



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 269 OF 2011 (OS)**  
**IN THE MATTER OF AN APPLICATION BY NANCY NJOKI KINYANJUI**  
**AND**  
**IN THE MATTER OF TITLE NUMBER NGONG/NGONG/6090**  
**BETWEEN**  
**NANCY NJOKI KINYANJUI.....PLAINTIFF**  
**AND**  
**EQUITY BANK LIMITED.....DEFENDANT**

**JUDGMENT**

[1] The Plaintiff, **Nancy Njoki Kinyanjui**, moved the Court vide the Originating Summons dated **24 June 2011** pursuant to **Article 40** of the **Constitution of Kenya, 2010**, **Section 72** of the **Registered Land Act, Chapter 300** of the **Laws of Kenya**, **Sections 1A and 1B** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 37 Rule 4** of the **Civil Procedure Rules, 2010**, for the determination of the following questions:

[a] Whether Title No. Ngong/Ngong/6090 has been redeemed from the Charge dated and registered against it on 16 April 2008 in favour of Equity Bank Limited.

[b] Whether Equity Bank Limited should be ordered and/or directed by an order of this Court to execute all required documents to ensue the discharge/encumbrance dated and registered on 16 April 2008 and in default thereof, whether the Deputy Registrar of this Court should be empowered to execute the said documents.

[c] Whether the District Land Registrar at Kajiado should be ordered and/or directed to cancel from the Encumbrances Section of Title No. Ngong/Ngong/6090 the entry therein dated 16 April 2008 noting the Charge in favour of Equity Bank Limited.

[d] Whether Equity Bank Limited, its agents, employees and/or servants should be permanently restrained from advertising for sale, selling, offering for sale and/or in any other manner whatsoever exercising any of the rights bestowed upon it by virtue of the

**Charge against Title No. Ngong/Ngong/6090 dated and registered on 16 April 2008.**

**[e] Whether the Defendant should meet the costs of this suit.**

[2] The Summons was premised on the grounds that on or about 16 April 2008, the Plaintiff consented to the creation of a Third Party Charge in favour of Equity Bank Limited, the Defendant herein, and that it was an express condition that the said security would cover credit accommodation extended to one **Joseph Gitau Kimani** on or about the 8 April 2008 which would not exceed **Kshs. 3,600,000** as follows:

[a] A Loan Facility not exceeding **Kshs. 1,600,000**; and

[b] A Guarantee Facility not exceeding **Kshs. 2,000,000**.

[3] It was further the contention of the Plaintiff that on the basis of the foregoing that the Defendant advanced a loan facility of **Kshs. 1,600,000** to **Joseph Gitau Kimani** personally and issued a Bank Guarantee amounting to **Kshs. 2,000,000** to the **National Oil Corporation of Kenya** on the instructions of **Joseph Gitau Kimani**, which Guarantee was required to enable him operate National Oil Corporation's Petrol Station situate in Nairobi; and that the Bank Guarantee was thereafter returned and discharged by the Defendant on **4 December 2008** without any claim. It was further averred by the Plaintiff that, having personally settled the debt of **Kshs. 1,600,000** by **16 May 2011**, the **Title No. Ngong/Ngong/6090** (the Suit Property) has been redeemed from the Charge aforementioned, and therefore that she is entitled to the orders sought because, because despite repeated requests and demands, the Plaintiff has refused, neglected and or/failed to discharge the property from the illegal encumbrance.

[4] The Plaintiff testified in support of her case on **19 June 2014**, adopting her Witness Statement dated **3 September 2012**; wherein she stated that she was approached by **Joseph Gitau Kimani** to offer the Suit Property, which she co-owns with her husband, to the Defendant as security in consideration of a credit facility not exceeding **Kshs. 3,600,000** comprising a Loan Facility not exceeding **Kshs. 1,600,000** and a Guarantee Facility not exceeding **Kshs. 2,000,000**; which was granted and a Charge created over the suit property. It was her testimony that the Third Party Charge did not give the Defendant the right to advance to the said **Joseph Gitau Kimani** numerous financial accommodations or to unilaterally alter the terms of the facility without her permission, authority or consent.

