REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

CIVIL CASE NO. 1 OF 2019

JOHN KARANJA KIHAGI.....1ST PLAINTIFF

LEAH NJERI KARANJA.....2ND PLAINTIFF

VERSUS

JAMII BORA BANK….....1ST DEFENDANT

RIDHIKA CAPITAL LIMITED….....2ND DEFENDANT

JOLANS TRANSPORTERS LIMITED.....3RD DEFENDANT

JUDGMENT

Background and Parties Position

1. The 1st Plaintiff is the registered owner of Title No. Naivasha/Maraigushu Block 2/2732 (Nyondia) (the land). The 2nd Plaintiff is his wife. The property is deemed as a matrimonial property, to which the 2nd Plaintiff consent to charge was voluntarily given.

2. Following negotiations with the 1st Defendant (the Bank), the 1st Plaintiff obtained Letters of Offer for financial facilities for Kshs 2,300,000/=. The Letters of Offer were dated 2nd April, 2011 and 28th May, 2014. The financial facilities were to be availed to the 2nd Defendant (Ridhika Capital) as Borrower, and the 1st Defendant would avail the land as collateral together with a personal guarantee.

3. Consequently, a charge instrument dated 24th June, 2014 (the Charge) was duly executed and registered on 25th June, 2014. The secured funds were then released to the borrower through an Account No. 1121712726004 in the Borrower's name. According to the 1st Plaintiff, the Borrower, Ridhika Capital, paid off the loan as shown in the statement at Page 121 of the Plaintiff's bundle, on 28th January, 2016. The account statement reflects a figure of zero (0) shillings as the balance. The 1st Plaintiff asserts that the initial financial facilities having been paid, the Charge over the Land should be discharged as should 1st Plaintiffs the guarantee supporting the Charge.

4. The 1st Plaintiff asserts that on 28th January, 2016, the Bank put off the loan of Kshs 2,300,000/= after the amount was paid off. Being the sum secured under the Charge, the 1st Plaintiff is aggrieved that the Bank has declined to discharge the Charge and release the title to the land to him.

5. Further, the 1st Plaintiff states that on 13th May, 2015 and 31st August 2015, respectively, the 2nd Defendant and 3rd Defendant used another title, viz LR No. 30000 in the name of the 3rd Defendant Jolans Transporters Limited, to secure from the Bank for Kshs 16,700,000/= financial facility and Kshs 5,000,000/= as overdraft loan facility. The collateral for these facilities was the aforesaid Title.

6. The 1st Plaintiff therefore contest the statutory notices of sale of the land dated 11th October, 2018 for Kshs 16,157,309.90 and that of 24th January, 2019 for Kshs 17,122,136.36; his contest against the Bank's notices is premised on the 1st Plaintiff's belief that he fully paid off the initial loan amount of Kshs 2,300,000/=.

7. It is to be noted that the 3rd Defendant has not filed any appearance and did not make any representations at all in this matter.

8. Accordingly, the 1st Plaintiff seeks a declaration that he does not owe the 1st Defendant any money, and that any statutory notices issued

by the 1st Defendant in connection with the Charge or guarantee be declared invalid.

9. On their part the 1st Defendant, the Bank, denies that the payment of the financial facilities is fully made. They assert that the 1st Plaintiff secure further financial accommodation on the strength of the securities given. In particular the Bank asserts that by letters of offer dated 2nd April, 2014, 13th May, 2015 and 20th June, 2017, the 2nd Defendant Ridhika Capital, as Borrower accepted the following facilities from the Bank:

a. Overdraft facility of Kshs 5,000,000/=

b. Term loan facility of Kshs 16,700,000/=

c. Term loan facility of Kshs 2,300,000/=

d. Term loan facility of Kshs 3,500,000/=

10. The Bank annexed letters of offer for the facilities upon which, the urge, the land was charged. In addition the Bank states that further securities and guarantees were executed in favour of the Bank for the additional banking facilities. Thus, they assert the Charge was intended to secure the initial amount of Kshs 2,300,000/= granted under the letters of offer of 2014 and all amounts in facilities thereafter granted.

11. The Bank asserts that for the additional bank facilities, the Bank requested and obtained duly executed securities and personal guaranteed in favour of the Bank by aid from the directors of the Ridhika Capital Limited.

12. In particular, the Bank points out that the directors of Ridhika Capital Limited namely Timothy Mungai, Japheth Momanyi Monari, Ajobole Kasope, Ramadhan Mwayaka and the 1st Plaintiff executed and availed, inter alia:

- a letter of offer dated 13th May, 2015 which required the Bank to be provided with security in form of the existing Legal Charge over the Land; a First Legal Charge over Title No. KJD/Ntashart/8799, 8801 and 8788 in the name of Ecko Line Investment Limited for Kshs 19,400,000/=; duly executed directors, personal guarantees of Kshs 21,700,000/= by the 1st Plaintiff; corporate guarantee of Kshs 21,700,000/= for Ecko Line Investments Limited;

- guarantees from Ridhika Capital Limited directors.

- guarantee from the 1st Plaintiff.

