Section 97** of the **Land Act.**
>
> **[d]** Whether the restructure of **7 November 2012** and the partial payment by the Borrower had the effect of extinguishing the liability of the plaintiff under the Deed of Guarantee; if not, what is the extent of the plaintiff's liability?

[a] Whether the1st defendant's statutory right of sale had accrued; and whether 1st defendant acted prematurely in seeking to realize the securities before exhausting its remedies against the principal borrower:

[25] There is no gainsaying that the primary responsibility of repaying the subject loan fell squarely on the principal borrower, **Lomsons Enterprises Ltd.** Hence, it is understandable that the plaintiff expected the 1st defendant to go after the said borrower before knocking on his door for purposes of enforcing the Guarantee. In particular, it was the plaintiff's contention that it was imperative for the 1st defendant to file a suit in enforcement of the obligations created under Guarantee and therefore acted prematurely in causing the suit property to be advertised for sale. It is notable however that in **Clause 2.1** of the Deed of Guarantee & Indemnity, the parties covenanted that:

> **"In consideration of the Lender making or continuing loans or advances to, or otherwise giving credit or granting banking facilities or accommodation or granting time to, the Debtor for so long as it may think fit, the Guarantor hereby unconditionally guarantees to pay to the Lender on demand in writing all monies and discharge the Debtor's Obligations without deduction, set-off or counterclaim together with interest thereon from the date of such demand…"**

[26] Accordingly, for the purpose of the loan transaction, the plaintiff's liability would arise upon default by the principal debtor and upon demand for payment by the 1st defendant. Thus, in **Fidelity Commercial Bank Limited vs. Kenya Grange Vehicle Industries Limited** [2017] eKLR, the Court of Appeal made this point as hereunder:

> **"This Court explained in Kenindia Assurance Company Ltd V. First National Finance Bank Ltd Civil Appeal No. 328 of 2002 that guarantees are special contracts and are;**
>
> > **"…… in the nature of a covenant by the appellant to pay upon the happening of a particular event. It is a form of security of guaranteeing payment by a third party. In such cases, the most important factor to consider before liability can attach is whether there has been default. Once default is established and there has been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security."**

[27] Moreover, the Charge instrument shows that it was drawn and executed pursuant to the provisions of the **Land Act, 2012**; and that the plaintiff confirmed that he fully understood the effect of **Section 90** of the **Land Act.** The certificate to that effect is at page 28 of the Charge exhibited in the 1st defendant's Bundle of Documents and it reads thus:

"I, WILLIAM KIMUTAI KANDIE, the Chargor herein, hereby confirm that I understand the remedies in and effect of Section 90 of the Land Act, 2012 as varied by provisions of this Security and I hereby agree that the Bank may exercise the Remedies specified therein and more particularly its statutory powers of sale and of appointment of receiver with such express variations and additions as contained in this Security and that the Bank's rights under section 82 and 83 of the LA and the restrictions under section 87 of the LA be noted against the above-mentioned title. I have read and had explained to me the above sections and confirm that I understand the same."

[28] In the premises, the plaintiff's posturing and assertion that the 1st defendant could not seek to realize the securities before exhausting its remedies against the principal borrower are entirely unfounded, as the right to sue is just one of the remedies available to the 1st defendant as the chargee.

[b] Whether the plaintiff, as the chargor, was duly served with the requisite statutory notices;

[29] Section 90 is explicit that it was imperative for the 1st defendant to serve a valid statutory notice of sale on the plaintiff as the chargor. It provides that:

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters--

(a) the nature and extent of the default by the chargor;

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within ninety days after the date of service of the notice under subsection (1), the chargee may--

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land.

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of member of the family or community the chargee may--

(a) appoint a receiver of the income of the charged land;

(b) apply to the court for an order to--

(i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;

(ii) sell the charged land to any person or group of persons referred to in the law relating to community land.

[30] Thus, looking at the statutory notice dated **31 January 2014,** it is plain that it was issued in the name of the plaintiff; and that it was in connection with the borrowing by **Lomsons Enterprises Ltd.** The notice further shows that the plaintiff's default and the suit property was **"…charged to secure an advance, loan and other credit facilities by way of financial accommodation to LOMSONS ENTERPRISES LIMITED…"**, which the plaintiff willingly guaranteed; and that the principal debtor had defaulted in repayment, such that the amount outstanding as at **31 January 2014** stood at **Kshs. 72,228,217.60.** The notice further indicated that the said sum continued to accrue interest and that if the default was not rectified within a period of three months from the date of service thereof, the Bank would proceed to exercise its remedies as provided for in **Section 96** of the **Land Act**.

