**Kolile v Equity Bank (K) Ltd & another (Land Case 615 of 2013) [2022] KEELC 3785 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3785 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**LAND CASE 615 OF 2013**

**FM NJOROGE, J**

**JUNE 29, 2022**

**BETWEEN**

**NATHAN MUTUA KOLILE ..... PLAINTIFF**

**AND**

**EQUITY BANK (K) LTD ..... 1ST DEFENDANT**

**STEPHEN NZULA MULI T/A GENERATION HIGHWAY ENTERPRISES ..... 2ND DEFENDANT**

***(FORMERLY NAKURU HCCC NO 172 OF 2009)***

## JUDGMENT

1. He who is surety for a stranger will suffer, but one who hates surety is secure states scripture; the one who hugs a debt also shakes hand with a danger, said a writer from the Indian sub-continent. In reality, and as twists and turns in the present dispute show, standing surety for bosom friends or kindred in the turbulent and uncertain world of modern commerce sometimes varies not from pledging for a total stranger. Upon a principal debtor's default, guarantorship offered for credit facilities oftentimes leaves the guarantor in much the same quandary as the borrower himself. For thirteen years and thirteen days, a period ending today, the plaintiff in the instant suit has undergone significant perplexity while attempting to stave off the sale by the 1st defendant of his domicile which he charged to the 1st defendant bank in addition to his execution of a letter of guarantee and indemnity to secure credit facilities it advanced to the 2nd defendant. The surprising aspect of this case is that the 2nd defendant, who is said to have been an acquaintance to the plaintiff and still running a ubiquitous business empire in within the court's jurisdiction to date, remained mute across the length and breadth of this litigation and ultimately no word was heard of what his intent is regarding his severe indebtedness to the 1st defendant that has so far occasioned his friend so much grief. It is also strange that when he took part in an injunction application dated 9/10/2020 the principal borrower's sworn affidavit dated

9/11/2020 sought that the guarantor's application be dismissed and with costs to him! Word was also not forthcoming from the 1st defendant as to whether the securities pledged by the principal debtor had been realised or not as at the time of the hearing. This suit is concerned with the issue of whether the principal debtor's part payment of a sum slightly in excess of the guaranteed sum liberates the guarantor from the claws of the letter of guarantee and charge he executed and therefore whether the sale of his property should be permanently halted by court.

2. The plaintiff commenced this suit by way of a plaint dated 7/5/2009 filed in the High Court on his behalf by Mongeri & Co Advocates on 16/6/2009. The suit was later transferred to this court and allocated its present number. The 1st defendant filed a statement of defence on 20/7/2009 denying the claim. An amended plaint was filed on 2/12/2013 through JN Njuguna & Co Advocates. The 1st defendant's reply to amended plaint was filed on 18/10/2021. This suit proceeded to hearing on 2/2/2022 when the plaintiff and the defendants adduced evidence and closed their respective cases. The court ordered the filing of submissions and the plaintiff complied on 12/4/2022 while the 1st defendant did so on 28/4/2022 and the 2nd defendant filed no submissions.