- guarantee from Ecko Line Investments Limited.

- resolution of the directors of Ecko Line Investment Limited resolving to issue the aforesaid guarantees.

13. The said letter of offer of 13th May, 2015 appears to have been duly signed by, amongst others, the 1st Plaintiff. The Letter of Offer is at Pages 2 -10 of the Banks Bundle. The amount granted under that Letters of Offer is an overdraft facility of Kshs 5 million and Term Loan of Kshs 16.7 million.

14. A letter of offer by the Bank to Ridhika Capital dated 20th June, 2017 for a sum of Kshs 3,500,000/= is also attached at pages 11-18 of the Bank's Bundle. The 1st Plaintiff does not appear to have signed this letter of offer.

15. The personal guarantee of the 1st Plaintiff dated 24th September, 2015 is exhibited at pages 70 - 77 of the 1st Defendant bundle. It is stated to be for the amount of Kshs 21,700,000/=. The guarantee instrument clearly appears to be signed by the 1st Plaintiff.

The Hearing

16. A hearing was held on 29th January, 2020 at which the 1st Plaintiff testified as PW1; and Samuel Macharia Murimi the 1st Defendant's Debt Recovery Manager testified for the Bank as DW1. They were the only witnesses at the hearing.

17. The 1st Plaintiff adopted his affidavit of 13th February, 2019 and was cross-examined and re-examined. He said that the only property in dispute is the Land. He stated that he understood Clause 10.5 of the charge to mean that he guaranteed the sum of Kshs 2,300,000/= for the loan. He said he understood the Charge; he said that he was a director of Ridhika Capital, the borrower; and that he was aware that the Borrower was advanced further facilities.

18. With regard to the letter of offer dated 13th May, 2015 he said in cross-examination:

"This letter was not the one used to give additional facilities to the Principal Borrower. This was meant to give the facility but it did not end up being used."

He however admitted that the letter of offer advanced Kshs 21.7 million, and that

"the letter (of offer) shows that the suit property to be collateral. I signed this letter."

He also said that he had no document to show the Bank declined to approve the facility. 19. On the letter of offer dated 31st August 2015, the 1st Plaintiff said this was a supplemental offer that refers to the letter of offer of 13th May 2015.

20. When shown the Letter of Guarantee at Page 98 of the 1st Defendant's bundle, he said he did not sign the guarantee instrument despite his signature appearing on it.

21. The 1st Plaintiff said he had no current or continuing account as at 28th January, 2016; at the time the Borrower signed the letter of offer of 31st August, 2015, he had not given consent to charge the Land for the additional facilities. He insisted that the only amount for which he consented to charge the land was the amount of Kshs 2,300,000/=.

22. The 1st Defendant's evidence through DW1, Mr. Murimi, adopted his witness statement of 24th October, 2019. The gist of its evidence-in-chief is that the 1st Plaintiff charged the land for Ridhika Capital Limited not only for the Initial financial facility of Kshs 2,300,000/=, but also for subsequent financial facilities for which he signed letters of offer and personal guarantees. In all these instruments, he said, the Land featured as a key item of the secured collateral.

23. Mr. Murimi emphasized that the charge over the land contained a Clause, number 10.5, which reserved the Bank's rights to secure additional financial facilities under the Charge pursuant to the provision of **Section 82** of the **Land Act**.

24. In cross-examination he said that once a letter of offer is agreed, a loan account can be created after compliance with the loan process. When a loan is repaid the client's statement would show a zero balance; that if there are no instructions from the charger to release or discharge the security, no action is taken on the security; that if the client approaches the Bank for another loan and the Bank is agreeable, another letter of offer will issue; that the statement exhibited by the 1st Plaintiff reflects the position on 28th January, 2016 in respect of the initial loan of Kshs 2,300,000/= that further loans were applied for by the 1st Plaintiff.

25. He admitted that a letter of offer for Kshs 3.5 million of 18th August, 2016 was not signed by him but by Ridhika Capital Directors and did not secure the Land; he stated that the letters of offer of 13th May, 2015 was for Kshs 21.7 million showing the securities and the guarantors.

26. In re-examination, Mr. Murimi said that by the 1st Plaintiff consenting to the Bank advancing any facilities to the Borrower Ridhika, he, the 1st Plaintiff was bound as surety as provided under Clause 10.5 of the Charge; that under the letter of offer to advance Kshs 21.7 million, the securities were, inter alia, the charged land; that it is this facility that has not been paid back and continues to earn interest.

27. The Bank confirmed that Ridhika Capital had one account with several transactional accounts. The Account with digits 6007 was opened when the Bank disbursed Kshs 21.7 million. The account with digits 6004 continued to run on account of the additional loan of Kshs 3.5 million. The Bank admitted that it had not attached board minutes and resolutions for Ridhika Capital showing it had opened the accounts.

28. At the close of the hearing, the 1st Plaintiff sought for judgment against the 3rd Defendant. However, the court noted that as there were no prayers in the plaint against both the 2nd and 3rd Defendants no prayers could issue.