[31] It is also explicit that in the said notice, the sum in arrears, and which the 1st defendant expected the plaintiff to immediately pay was also specified to be **Kshs. 6,792,474.90**. Accordingly, whereas the entire loan sum of **Kshs. 72,228,217.60** was stated in paragraph 4 of the notice instead of **Kshs. 6,792,474.90**, the fact remains that the borrower was in default; and that nothing stopped the plaintiff from paying the **Kshs. 6,792,474.90** that was clearly shown to be the sum due from him at that point in time for purposes of **Section 90(2)(b)** of the **Land Act.** Accordingly, the next question to pose is whether the said notice was served on the plaintiff.

[32] On the face of it, the statutory notice dated **31 January 2014** shows that it was dispatched to the plaintiff by registered post; and that a copy thereof was also served by ordinary post. The 1st defendant produced as an exhibit, a duly stamped and signed list of registered postal packets sent by the 1st defendant by registered post on **8 February 2014** and it confirms that the plaintiff's letter was listed therein as Item No. 4. That being the case, the evidential burden shifted to the plaintiff to demonstrate that he did not and could not have received the said notice. In **Nyagilo Ochieng & Another vs. Phanuel B. Ochieng & 2 Others [1996] eKLR,** the Court of Appeal pronounced itself on this point thus:

> **Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya.**

[33] Section 3(5) of the **Interpretation and General Provisions Act**, on the other hand, provides that:

> **"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post."**

[34] The letter was addressed to **P.O. Box 817 - 30100, Eldoret,** which is the same address furnished by the plaintiff in the Charge Instrument. As mentioned hereinabove, the same address appears in the plaintiff's Certificate of Title and the Certificate of Official Search produced by him as the **Plaintiff's Exhibit 4A and 4B.** Accordingly, it was sufficient that the statutory notice dated **31 January 2014** was sent by the 1st defendant to that address; it being the chargor's last known address for service. No evidence whatsoever was availed herein by the plaintiff to prove that he did not, and/or could not, have received the notice. In those circumstances, the plaintiff cannot validly claim that the 1st defendant did not serve the requisite notice for purposes of **Section 90** of the **Land Act**. It is immaterial therefore that, in the Deed of Guarantee, a different address, namely, P.O. Box 6748 – 30100, Eldoret, was used by the plaintiff; for the statutory notice was issued pursuant to the Charge.

[35] Having served the three months' statutory notice under **Section 90** of the **Land Act,** it was incumbent upon the 1st defendant to thereafter issue the 40 days' notice to sell envisaged by **Section 96** of the **Land Act**. That provision states as follows in **Subsections (1) and (2):**

> **"(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.**
>
> **(2) Before exercising the power to sell the charged land the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell."**

[36] Having carefully considered the evidence presented herein by the 1st defendant, including the Bundle of Documents marked **the Defendant's Exhibit 1B**, there appears to be no indication that the **Section 96** notice was ever issued by the 1st defendant or served on the plaintiff. It is instructive that the provision is couched in peremptory terms and is therefore a mandatory requirement. Talking about the significance of a **Section 90** notice, **Hon. Warsame, J.** (as he then was) pointed out, in **Executive Curtains & Furnishings Ltd vs. Family Finance Building Society [2007] eKLR** that:

> **"…The purpose of the notice is to warn the borrower that due to his default and due to the outstanding debt, the charged property is susceptible to a sale if he fails to redeem it within the 90 days after service of the notice. The period of 90 days is meant to give the borrower sufficient time within which to make arrangement to redeem his charged property. Any time after the expiry of the 90 days, the charged property is out of the hands of the borrower."**

[37] I am in full agreement and would take the view that the same observation can, likewise, be made about the notice to sell as provided for in **Section 96** of the **Land Act**. There has been some debate as to whether the Auctioneer's 45 days' Redemption Notice is sufficient for the purposes of **Section 96;** and it is noteworthy that in this case, it is common ground that the Redemption Notice was duly served. My considered view is that the 40 days' notice provided for in **Section 96** of the **Land Act** is distinct and disparate from the 45 days'