[5] It was further her evidence that the Bank Guarantee component of the facility was, on **2 December 2008**, returned and discharged by the beneficiary, **National Oil Corporation of Kenya**, without any claim; and that the Defendant did not have to pay the **National Oil Corporation of Kenya** any money on the basis of the Guarantee; and that in any event, that Guarantee was only for one year, which lapsed on **8 April 2009**. As for the term loan of **Kshs. 1,600,000**, it was the evidence of the Plaintiff that, after the Borrower, **Joseph Gitau Kimani** defaulted, she took it upon herself to repay the same through the Loan Account of **Joseph Gitau Kimani**, Number **0240592215152**; and that by **16 May 2011**, the loan had been fully repaid. It was therefore the Plaintiff's contention that the Suit Property had been redeemed from the Charge dated and registered against it on **16 April 2008** in favour of the Defendant. She produced her Bundle of Documents filed herein on **4 September 2014** as exhibits to buttress her testimony.

[6] The Defendant's response to the Originating Summons was made through the Replying Affidavit sworn by the Head of its Debt Recovery Unit, **Purity Kinyanjui**, on **2 December 2011**. It was affirmed that the a Charge was created in favour of the Defendant by the Plaintiff and her Co-Chargor for the cumulative credit facility of **Kshs. 3,600,000** and that the Charge was duly registered, whereupon the facility was made available for the use by the borrower. It was however denied that the Bank Guarantee was cancelled or discharged as alleged by the Plaintiff. According to the Defendant, in so far as the Charge was for the cumulative sum of **Kshs. 3,600,000**, it was at liberty to disburse the same in any format, including by way of Overdraft.

[7] It was further deposed that the Borrower held two accounts with the Defendant, being **Account Numbers [particulars withheld]** and **[particulars withheld]**, which was the Overdraft Account; and that

whereas the loan account may have been paid in full, the Overdraft Account remained in debt, with a sum of **Kshs.3,195,558.25** outstanding as at **31 July 2011**. It was therefore the contention of the Defendant that the Charge had not been redeemed by the time the Statutory Notice dated **13 November 2009** was issued. The Defendant exhibited copies of the Statement of Account, a demand letter dated **14 April 2009** and the Statutory Notice as attachments to the Replying Affidavit.

**[8]** Further to the Replying Affidavit of **Purity Kinyanjui**, the Defendant relied on the testimony of its Relationship Manager, Credit, **Zachary Mucheru (DW1)**, who added that, by Clause (b) of the Charge, the Chargors gave the Defendant the authority to make advances or grant banking facilities or other financial accommodation to **Joseph Gitau Kimani** from time to time on the basis of that Charge, so long as such facilities did not exceed **Kshs. 3,600,000**. He further conceded that although the initial arrangement was for the Defendant to issue a Bank Guarantee in favour of the **National Oil Corporation of Kenya**, the said Guarantee was not utilized; and that instead, the Borrower applied to the Defendant to convert the said Guarantee to an Overdraft Facility.

**[9]** **DW1** further testified that at the Borrower's request, a Letter of Offer in respect of the Overdraft Facility was issued by the Defendant to the Borrower, jointly with one of the Chargors, **Benson Muiruri Kinyanjui**, dated **24 November 2008** (at page 10 of the Defendant's Bundle of Documents); and that **Clause 6** thereof clearly stated that the security for the Overdraft Facility was the existing Charge over the Suit Property. According to **DW1**, there was never any obligation on the part of the Defendant to always consult the Chargors or the Plaintiff every time a request for disbursement was made by the Borrower, as long as the Defendant was acting within its obligations as set out in the said Charge; adding that failure to honour the Borrower's disbursement instructions as long as the same were within the confines of **Kshs. 3,600,000** would have attracted legal consequences on the part of the Defendant.