Issues for Determination

29. The issues for determination in my view, are:

a) Which documents form the contractual relations between the 1st Plaintiff and the Bank?

b) What is the nature of the contractual relations, relative to the Charged Land (the suit land), namely, Naivasha/Maraigushu Block 2/2732 (Nyondia)?

c) Whether the 1st Defendant's statutory notices in respect of the charged land are valid.

Analysis and Determination

Initial loan

30. The starting point not disputed by any party, is the Letters of Offer of 2nd April, 2014 for Kshs 2,300,000/=, and accepted by Ridhika Capital. The security for this loan was a third party security, the Land (Naivasha/Maraigushu Block 2/2732) Ridhika Director, personal guarantees, and the 1st Plaintiff's personal guarantee.

31. The Charge securing the facility indicates in the recitals that Maximum Principal Amount on Kshs 2,300,000/=. By executing the Charge what did the 1st Plaintiff as Chargor sign to? The 1st Plaintiff executed the Charge in the presence of an advocate who confirms that execution was voluntarily done. The 1st Plaintiff also executed an acknowledgment that he understands the remedies and effect of **Section 90** of the **Land Act** as varied by the provisions of the charge instrument and the Bank's rights under **Section 82 and 83** of the **Land Act** and the

restrictions under **Section 87** of the **Land Act**, all of which were to be noted against the title.

32. Although the 1st Plaintiff is the sole registered proprietor of the land he indicated that the land was matrimonial property. To this end his wife, the 2nd Plaintiff on 16th June, 2014, executed her spousal consent to the charge, confirming that she understood the contents of the Charge and authorized the Chargor to offer the Charged Property as security to the Bank. In addition, she confirmed that:

> ***"I understand the remedies stipulated in this Security and the effect of Section 90 of the Land Act as varied by the provision of this security and I hereby agree that the Chargee may exercise the remedies specified therein……..and I unconditionally and irrevocably grant authority for the Chargee rights under Section 82 and 83 of the Land Act and the restrictions under Section 87 of the Land Act to be noted against the abovementioned title. I have had read to me and explained to me the above sections and confirm that I understand the same."***

33. The Charge having been registered, the title exhibited by the 1st Plaintiff shows the Charge clearly entered in the encumbrances section of the title with the notation:

> ***"Rights under Section 82 and 83 of the Land Act reserved."***

The next port of call is to confirm what this meant.

34. It is not in dispute that the Charge at clause 10.5 contains the following clause:

> ***"10.5 Pursuant to Section 82 (1) of the Land Act, the Chargor hereby gives irrevocable authority to the Bank, to utilize this Charge instrument as security to give further financial accommodation by way of loan, time credit, banking facilities, overdraft, advances and other financial facilities to the Chargor or others for whom the Chargor is a surety on a current or continuing Account."*** (Emphasis added)

35. **Section 82** of the **Land Act** provides as follows:

> ***"82 (1) Subject to provision of this Act, chargor may make provision in the charge instrument to further advances or credit to the chargor on a current or continuing account.***
>
> ***(2) A further advance referred to in subsection (1) shall not rank in priority to any subsequent charge unless-***
>
> ***a) the provision for further advances is noted in the register in which the charge is registered; or***
>
> ***b) the subsequent chargee has consented in writing to the priority of the further advance.*** (Emphasis added)

36. Clearly **Section 82** of the **Land Act** entitles a Chargor, a person securing a property for financial accommodation, to provide in the Charge document for power to give further advances or credit to the Chargor. So it will be important to check whether the Chargor, that is the 1st Plaintiff, made any moves to obtain or secure further advances or credit beyond the initial Kshs 2,300,000/= to himself or to anyone he chose to secure. This requires an assessment of the various Letters of Offer subsequent to the ones of 2014.

37. The copy exhibited in the 1st Defendant's documents bear the signatures of the Borrower (Ridhika Capital's) directors including the 1st Plaintiff signature. In his cross-examination when this document was put to him, the 1st Plaintiff said:

> ***"It is a letter of offer dated 13th May, 2015. I am aware of this offer. The letter was not the one used to give additional facilities to the Principal Borrower. This was meant to give the facility but it did no tend up being used. The letter shows it was advancing Shs 21.7 million. The letter shows that the suit property was to be the collateral.***
>
> ***I signed the letter……..I have no document showing the Bank declined to approve the facility."***

38. The Bank exhibited a bank statement for Ridhika Capital Limited Account number 1051712726007 showing a debit of Kshs 16,700,000/= on 28th January 2016. From the statement exhibited, the account was active as of 18th February, 2019. Going back to the Letter of offer of 13th May 2015, then, it is clear that the Bank proceeded pursuant to the offer to disburse the funds to the Borrower Ridhika Capital.