Redemption Notice envisaged under **Rule 15** of the **Auctioneers Rules**; and that it was deliberately provided for to safeguard and concretize a chargors' right of redemption. To my mind, instructions to an auctioneer must of necessity be preceded by the two mandatory notices specified in **Section 90** and **Section 96** of the **Land Act**. Consequently, failure to serve the notice to sell has the inevitable effect of invalidating the process leading up to sale. Indeed, **Rule 15** of the **Auctioneers Rules** is explicit that:

> **"Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—**
>
> **(a) record the court warrant or letter of instruction in the register;**
>
> **(b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;**
>
> **(c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refused to sign such notification, the auctioneer shall sign a certificate to that effect;**
>
> **(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;**
>
> **(e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.**

[38] It is also instructive that for purposes of the subject Charge, spousal consent was given by one **Grace Jeptepkeny Lagat**. It was therefore imperative for the 1st defendant to demonstrate that the said **Grace Jeptepkeny Lagat** was served with the 40 days' notice to sell for purposes of **Section 96(3)(c)** of the **Land Act.** No such evidence was availed by the 1st defendant. In the premises, it matters not that the statutory notice under **Section 90** of the **Land Act** was validly issued and served; or that the auctioneer dutifully discharged his obligations under the **Auctioneers Rules.** Compliance with the laid down procedure in the **Land Act** as to the issuance and service of all the requisite notices is peremptory; and I so hold. It is also my finding that it was entirely misleading for the Schedule of Property the subject of the Notification of Sale to indicate that the title had been charged in favour of **Oriental Commercial Bank Ltd** to secure a sum of **Kshs. 12,000,000/=** vide a Charge dated **22 March, 2011**.

> **[c] Whether the Bank satisfied the legal requirement as to valuation of the charged property for purposes of Section 97 of the Land Act**:

[39] As to whether the Bank satisfied the legal requirement with regard to the valuation of the charged property for purposes of **Section 97** of the **Land Act**, it is apposite to restate the relevant provisions of that section as hereunder:

> **"(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, or any guarantor of the whole or any part of the sums advanced to the chargor, any charge under a subsequent charge or under a *lien* to obtain the best price reasonably obtainable at the time of the sale.**
>
> **(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.**
>
> **(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—**
>
> **(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and**
>
> **(b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1)**
>
> **(4) It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection (1) that the chargee was acting as agent of or under a power of attorney from the chargor or any former chargor.**

[40] The contention of the plaintiff that the 1st defendant completely ignored the requirements of the abovementioned provision as to valuation is credible for no indication was made by either the 1st defendant or the 2nd defendant that valuation was undertaken before the proposed sale. Indeed, no such valuation report was exhibited herein to show that a forced sale price was determined before the advertisements for sale were floated as per the Document No. 9 in the Defendant's List and Bundle of Documents. Clearly, therefore, the auctioneer did not have the benefit of the valuation report in fixing both the open market value and the reserve price as reflected in the Schedule of Property attached to the Notification of Sale. In the premises, I am far from convinced that there was strict compliance, on the part of the defendants, with the requirements of **Section 97** of the **Land Act**.

> **[d] Whether the restructure of 7 November 2012 and the partial payment by the Borrower had the effect of extinguishing the liability of the plaintiff under the Deed of Guarantee; if not, what is the extent of the plaintiff's liability?**

[41] The last issue is whether the restructure of **7 November 2012** and the partial payment by the Borrower had the effect of extinguishing the liability of the plaintiff under the Deed of Guarantee; and if not, the extent of the plaintiff's liability. The Guarantee and Indemnity was produced as Document No. 3 in the Defendant's List and Bundle of Documents. It was given by the plaintiff to the 1st defendant on behalf of **Lomsons Enterprises Ltd** for a facility of **Kshs. 175,000,000/=**. By its very definition, a guarantee is an additional security; for, according to **Black's Law Dictionary, Tenth Edition**, it means to assume a suretyship obligation; to agree to answer for a debt or default; to promise that a contract or legal act will be duly carried out; or to give security for.