**[10]** It was thus the case of the Defendant that while the Loan Facility may have been settled in full, the Overdraft Account remains unpaid, and had a debit balance of **Kshs. 3,195,558.25** as at **31 July 2011**, which continues to attract interest and penalties. The Defendant also pointed out that the Plaintiff had filed **HCCC No. 80 of 2010** in which the same issues herein were raised, and that the same was dismissed by **Lady Justice Koome** for want of merit as the loan had not been repaid in full. A copy of the Ruling was also annexed to the Replying Affidavit and marked as **Annexure PK5**. Additional documents in support of the Defence Case were produced by **DW1** as a Bundle and marked **Defence Exhibit No. 1**. It was therefore the contention of the Defendant that the instant suit is an abuse of the process of the Court, granted that there was no evidence that the earlier suit aforementioned had been withdrawn.

**[11]** Having carefully considered the Originating Summons, the grounds raised in support thereof and the averments in the Supporting and Replying Affidavits thereto, two preliminary issues arise for determination before delving into the merits. The first is whether this suit should be entertained at all given that the Plaintiff had filed **HCCC No. 80 of 2010: Nancy Njoki Kinyanjui vs. Equity Bank Limited** in which similar issues were raised. It is instructive that this latter point was taken up in the course of the interlocutory application for temporary injunction; and that **Odunga, J** had occasion to consider the same and render himself thereon thus:

**"When I retired to write this ruling, I called for the file in respect of HCCC No. 80 of 2010...The application restraining the sale of the suit property was heard and dismissed by Koome, J. on 16<sup>th</sup> July 2010. On 27<sup>th</sup> June 2011 the firm of Mwaniki Gachoka & Co. Advocates filed a notice of withdrawal of suit together with a notice of change of advocates both dated 23<sup>rd</sup> June 2011. By a minute made on the file on 28<sup>th</sup> June 2011 only the notice of change of advocates was endorsed by the Deputy Registrar...Accordingly, Nairobi High Court Civil Case has not been withdrawn and I so find. That, however, may not materially affect this application since it is my view that the cause of action herein, which is based on the repayment was not available to the plaintiff at the time the said suit was filed since the said repayment was made after the filing of the said suit...I have in the exercise of this court's jurisdiction conferred by Article 159(2)(d) decided to decide this matter without undue regard to procedural technicalities..."**

[12] In the premises, the question of whether the filing of this suit before the withdrawal of **HCCC No. 80 of 2010** constitutes an abuse of process has been canvassed and brought to a close. I would similarly find and hold that the suit is competently before this Court. In any event, at paragraph 13 of **DW1's** Witness Statement, it was expressly stated that the Plaintiff later withdrew **HCCC No. 80 of 2010**.

[13] The second preliminary issue arising from the Defendant's Replying Affidavit and the ruling of **Koome, J** dated **16 July 2010** is the question of whether this suit and its subject matter is *res judicata*. Again, this point was taken up before **Odunga, J** and his determination thereon is as hereunder:

**"Turning to the application before me, the next question is whether the present application is caught up by the doctrine of *res judicata* in the light of the fact that an application for injunction which was filed in the earlier suit was dismissed as lacking merits...I have looked at the application herein and the annexures to the supporting affidavit. The documents relied upon as forming the basis of the cause of action herein is a copy of the statement for the period between 21<sup>st</sup> April 2008 and 16<sup>th</sup> May 2011 in which the last entry is indicated as nil and that entry is dated 16<sup>th</sup> May 2011. Can it therefore be said that the grounds for presenting the application were available to the applicant at the time the dismissed application was made? Clearly the answer must be in the negative. At the time the earlier application was made payment had not been made and therefore the cause of action is based on full settlement and redemption was not available to the applicant. It follows that the doctrine does not apply in the present circumstances."**

[14] In the light of the pleadings and evidence on record herein, I would be of the same mind, that the Plaintiff's cause of action is valid for the reason that it is predicated on the foundation that the sums lent, namely the **Kshs. 1,600,000** comprising the term loan, have since been fully paid; a fact conceded to by the Defendant as will be shortly demonstrated.

[15] From the foregoing therefore, there appears to be no dispute that the Plaintiff offered the Suit Property, which she jointly owns with her husband, **Benson Muiruri Kinyanjui** for use as security for financial facilities, not exceeding **Kshs. 3,600,000** that the Defendant offered to **Joseph Gitau Kimani**, the Borrower. A Letter of Offer was accordingly issued by the Defendant, which was produced herein (at pages 3 to 8 of the Plaintiff's Bundle of Documents). The terms set out on that Letter of Offer were that **Kshs. 1,600,000** would be disbursed as a term loan; while **Kshs. 2,000,000** would be in the form of a Guarantee Facility.