39. By the said letter of offer of 13th May 2015, the parties agreed that the collateral for the facility would include, inter alia:

> ***"5. Existing legal change over property Title No. Naivasha/Maraigushu Block 2/2732 (Nyondia) in the name of John Karanja Kihagi of Kshs 2,300,000/= ……..***
>
> ***8. Duly executed Personal Guarantee of Kshs 21,700,000/= by John Karanja Kihagi the registered owner of property Title No. Naivasha /Maraigushu Block 2/2732 (Nyondia)"***

The letter of offer indicates the guarantors for the facility as:

> ***"All directors of Ridhika Capital Limited***
>
> ***John Karanja Kihagi***
>
> ***Ecko Line Investments Limited"***

40. The Bank also exhibited a Deed of Guarantee dated 24th September, 2015 which appears to have been stamped with stamp duty on 16th October, 2015. The Guarantee is for Kshs 21,700,000/= and contains the signature of the 1st Plaintiff. When shown this document in cross-examination, the 1st Plaintiff said:

> ***"I did not sign this letter of Guarantee. I signed an earlier one……"***

41. It is somewhat surprising for the 1st Plaintiff to say that he did not sign the guarantee when clearly it has his signature and also relates to the letter of offer dated 13th May, 2015 for Kshs 21.7 Million. It is that offer letter that he admitted signing but stated that the Bank did not approves despite the bank statement showing the disbursement of the said amount.

42. The 1st Plaintiff did not allege that the signature on the said guarantee or the Letter of Offer of 13th May, 2015 had been forged or fraudulently obtained, or challenge its authenticity. Nor did he annex in his documents, any earlier guarantee instrument which he alleges he signed. For that reason I take both the letter of offer and the Guarantee as documents pertaining to the mutually consented or agreed transactions between the parties.

43. I have further noted a Letter of Offer dated 20th June, 2017 offering a loan of Kshs 3,500,000/=. This Letter of Offer was signed by Japheth Momanyi Monari and Ramathan M. Mwinyi who are directors of the 2nd Defendant Ridhika Capital Limited. The Bank statement for Account digit 007 shows that on 18th August 2017, an amount of Kshs 3,500,000/= was credited there.

44. In respect, of this Letter of Offer, in absence of the 1st Plaintiff's signature, he may be believed: that is, that he was not aware or involved in consenting to the same.

45. Given that at least three Letters of Offer are shown to have been signed by the 1st Plaintiff - the two in 2014 under which the initial loan was granted and the suit title charged, and the 2015 Letter of Offer for Kshs 21.7 million - the question is what place and effect do these letters of offer have?

46. All the letters of offer mentioned identify the existing charge as a collateral security. The letters of offer of 13th May, 2015 incorporated additional properties to be charged to secure the financial facilities. The Plaintiff asserts that he is not bound by the letter of offer of 2015 because it was not approved by the Bank.

47. The letters of offer executed by the parties are relevant in forming the foundation of the contract and intention of the parties. This position is well elucidated by Kimondo J in **John Muriithi Gacago Nganga v HFCK Limited and Another Nbi HCCC 15 of 2005 (UR)** and more recently by Gikonyo J in **Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited [2014] eKLR**. In the **Surya case**, Gikonyo J said:

> ***"[66] Accordingly, the Letter of Offer and any other pertinent document in the bargain of the loan which eventually leads to a charge, bind the parties in so far as they are not inconsistent with the charge, and such documents preceding the charge are useful in ascertaining the intention of the parties. Quite apart from the legal position I have stated, all the debentures herein and the charges created thereto acknowledge the letters of offer and agreements in the bargain leading to the debt herein and there is nothing in those letters of offer and agreements which is inconsistent with the debenture thereto."***

As such, the letters of offer are central to the parties' contractual relations and cannot be ignored.

48. Having identified the documents forming the contractual relations between the parties, it is now necessary to establish what was the nature of the relations that they entered into, on the basis of those documents.

The nature of the existing contractual relations relative to the charged land (Naivasha/Maraigushu Block 2/2732 (Nyondia).

49. There is no dispute that the Charge was duly entered into by the parties. The spousal consent form and the execution and attestation clause clearly indicate that both the 1st Plaintiff and his wife (2nd Plaintiff) had read and understood the Charge instrument and, in particular, the Bank's remedies under **Section 90** of the **Land Act**, and the Bank's rights under **Section 82** and **83** of the **Land Act**. They understood that by creating the security, for and on behalf of the Borrower 2nd Defendant, they thereby expressly accepted the concept of tacking under **Section 82** of the **Land Act**. Tacking, in its most basic meaning, is an English Common Law concept whereby a lender who has taken a security as part of the loan is allowed to *"tack on"* to the same security a new advance under the same or restricted loan.

50. Clause 10 of the Charge covers the subject of continuing security and consolidation; Clause 10.1 provides for the security to be a *"continuing security"* for the payment of the *"Secured Obligations"*; Clause 10.2 allows for the Bank to consolidate charged securities;

Clause 10.3 permits the Bank, inter alia:

- to combine, consolidate, split, determine or vary any credit or accounts of the Chargor.

- to vary exchange or release any other securities held by the Bank for or an account of the Secured Obligations.

- to combine or consolidate all or any of the Charger's accounts with the Bank and set off or transfer any sums standing to the credit of any one or more such accounts.