**The Plaintiff's Case**

3. In the amended plaint the Claimant states that he is the registered owner of LR Nakuru Municipality Block 21/66 measuring 0.6 Ha where he resides with his entire family; that he charged his property by a letter of guarantee dated 19/9/2006 in favour of the 1st defendant to secure a credit facility of Kshs 1.2 million to be advanced to the 2nd defendant and that charge was registered and the monies disbursed to the 2nd defendant *vide* account number 03105906xxxxx (titled business loan account). The plaintiff claims that his liability was limited to the guarantee of Kshs 1.2 million, the principal sum which has now been repaid and the plaintiff's status of guarantorship has been extinguished. However, the plaintiff also complains that on December 21, 2006 the 1st defendant advanced a business loan of Kshs 4,000,000/= to the 2nd defendant and the plaintiff was not informed as to the basis on which an extra amount of Kshs 2,800,000/= had been advanced to the 2nd defendant through another loan account number 031590xxxx/8. He denies having guaranteed the sum of Ksh 2,800,000/= under the guarantee dated 19/9/2006; nevertheless, he avers by 30/6/2008 the 2nd defendant had repaid the loan to the tune of Kshs 3,297,138/=. In view of the foregoing, the plaintiff avers, the principal sum of Ksh 1,200,000/= which he had guaranteed has already been repaid and pursuant to that payment his liability has been thus extinguished as per the written guarantee. Notwithstanding the foregoing the 1st defendant served on the plaintiff letters dated 29/1/2009 and 12/2/2009 expressing an intention to exercise its power of sale over the suit premises allegedly to recover the amount owed to it by the 2nd defendant and secured by the charge. The plaintiff terms the demand and the intention to exercise statutory power of sale to recover the amount purportedly owed to the 1st defendant by the 2nd defendant as illegal, unreasonable, fraudulent, extortionist and inappropriate and lacking in basis. Particulars of illegality and fraud on the part of the two defendants are set out in paragraph 9(A) and 10(A) of the plaint. He avers that if the sale takes place, he and his family would be rendered homeless owing to the illegalities committed by the defendants. Further to the a foregoing the plaintiff avers that the dealings related to the guarantee were governed by the *Registered Land Act*; that the chargee was required to issue statutory notices of default to the borrower intimating his intention to exercise statutory power of sale against the chargor as a condition precedent to the exercise of that power; that the *Registered Land Act* having been replaced by the *Land Act* 2012, section 90 of the *Land Act* provides for the chargee's remedy in case of default of any periodic payment of interest for one month: the chargee is required to serve notice on the borrower in writing to pay or rectify the default within at least 3 months; that further section 78 of the *Land Act* makes the requirements of section 90 of the Act applicable to all charges including charges made before the coming into effect of the *Land Act*; that notwithstanding the provisions herein before stated, the

1st defendant failed to issue any notice pursuant to the *Land Act* and so the purported threat to sell the suit land is unlawful, null and void. He also avers that the defendants' actions are statute-barred. The plaintiff blames the 1st and 2nd defendants for their acts and omissions for his miserly. In the amended plaint dated November 20, 2013, the plaintiff prays for the following prayers:

a) A declaration that the intended sale of the plaintiff's Land Parcel Number Nakuru/ Municipality Block 21/66 is unlawful, illegal, null and void and is of no legal consequence.

b) A declaration that the 1st defendant's right to exercise its power of sale over the guarantee dated 19/9/2006 has been extinguished and that the 1st defendant should discharge the charge registered by it over the plaintiff's parcel of land and to hand over the original title document for land parcel number Nakuru/Municipality Block 21/66 to the plaintiff.

c) An order of permanent injunction to permanently restrain the 1st defendant either acting by itself, its servants and or agents from selling and or otherwise disposing of the plaintiff's land parcel number Nakuru/Municipality Block 21/66.

d) Costs to be provided for.

e) Any such other or further relief as this court may deem appropriate to grant.

**The Defence of the 1st Defendant**

4. The 1st defendant's defence to the claim is as follows: That the 2nd defendant applied for a loan facility of Ksh 4 million from the 1st defendant which was granted on the strength of security by way of charge registered against the suit property whereby the plaintiff executed a guarantee and indemnity in favour of the 2nd respondent; that execution of those instruments was attested to by an advocate in terms of section 74 *RLA* at the time of execution; that the plaintiff was all along aware of the loan and voluntarily offered his land as security and had a duty to follow up and ensure the 2nd defendant was servicing the loan; that the charge is valid; that there is no fraud; that the 2nd defendant owes the 1st defendant monies and the action of attempting to exercise statutory power of sale is lawful; that the plaintiff's recourse is against the 2nd defendant for his default and that all the laid down procedures having been followed and notices issued the sale should not be halted. The 1st defendant, while denying that the plaintiff has paid the guarantee sum of 1,200,000/= further avers that the plaintiff guaranteed that sum plus interest thereof and he can only be discharged upon full payment of the guaranteed sum plus interest; that the plaintiff has admitted to not paying the guaranteed sum; that there is no illegality and the plaintiff has admitted that he was served with requisite notices and that the property was advertised for sale. The 1st defendant points at the various applications for injunctions which have been dismissed by this court and avers that the issue of whether relevant notices were issued and advertisement for sale done has been conclusively dealt with before. It states that the plaintiff's case is "desperate and scandalous" and which ought to be dismissed with costs.