[16] It is common ground that the terms stipulated in the Letter of Offer were duly accepted by the Borrower, whereupon, a Charge dated **16 April 2008** (see **pages 9 to 20** of the Plaintiff's Bundle of Documents) was prepared and executed by the Plaintiff, her Co-Chargor and the Defendant; which is sufficient proof that the Plaintiff and her Co-Chargor were agreeable to those terms. Upon registration of the Charge at Kajiado Lands Registry on **16 April 2008**, the sum of **Kshs. 1,600,000** was disbursed to the Borrower on **21 April 2008** through his Loan Account No. **[particulars withheld]** as confirmed by the Statement at **pages 24 to 26** of the Plaintiff's Bundle of Documents. The parties are in agreement that this facility was fully serviced; and indeed the Statement of Account at **pages 24 to 26** of the Plaintiff's Bundle of Documents confirms the payment.

[17] There is further no disputation that the Bank Guarantee for **Kshs. 2,000,000**, though issued in favour of **National Oil Corporation of Kenya**, remained unutilized until **6 October 2008**, when the Borrower, by his letter dated **6 October 2008** made an application to the Defendant to have the same converted to an Overdraft Facility. That letter (a copy whereof is at **page 34** of the Plaintiff's Bundle of Documents) states as hereunder in part:

**"...At our request you issued a guarantee of Kshs. 2,000,000 to National Oil Corporation (K) Ltd. At that point we expected that the guarantee would serve the business and improve our cash flow. However, this expectation was not realized and we have found out that the guarantee is not serving the intended purposes."**

**We are therefore requesting you to convert the guarantee into an overdraft facility of Kshs. 2.0 million. The Loan facility of Kshs. 1.66 million will continue to be repaid at the current rate of Kshs. 55,474.00 per month for a period of 36 months.**

**This facility will continue to be served by property title No.Ngong/Ngong/6090 valued at Kshs. 8.2 million and already charged to yourselves..."**

**[18]** The Borrower's request was granted by the Defendant and a Letter of Offer issued to him incorporating the new arrangement dated **24 November 2008**. The Letter of Offer was exhibited at **pages 10 to 15** of the Defendant's Bundle of Documents and it was restricted to an Overdraft not exceeding the aggregate sum of **Kshs. 2,000,000**. There is no dispute that those funds were duly disbursed and utilized by the Borrower, or that the Borrower failed to repay the same, such that by **31 July 2011**, the Overdraft Facility was in arrears to the tune of **Kshs. 3,195,558.25** as evidenced by the Statement of Account at **pages 30 and 31** of the Plaintiff's Bundle of Documents and confirmed by the evidence of **DW1**.

**[19]** I note that the Plaintiff framed a total of 10 issues for the Court's determination, but which can safely be reduced to the following:

**[a] Whether the obligations created pursuant to the Letter of Offer dated 8 April 2008 in favour of the Defendant have been satisfied and fully discharged.**

**[b] Whether the Charge over the Suit Property dated 16 April 2008 could be utilized to secure the Overdraft Facility that was given to Joseph Gitau Kimani and Benson Muiruri Kinyanjui on 24 November 2008**

**[c] Whether Title to the suit property has been redeemed from the Charge dated 16 April 2008; and if so, Whether the Plaintiff is entitled to the prayers sought herein.**

**On whether the obligations created pursuant to the Letter of Offer dated 8 April 2008 in favour of the Defendant have been satisfied and fully discharged:**

**[20]** The Letter of Offer dated **8 April 2008** was explicit as to its scope. it was for **Kshs. 3,600,000**, comprising of a Loan Facility of **Kshs. 1,600,000** and a Guarantee Facility of **Kshs. 2,000,000**. It was further specified in that Letter of Offer that:

**"The maximum amount that will be made available to the Borrower under the loan facility shall not exceed the maximum principal amount of Kshs. 1,600,000/= (Kshs. One Million Six Hundred Thousand Only).**

**The maximum amount that will be available under the proposed Guarantee facility shall not exceed the aggregate of Kenya Shillings 2,000,000/= (Kshs. Two Million Only).**

**The Guarantee expires on 08/04/2009..."**

The Letter of Offer further stipulated that the facility was to be secured by a first legal charge over the suit property to the tune of **Kshs. 3,600,000** and a cash cover of **Kshs. 300,000**.