51. Clause 10.5, as earlier noted, empowers the bank to use the Charge instrument to give further financial accommodation by way of loan, time credit, banking facilities, overdraft advances or other financial facilities. The powers of the Bank under Clause 10 are extremely broad and expansive in relation to the secured obligations.

52. What were the Secured Obligations under the Charge? This is found at Clause 4 which describes *"Secured Obligations"* as:

> ***"The total monies for which these presents shall constitute security shall be the aggregate of the Maximum Principal Amount together with Interest as aforesaid and such other costs, liabilities, taxes, expenses and charges and other amounts payable to the Chargor pursuant to the provisions of this charge (hereinafter referred to as the "Secured Obligations"). PROVIDED ALWAYS that the Secured Obligations shall for all intents and purposes include the amounts payable pursuant to Clause 10.5 hereinafter."*** (Emphasis added)

53. So that although in Recital B the Maximum Principal Amount is capped at Kshs 2,300,000/=, that definition is expanded by Clause 4 to include *"Secured Obligations"* which are all those amounts comprising the loan offered all other costs charges and expenses under the security, and more significantly and expansively, under clause 10.5.

> ***"All further financial accommodation by way of loan, time credit banking facilities, overdraft advances and other financial facilities to the Chargor or others for whom the charger is a surety on a current or continuing account."***

54. The 1st Plaintiff argued that once the Maximum Principal Amount of Kshs 2,300,000/= was paid as demonstrated in the bank statement, he was entitled to a discharge of the charge. That is incorrect. The Maximum Principal Amount is the figure described and contained in the recitals of the Charge. There is no covenant or agreement created in the recital under the Charge Instrument.

55. By this, I mean that a recital is an introductory statement in a written agreement or deed, similar to a preamble. Its purpose is to set out a summary of the parties' intentions, scope of contract, nature of contract and so on. A recital carries no contract force in that it has no inherent legal effect, although it may be looked at to aid interpretation. In the present Charge Instrument, there is an interpretation and construction Clause, that is Clause 1, which is where the parties' actual agreement commences with the words: *"Now it is hereby Agreed and Declared"*, and the provisions of the agreements of the agreed between the parties follow from Clause 1 to Clause 33.

56. In the interpretation Clause 1.12, of the Charge there is a definition of what an agreement is: It is defined as follows:

> ***"the expression 'covenant' means and includes 'agree' and 'agreement'."***

57. In any event, as already pointed out putting aside the discussion on 'agreement' and 'covenant' and whether a recital is an agreement, the Charge instrument itself expands the amount that is described as Maximum Principal Amount in the recitals to include all Secured Obligations under Clause 4 and 10.5 of the Charge.

58. The 1st Plaintiff relied on the case of **Abraham K. Kiptanui vs. Delphis Bank Ltd. & Another Nairobi (Milimani Commercial Courts) HCCC No. 1864 of 1999** it was stated that:

> ***"The act of a banker in requiring the second account to be opened without the consent of the guarantor discharges the guarantor from his liability...The true rule is that if there is any agreement between the principles with reference to the contract guaranteed, the surety ought to be consulted, and that if he had not consented to the alteration, although in cases where it is without inquiry evidence that the alteration is insubstantial, in that it cannot be otherwise than beneficial to the surety, the surety may not be discharged, yet that if it is not self-evident that the alteration is insubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration...A guarantor will be discharged unless the guarantor's liability has been preserved with words in the guarantee which cover the conduct relied on by the guarantor to discharge him."*** (Emphasis added)

59. The **Kiptanui Case** does not aid the 1st Plaintiff for the following reasons: First, the Bank is given omnibus powers under Clause 10 of the Charge to open accounts and to make the charge a continuing security for additional financial facilities. Second, the financial arrangement being one for advancing credit to the Borrower (a third party) on the guarantee or surety of the 1st Plaintiff, there is no requirement for an account to be opened for the guarantors. The account is in the name of the Borrower. Further the guarantor cannot be discharged in this case because the letter of offer of 13th May, 2015, signed by the 1st Plaintiff, embraced and bound the Charge over the Naivasha/Maraigushu Block 2/2732 land as collateral, in addition to requiring the 1st Plaintiff's personal guarantee for Kshs 21.7 Million which he also executed.

60. The 1st Plaintiff further submitted that a variation in a charge is required by **Section 83 (2) (3)** and **(5)** of the **Land Act** to be made by

way of a memorandum which is signed by the parties and endorsed or annexed to the charge instrument. I take this submission to mean that for the additional or further financial facilities to be part of further charge they ought to be in a memorandum endorsed against the charge.

61. I note that in this case, the letter of offer extending the facilities to Kshs 21.7 Million dictated that the existing Charge - and other collateral - would act as security for the increased credit. Two of these other collateral included the Personal Guarantee of the 1st Plaintiff and a third party charge over L.R. No. 30000 CR No. 65414 in the name of Jolans Transport Limited for Kshs 19,400,000/=. The additional charge is exhibited in the Bank's documents. So that, in my view, the properties secured would demonstrate compliance with the **Section 84** of the **Land Act** provisions for variation.