[42] Indeed, in **Clause 5.1** of the Guarantee it was agreed by the parties that:

> **"This Guarantee shall be additional to any other security which the Lender may hold now or at any time hereafter from the Guarantor or the Debtor or from any other person in respect of the Debtor's Obligations, and shall not merge with or prejudice or otherwise affect such other security or any contractual or legal rights of the Lender."**

[43] That being the case, can it be said that the obligation of the plaintiff was extinguished the moment the Borrower's repayment reached the sum guaranteed, as postulated by counsel for the plaintiff? I have no hesitation in holding that that cannot be the case, given the parties' covenant vide **Clause 3.1** of the Guarantee. It states that:

> **"This Guarantee is and shall remain a continuing security for the Debtor's Obligations to the Lender at any time and shall not be satisfied or otherwise affected by any repayment or recovery from time to time of the whole or any amount which may then be due and owing from the Debtor to the Lender."**

[44] What that means, to my mind, is that so long as the facility remained unpaid, the Guarantee would subsist and remain enforceable until and unless the advanced sums were fully paid. If, as has been demonstrated herein, the amount outstanding from the principal debtor as at **21 January 2014** was **Kshs. 72,228,217.60** then, by dint of the Charge and the Guarantee, the 1st defendant had every right to call in the plaintiff's guarantee. Besides, since this was not a question of interest outstripping the principal sum, the question of *in duplum* as envisaged by **Section 44A** of the **Banking Act**, **Chapter 488** of the **Laws of Kenya**, would not apply. Similarly, the argument by learned counsel for the plaintiff that the guarantee can only be enforced by a suit appears to me to be misconceived for the exercise of the statutory power of sale was, as has been pointed out hereinabove, not hinged on the Deed of Guarantee, but on the Charge instrument, to which, by dint of **Clause 5.1** aforementioned the Guarantee was complementary**.** Hence, the question that next arises then would be, what was the extent of the plaintiff's liability to the 1st defendant? The answer to that question is to be found in **Clause 2.2** of the Guarantee, which states that:

> **"The total amount recoverable under this Guarantee shall be limited to the principal sum set out in the Schedule or its equivalent thereof in whatever currency denominated at the date of payment and interest and commission thereon and all costs charges and expenses referred to herein."**

[45] At page 12 of the Guarantee Instrument (page 50 of the Defendant's Bundle of Documents) it is explicit that the plaintiff's liability was limited to **Kshs. 16,000,000/=**. It is worth noting that while the Charge was limited to **Kshs. 13,000,000/=**, the Guarantee, which the plaintiff knowingly and willingly executed, separately provided for liability up to **Kshs. 16,000,000/=** in addition to interest, fees, commission, costs, charges and expenses that would be incurred by the Bank. It is in that light that **DW1** conceded thus in cross-examination:

> **"…There were 6 guarantors and the Plaintiff was one of them. The guarantees were limited to specific amounts. The guarantee of William Kandie was limited to 13 million. In para 4(b) of the 1st Defendant's Amended Defence, it is stated that the plaintiff's liability was limited to 21 million as at June 2017. Para 6 makes reference to Kshs. 64,960,523.16 which continues to attract interest at contractual rates. This is the entire debt. The 1st Defendant expects the plaintiff to pay that amount together with the other 5 guarantors. Some guarantors have paid and had their titles discharged…In my witness statement I stated, in para 4 that the amount due from the Plaintiff as at 30/1/2014 was Kshs. 6,792,497/90…"**

[46] Consequently, it is my finding that, in view of the clear terms of the Guarantee and the evidence of **DW2**, what was due from the plaintiff as at the time when the defendants commenced the process of exercising the statutory power of sale was only **Kshs. 6,792,497.90.** Having so found, the final issue to consider is the effect, if any, of the restructure and the Letter of Offer dated **7 November 2012** on the obligations of the plaintiff as a guarantor.