**[21]** The Plaintiff having demonstrated that the Loan Facility of **Kshs. 1,600,000** was fully repaid by her; and that the Guarantee to **National Oil Corporation of Kenya** was not utilized, it is evident that the obligations set out in the Letter of Offer dated **8 April 2008** were fulfilled. Indeed, the letter by **National Oil Corporation of Kenya** dated **4 December 2008** confirms that no liability was incurred by the Borrower in respect of the Guarantee. Accordingly, I would find and hold that the obligations created by the Letter of Offer dated **8 April 2008** on the Borrower were fully discharged.

**On whether the Charge over the Suit Property dated 16 April 2008 could be utilized to secure**

**the Overdraft Facility that was given to Joseph Gitau Kimani and Benson MuiruriKinyanjui on 24 November 2008:**

[22] The Plaintiff distanced herself from the Overdraft Facility that was offered to the Borrower vide the Letter of Offer of **24 November 2008**, contending that she was not a party thereto, a fact that was conceded to by **DW1**. In the written submissions filed herein by Counsel for the Plaintiff, the Court was urged to find that the second arrangement following the Letter of Offer dated **24 November 2008** was a different contract in respect of two borrowers; which arrangement was not in the contemplation of the parties when the Charge dated **16 April 2008** was signed. Counsel argued that an Overdraft Facility is not the same as a Bank Guarantee, and urged the Court to consider that no interest would have accrued in respect of the Guarantee and that barring the contemplated contingency, no obligation would have been imposed on the Borrower to pay; and further that on account of these marked differences in the two facilities, it was imperative that the Plaintiff's consent to the terms of the second Letter of Offer be obtained and a Further Charge drawn.

[23] It was however the contention of **DW1** that Clause (b) of the Charge instrument made provision for such additional facilities in the following terms:

**"The Lender has at the request of the Chargor agreed to make advances or to grant banking facilities or other financial accommodation to JOSEPH GITAU KIMANI (hereinafter called "the Borrower") to an aggregate amount not exceeding the sum of Kenya Shillings Three Million Six Hundred Thousand only (Kshs. 3,600,000/-) exclusive of interest and other charges or such lower limits as may from time to time be fixed by the Lender..."**

[24] Accordingly, it was posited that the Overdraft Facility was validly given to the Borrower, and that the Defendant did not have to revert to the Plaintiff for approval and that the manner via which the advances or financial facilities were to be disbursed to the Borrower was not limited as long as the aggregate sum disbursed did not exceed **Kshs. 3,600,000**. It was further submitted by Counsel for the Defendant that, just as the first Letter of Offer dated **8 April 2008** was between the Borrower and the Defendant, so too was the second Letter of Offer dated **24 November 2008**; and therefore that the Plaintiff should not be heard to say that she was not a party to the terms set out in the second Letter of Offer.

[25] Having considered these rival arguments, I would take the view that the Loan Facility of **Kshs. 1,600,000** having been fully paid by the Plaintiff, and the Guarantee having been discharged without utilization as envisaged under the Letter of Offer of **8 April 2008**, the obligation of the Chargor had been discharged; and therefore that her consent was required to validate the terms of the Letter of Offer of **24 November 2008** in so far as the borrowing was to be secured by the Charge of **16 April 2008**. This is because the Overdraft was to entail, and did entail, completely different financial and legal implications from the Bank Guarantee that was the object of the Charge. It is noteworthy too, that the borrowing was not just in respect of the Borrower but included additional person, a situation which was not envisaged under the Charge Instrument.