62. The 1st Plaintiff also submitted that the right to tack is limited only to continuing and current accounts pursuant to **Section 82 (1)** of the **Land Act**. The Act does not define continuing or current accounts. Under the **Banking Act**, **Section 2**, a **current account** is defined as follows:

> ***"An account maintained by a bank for and in the name of, or in a name designated by, a customer of the bank into which money is paid by or for the benefit of such customer and on which cheques and other bills of exchange may be drawn by, and transfers and other banking transactions made on the instructions of, the customer;"***

Thus, a current account is a type of a deposit account maintained by a bank in which there is a significantly higher number of transactions on a regular basis. For these, cheque facilities are generally available for payment to creditors.

I would venture to opine that a continuing account may be considered to be an account against which banks avail rolled-over or renewed facilities and financial accommodation and such account need not be specifically a current account.

63. In this regard, the Bank submitted that the definition may be borrowed from the case of **Equip Agencies Limited v I & M Bank Limited [2017] eKLR** where Nzioka J. observed:

> ***"40. That the doctrine of "continuing securities" in banking transactions arises from the practice whereby the banks do offer facilities which may be rolled over or renewed if the terms and conditions of the facility remain materially unchanged, the doctrine takes effect. However, the said facilities must be within the headroom created by the securities."***

But for all this, the 1st Plaintiff did not operate an account with the Bank and the issue concerning current accounts is moot.

64. With regard to the requirement under **Section 84 (2)** of the **Land Act** for a varied Charge to be evidenced by memorandum which must be endorsed against a charge, my view is that where **Section 82** of the **Land Act** rights have been reserved and endorsed, there is an implied indication that the amount secured by the charge is inherently and automatically subject to variation by way of further advances provided that the maximum advanced is within the headroom.

65. In the present case, not only do Clauses 9.7 and 10.1 constitute the Charge as a continuing security, it is a deemed a continuing security for the payment of all Secured Obligations which includes the Maximum Principal Amount and all amounts payable pursuant to Clause 10.5 under which further credit or financial accommodation may be granted to the Chargor or others for whom the Charger is a surety.

66. Additionally, the 1st Plaintiff's argument concerning the accounts, and his assertion that the amount secured of Kshs 2,300,000/= was paid off therefore discharging the charge, is a red herring. The account maintained by the Bank belongs to the Borrower who received the financial accommodation. The 1st Plaintiff merely facilitated the financial accommodation as a guarantor or surety by securing a third party charge. He had no account with the Bank that he could pay off. The Borrower, Ridhika Capital, although sued did not participate in these proceedings, not even as a witness, and has not complained that it paid off the amount. Thus, any discussion about the nature of the accounts and payments thereunder could only authoritatively be discussed, probatively speaking, by the Borrower.

67. It is further to be noted that the Charge herein is a third party charge created by way of a guarantee or surety. This is clear from Clause 2.1.1. whereby:

> ***"2.1.1. The Bank hereby covenants with the Chargor to advance to the Chargor, the balance of the agreed advance as stipulated in the loan agreement(s), Facility Letter(s) or the other agreement(s) or obligation relating to borrowing between the Bank, the Chargor and all for whom the Chargor acts as surety and as may be amended, supplemented, varied or reviewed from time to time. The balance of the agreed advance may be paid in one sum or by installments tailored to the Chargor's covenants in the facility letter(s), Loan, Agreement(s) or other Agreement(s) with the bank and the same shall become payable when the Bank is satisfied that the Chargor has satisfied the said covenants or made sufficient progress in satisfying the same or at the sole discretion of the Bank on the justification for the advance PROVIDED ALWAYS that the Bank may by notice in writing to the Chargor elect not to advance to the Chargor any outstanding balance of the agreed advance to which the Chargor shall not have become entitled under the provisions of this Clause by such later date as the Bank shall in its absolute discretion decide AND in the event of the Bank electing as aforesaid not to advance to the Chargor the said outstanding balance the amount of the monthly installments provided for in the loan agreement(s), Facility Letter(s) or other agreement(s) or obligation relating to borrowing between the Bank, the Chargor and all for whom the Chargor acts as surety may be adjusted as the Bank in its absolute discretion shall think fit and notice of such variation to be given to the Chargor;"*** (Emphasis added)

68. More significantly, as earlier noted the Charge is a continuing security for all "Secured Obligations" as provided in Clause 5.1:

> ***"5.1 The Chargor as beneficial owner hereby charges the Charged Property to the Bank as a continuing security for the***

payment and discharge unconditionally and in full of the Secured Obligations." (Emphasis added)

69. Prima facie the third party charge is a continuing security which allows the 2nd Defendant to obtain facilities from the Bank from time to time with reliance on the same security and or additional securities. **Section 82 (1)** of the **Land Act** allowed the parties to so contract.