[47] The 1st defendant conceded that indeed the restructuring and the so called splitting of the loan owed by **Lomsons Enterprises Ltd** amongst the guarantors, who included the plaintiff, was done without the involvement of the plaintiff. Here below is what **DW1** had to say in cross-examination in this regard:

> **"…We called all the 6 guarantors for purposes of the split but William Kandie did not respond. I do not have any evidence to show that William Kandie was notified of the restructure. The restructure took place on 28/4/2015 after this case was filed. I also confirm that the Redemption Notice was issued before the restructure. Some of the guarantors came for the restructure, but others, such as William Kandie, did not come. I do not have any proof of notification after the restructure. It was up to the Plaintiff to take the initiative and ask for a restructure…"**

[48] In view of the express admission by **DW1,** that the plaintiff was neither a party to the restructure nor was he notified thereof for purposes of concurrence, there is no basis upon which the plaintiff can be held to account for the restructured facility to which he was not privy. In **Halsbury's Laws of England**, Fourth Edition, Volume 20 (1) para 324 page 210, the rationale for this principle was explained thus:

"The basis of the principle that a guarantor is discharged by an agreement between the creditor and the principal debtor which has the effect of varying the guarantee, is that it is the clearest and most evident equity not to carry on any transaction without the privity of the guarantor, who must necessarily have a concern in every transaction with the principal debtor, and who cannot as a guarantor be made liable for default in the performance of a contract which is not the one the fulfillment of which he has guaranteed."

[49] Authorities abound to support this posturing, including **David Harris vs. Middle East Bank Kenya Limited & 3 Others** [2019] eKLR wherein the Court of Appeal held that:

The letter of offer for the initial facility of 27th January 1995 specified that 2nd respondent would borrow a maximum of Kshs. 5,000,000 together with interest and charges thereon. The borrowed amount was secured by the creation of a First Legal Charge over the Land parcel. The tenure of the facility was to be one year from the time of creation of the First Legal Charge. When the initial terms are considered alongside the terms of the additional facility, it is apparent that the further financial accommodation increased the sums advanced to Kshs. 10,000,000 together with interest and charges, and a Supplementary First Legal Charge was created over the Land parcel…In effect, not only did the additional banking facility increase the 2nd respondent's debt, it also extended the time for which the credit facilities were to be repaid. All this was carried out without the appellant's consent, and materially changed the entire banking arrangement between appellant on the one hand, and the Bank, the principle debtor, and the guarantors, on the other hand. The way in which the principal debtor, the Bank and the 3rd and 4th respondents jointly and severally dealt with the original and subsequent facilities, resulted in their creating a liability without the knowledge and consent of the appellant. It means that the appellant cannot take responsibility for the liability created behind his back. For clarity, we think that since the appellant was not privy to the transactions, which enhanced the debt and guarantee, he should not be made to suffer for the acts and omissions of the Bank, the principal debtor and the 3rd and 4th respondents. Consequently, it is our humble view that the totality of the conduct of the bank, principal debtor, 3rd and 4th respondents discharges the appellant from the initial guarantee and the further liability charged and created by the said parties…"

[50] Granted, the facilities were not increased from what was offered in the initial Letter of Offer dated **16 May 2012;** nevertheless, it was significant that the nature of the facilities were converted from 12 months' overdrafts and invoice discounting to term loans in the names of the individual guarantors. I am therefore satisfied that the restructuring fundamentally altered the initial obligations as conceived and committed to by the parties and therefore ought to have been done with the participation and consent of the plaintiff. In any event, the plaintiff not having participated in the restructure cannot be held to account on those altered terms. Consequently, it is my finding that the restructure has the effect of fully discharging the plaintiff from his obligations as a guarantor for purposes of the initial Letter of Offer as well as the subsequent Letter of Offer dated **7 November 2012**. I therefore find merit in the plaintiff's case and would allow the same with costs and make orders as hereunder:

[a] That a declaration be and is hereby issued that the 1st defendant's intended exercise of its statutory power of sale is a nullity.

[b] That a declaration be and is hereby issued that the plaintiff is discharged from his obligations as a guarantor; and that the Charge executed by him in favour of the 1st defendant over Land Parcel No. **ELDORET MUNICIPALITY/BLOCK 14/255** be discharged forthwith.

[c] That a permanent injunction be and is hereby issued restraining the defendants by themselves or their agents or servants, from selling, advertising for sale or in any manner whatsoever dealing with or disposing of Land Parcel No. **ELDORET MUNICIPALITY/BLOCK 14/255.**

[d] That costs of the suit be borne by the 1st defendant.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF SEPTEMBER 2020

OLGA SEWE

JUDGE