[26] More importantly, the Letter of Offer dated **24 November 2008** was explicit that the Overdraft would be secured by **"...a personal guarantee by Nancy Njoki Kinyanjui and Benson Muiruri..."** in addition to the existing Charge. It was therefore imperative that the Plaintiff be involved before draw down of the funds. That this was not done was explicit in the evidence of **DW1**, who, in cross-examination admitted that:

**"At page 10 of the Defendant's Bundle of Documents is a Letter of Offer dated 24 November 2008 addressed to Joseph Gitau Kimani and Benson Muiruri. The amount offered is Kshs. 2 million. The security was a Personal Guarantee by Nancy Njoki Kinyanjui and the Charge over Ngong/Ngong/6090. Nancy Njoki Kinyanjui is not a party to this Letter of Offer. She did not sign it. She did not provide a Personal Guarantee. Benson did not sign a Guarantee either, but he signed the Letter of Offer. I do not know whether Nancy Njoki Kinyanjui was notified of this Letter of Offer...Nancy Njoki Kinyanjui did not guarantee the Overdraft...As**

**far as I am concerned Nancy Njoki Kinyanjui does not owe the bank any money either as a borrower or as a Guarantor..."**

[27] In the premises, it is my considered view, that in the absence of a Personal Guarantee by the Plaintiff as contemplated by the Letter of Offer dated **24 November 2008**, and there being no dispute that the Plaintiff was never involved in this subsequent arrangement, there would be no basis upon which the Charge over the Suit Property dated **16 April 2008** could be utilized to secure the Overdraft Facility that was given to **Joseph Gitau Kimani** and **Benson Muiruri Kinyanjui** vide the Letter of Offer dated **24 November 2008**. Accordingly, it cannot be validly argued that the Guarantee was converted to an Overdraft Facility under the same terms as envisaged by the Charge. I find succor in this respect in the words of **Ojwang, J** (as he then was) in **Kanyoro vs. Wakarwa Printers Ltd & Another [2005] eKLR**, that:

**"The governing principle of law is clearly stated in Halsbury's Laws of England, 4th Ed. Vol. 30 parar. 253:**

**"Any material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety, who is relieved from liability by the creditor dealing with the principal debtor..."**

**I take notice of the clear terms upon which the Plaintiff's securities were to be restored to him, in the event of certain courses of conduct by the first Defendant; I take notice of the fact that upon the happening of certain events the Plaintiff demanded the restoration of his land titles, free of encumbrance, and the first Defendant formally acceded to the request; I take notice of the fact that the same first Defendant made variations to the terms of the loan with the second Defendant and that in these dealings the Plaintiff was kept in the dark. These events, I believe and do now hold, created a major variation to the loan arrangements between the two principal parties, namely the first Defendant and the second Defendant, which adversely affected the Plaintiff. Therefore, the guarantee which the Plaintiff had given must be held to have lapsed..."**

**Whether the Title to the suit property has been redeemed from the Charge dated 16 April 2008; and if so, whether the Plaintiff is entitled to the prayers sought herein:**

[28] The foregoing being my view of the matter, I would find and hold that Title to the suit property has been redeemed from the Charge dated **16 April 2008** and that the Plaintiff is indeed entitled to the following orders granted the foregoing answers to the questions posed in her Originating Summons dated **24 June 2011**, namely:

**[b] That Equity Bank Limited be and is hereby ordered to execute all required documents to ensue the discharge/encumbrance dated and registered on 16 April 2008 within 14 days from the date hereof, and in default thereof, the Deputy Registrar of this Court do execute the said documents.**

**[c] That the District Land Registrar at Kajiado be and is hereby ordered and/or directed to cancel from the Encumbrances Section of Title No. Ngong/Ngong/6090 the entry therein dated 16 April 2008 noting the Charge in favour of Equity Bank Limited.**

**[d] That Equity Bank Limited, its agents, employees and/or servants should be permanently restrained from advertising for sale, selling, offering for sale and/or in any other manner whatsoever exercising any of the rights bestowed upon it by virtue of the Charge against Title No. Ngong/Ngong/6090 dated and registered on 16 April 2008.**

**[e] That the costs of this suit be borne by the Defendant.**

**Orders accordingly.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF AUGUST, 2017**

**OLGA SEWE**

**JUDGE**