70. For the Chargor to be entitled to earlier discharge of the security, this is controlled by Clause 2.4 which requires that the Secured Obligations be repaid and notice of intention to discharge be given. Clause 2.4, 2.4.1 and 2.4.2 cover this aspect in the following terms:

"2.4 Upon payment of its secured obligations and the performanceof all other conditions and obligations under the Charge the Chargor shall be entitled to discharge the Charge. If the Chargor shall wish to seek to exercise the right to discharge the Charge at any time before the expiry of the term of the Charger, he shall:-

2.4.1. Give the Bank a formal One (1) month's notice of the intention to discharge and he shall thereafter repay its secured obligations to the Bank and performance all other conditions and obligations under the Charge; or

2.4.2. Pay to the Bank (1) month's interest at the rate at which interest is payable on the principal sum secured by the Charge or at any lesser rate which may be agreed with the Bank, as well as repaying its secured obligations to the Bank and performing all other conditions and obligations under the Charge." (Emphasis added)

71. All these provisions tied the Charge up to the repayment of the full amount of the Secured Obligations as defined in Clause 4 of the Charge.

72. The 1st Plaintiff further contended that any variation to the amount secured under the Charge cannot be the subject of the original surety that he provided when his express approval was sought. This argument is rather facetious, however, given that the 1st Plaintiff admitted he signed a Letter of Offer and guarantee for the whole amount of Kshs 21,700,000/=.

73. I have perused the guarantee and would highlight the following of its clauses covenanting to the Bank as follows:

"1. To pay on Demand

The Guarantor as principal obligor will pay to you on demand all money that is now or shall at any time or times hereafter be due or owing to you from or payable to you by the Principal under or in respect of any dealing, transaction or engagement whatsoever, either solely or jointly with any other person, firm, company and whether as principal or guarantor, and whether upon current or other banking account or accounts or otherwise or in respect of bills, drafts, notes or other negotiable instruments made, drawn, accepted, advised, endorsed or paid by you or on your account for the Principal, either solely or jointly as stated above, or that you may from time to time become liable to pay in respect of any bills, drafts, notes or letters of credit or any other dealing, transaction or engagement on account of or for the benefit or accommodation of the Principal, either solely or jointly as stated above ('the indebtedness')

2. This guarantee shall be a continuing security (subject only to such notice as is mentioned below) and shall secure the ultimate balance of the indebtedness notwithstanding the liquidation, administration or other insolvency or other incapacity of any change in the constitution of the principal or of the Guarantor or any of them or in the name or style therefore and shall not be satisfied,discharged or affected by any intermediate payment or settlement of account." (Emphasis added)

74. In this regard, it is clear to me that the guarantee remains in force notwithstanding any payments made, provided that any amount the secured ultimate balance or indebtedness of Kshs 21,700,000/=, but no more.

Whether the 1st Defendant's statutory notices in respect of the Charged Land are valid

75. The 1st Plaintiff's argument is that the statutory notices issued by the Bank are void. The first reason given is that the sums sought in the statutory notices seek sums or amounts not consented to by the 1st Plaintiff. The rationale of the 1st Plaintiff is that the amount of Kshs 2.3 Million was the only amount he consented to be secured by the Charge.

76. In the foregoing discussion, I have already found that the Charge was a third party charge to secure advances, not to the 1st Plaintiff, but to the Borrower. That the charge by making express provisions to give further advances pursuant to **Section 82** of the **Land Act** expanded the Maximum Principal Amount of Kshs 2.3 million to include the entirety of the Secured Obligations subsequently granted. The 1st Plaintiff cannot feign ignorance of the further financial facilities granted when he admitted having signed the letter of offer for advances up to Kshs 21.7 million and also signed a personal guarantee for a similar amount.

77. The 1st Plaintiff also argues that the requirements for notice of sale under **Section 90 (2) (a)** and **(b)** of the **Land Act** were breached. That Section provides as follows:

"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;"

He further submits that the charge for which the notices were issued is not specified, neither is the principal amount advanced; that since the 1st Plaintiff only consented to a charge for Kshs 2,300,000/=, which was paid, any amount outside or beyond that amount was not consented to, and that the suit land was not used as collateral thereof. He cited the following paragraph in the case of **Peter Ngure Nganga v Pioneer Building Society (in Liquidation) [2014] eKLR**:

"27 The centrality of equity of redemption cannot be overemphasized, which now has statutory expression in section 86 of the Land Act. Extinguishing it requires strict adherence with the law, in this case the RLA (repealed). Therefore, exercise of the statutory power of sale without following the law is illegal, null and void and does not extinguish the proprietary rights of the chargor nor pass any good title to a purchaser in an action which is founded on the illegality committed by the Chargee. Ringera J (as he then was) in the case of SIMIYU v HFCK (HCCC 937 OF 2001) had the following to say on the effect of want of service of notice under Registered land Act and he concluded that:

"...Without compliance with the statutory demand, there can be no valid exercise of the power of sale and accordingly, it cannot be said that the chargor's equity of redemption is extinguished in any sale conducted in breach thereof.'

78. There is no question that strict adherence to the provisions of **Section 90** of the **Land Act** must be demonstrated. A perusal of the statutory notice in the 1st Defendant's Bundle and dated 11th October, 2018 by the Bank's lawyers discloses the following.

79. The Notice is entitled as being under **Section 90 (1) (2) (3) e)** of the **Land Act**. It was preceded by a letter dated 9th August 2018 informing the 1st Plaintiff of the default in payment of Kshs 15,552,222.49 and demanding payment thereof.

80. The statutory notice was required to notify the nature and extent of default by the Chargor in terms of **Section 90 (2) a)** of the **Land Act.** In Paragraphs 1 and 2, of the Notice it indicates who is the Chargor/Guarantor and the Borrower, viz the 2nd Defendant. It clearly shows that the total outstanding debt as at 8th October, 2018 was Kshs 16,157,309.94. The nature and extent of default is shown to consist of arrears of Kshs 3,721,988.93 as at 8th October, 2018. This accords to **Section 90 (2) (a)** of the **Land Act**.

81. In its paragraph 3 and 5, the Notice, demands that the amount in default should be paid "within three (3) months from the date of service of this notice", and that after expiry of that period they shall commence sale of the Charged property. The Charged property is indicated on the title to the Notice as "Charge Over Property known as Title Number Naivasha/Maraigushu Block 2/2732 (Nyondia)". This is in accord with **Section 90 (2) (b)** of the **Land Act**.

82. The Notice goes on to indicate at paragraph 6 that the sale of the Charged Property shall be by public auction or private treaty. Finally, the Notice at paragraph 7 gives notice to the 1st Plaintiff that he is at liberty to apply to court for relief and required under **Seciotn 90 (1) e)** of the **Land Act**. The Notice is copied to Ridhika Capital Limited, Leah Njeri Karanja the 2nd Plaintiff and the Bank.

83. I do not see that there was any non-compliance of the Notice with provisions of **Section 90** of the **Land Act** in respect of the statutory notice.

84. A second statutory notice dated 24th January, 2009, exhibited by the 1st Plaintiff was also issued by the Bank's counsel. I have perused it carefully. Like the previous notice, it indicates the name of the Chargor and the Borrower; it identified the Charged Land in its title; it indicates that as at 24th January, 2019 the arrears in default amount to Kshs 17,122,137.38. It gives the Chargor forty (40) days to redeem the Charged Land, and notifies the Chargor that a sale by public auction of the Charged Land will commence after the said period. In my view, the second notice was gratuitous, the first notice hearing already been issued in compliance with the provisions of **Section 90** of the **Land Act**.

85. In the plaint the 1st Plaintiff sought the following reliefs from the court:

1. ……...spent.

*2. **THAT** this Honourable Court be pleased to grant a temporary injunction restraining the 1st Respondent whether by itself, its employees, servants, agents or auctioneer from doing any of the following act, that is to say, from advertising for sale, selling whether by public auction private treaty, disposing of or otherwise howsoever completing by conveyance or appointing Receivers or exercising any power conferred by Section 90 (3) of the Land Act by leasing, letting, charging or otherwise howsoever interfering with Plaintiff's ownership of and title to **ALL THAT** parcel of land known as **NAIVASHA/MARAIGUSHU BLOCK 2/2732. (NYONDIA)**.*

*3. **THAT** pending hearing and determination of this Application, this Honourable Court be pleased to grant an order of injunction restraining the 1st Respondent whether by itself, its employees, servants, agents or auctioneer from doing any of the following act, that is to say, from advertising for sale, selling whether by public auction private treaty, disposing of or otherwise howsoever completing by conveyance or appointing Receivers or exercising any power conferred by Section 90 (3) of the Land Act by leasing, letting, charging or otherwise howsoever interfering with Plaintiff's ownership of and title to **ALL THAT** parcel of land known as*

NAIVASHA/MARAIGUSHU BLOCK 2/2732. (NYONDIA).

*4. **THAT** pending hearing and determination of this suit, this Honourable Court be pleased to grant an order of injunction restraining the 1st Respondent whether by itself, its employees, servants, agents or auctioneer from doing any of the following act, that is to say, from advertising for sale, selling whether by public auction private treaty, disposing of or otherwise howsoever completing by conveyance or appointing Receivers or exercising any power conferred by Section 90 (3) of the Land Act by leasing, letting, charging or otherwise howsoever interfering with Plaintiff's ownership of and title to **ALL THAT** parcel of land known as **NAIVASHA/MARAIGUSHU BLOCK 2/2732. (NYONDIA).***

*5. **THAT** the honourable be pleased to issue an order compelling the 1st Respondent to furnish the applicant and this honourable court with true, proper and accurate certified copies of all the documents regarding the two charges and the statement of loan accounts thereto.*

*6. **THAT** the cost of this application be provided for.*

86. In light of my findings herein I am able to make a determination which is as follows:

a) The declaration sought in prayer (a) does not lie and the Court shall not issue the same.

b) Prayer (b) is declined.

c) The declaration sought in prayer (c) does not lie the court having found the statutory notices to be in compliance with the Land Act.

87. Accordingly, the Plaintiffs' suit is hereby dismissed with costs.

Administrative directions

88. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

89. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

90. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 12th Day of November, 2020.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mukonyi for the Plaintiffs

2. Dachi for the 1st Defendant

3. No representation for the 2nd and 3rd Defendants

4. Court Clerk - Quinter Ogutu