**The 2nd Defendant's Defence**

5. The 2nd defendant filed a notice of appointment through Wambeyi & Makomere & Co Advocates on 21/7/2008 and a replying affidavit to the plaintiff's motion dated 7/5/2009 but filed no other documents thereafter. The 2nd defendant also failed to participate in the hearing of the suit.

**The Plaintiff's Evidence**

6. The plaintiff's evidence closely followed what is in the plaint. He adopted his witness statement dated 12/5/2021 as his evidence-in-chief. He admitted to having executed a guarantee against a defined loan

amount of Kshs 1,200,000/= that the 2nd defendant was to receive from the 1st defendant; he produced the letter of guarantee as PExh 1, the letter of offer as PExh 2a and loan application form as PExh.2b. He pointed out that the offer to the 2nd defendant dated 11/8/2006 is for Kshs 4,000,000/=. Paragraph 6 of the said letter of offer states that the security of the suit land was earmarked as security to cover Kshs 1,200,000/=; a chattels mortgage over several vehicles belonging to the 2nd defendant, with their registration details was also provided for. Of the securities, only the land belonged to the plaintiff. The plaintiff referred to the letter of guarantee and indemnity (PExh3) between him and the 1st defendant. He averred that it stated that the limitation of his liability is Kshs 1,200,000/=. He also referred to the loan account statement (PExh.4) for account number 03105906xxxxxx through which the 2nd defendant obtained the loan of sum Kshs 4,000,000/=; he stated that as at 1/1/2008 the 2nd defendant had already paid Ksh 3,319,274.44 as shown in the account statement. He drew the court's attention to the last entry on the credit column on that statement which read Ksh 2,717,625.55 and averred that that implied that the 2nd defendant has already paid Kshs 6,036,899.99 which far exits the guaranteed sum by about Kshs 4,800,000/=. The plaintiff expected his title to be released to him once the 1,200,000/= was paid by the 2nd defendant but that has not been the case; instead the 1st defendant has threatened to sell his land. The 1st defendant gave him a demand notice and through auctioneers advertised the property in the newspapers and pasted advertisements on his plot claiming Kshs 3,654,243.44 through a notice (PExh.5a) dated 12/2/2009. Further in a notice dated 10/1/2014 (PExh.5b) the 1st defendant sought payment of Kshs7,319,806.44. In another notice dated 29/5/2014 (PExh 5c) the 1st defendant claimed Kshs10,423,547.49. Also, in a letter dated 18/9/2014 (PExh.5d) the 1st defendant demanded Ksh 10,719,884.54. The 1st defendant employed Antique Auctions who sent him two notices both dated 25/5/2009 (PExh 6a and PExh 6b) and a letter dated 28/5/2009 (PExh.6c) and an affidavit of service (PExh 6d). Valley Auctioneers sent the plaintiff a letter dated 28/10/2016 (PExh 7a) on their intention to sell the suit land as well as a notification of sale of even date (PExh 7b).

7. The plaintiff claims that he suffered and his family was embarrassed not to mention that his church was also scandalised a lot when people around him came to know that his land was being sold; his wife and his children sued him for taking a loan without informing them in Nakuru CMCC 1025/2011 *Dorcus Mumo Mutua vs Equity Bank & another* in which case the court issued several orders. The plaintiff further testified that the 2nd defendant is a businessman conducting transport business in Nakuru under the name of Prestige safaris, having almost 100 vehicles with offices known to the 1st defendant; that the 2nd defendant has ability to repay the loan and the 1st defendant has not informed the plaintiff whether it has sued or pursued his properties over the loan. In an attempt to prove that the 2nd defendant was able to repay the loan the plaintiff produced PExh.10, some extracts from the Daily Nation newspaper. He avers that his land should not be sold and his title should be discharged and returned to him.

8. Upon cross-examination by Ms Kimure PW1 admitted to having executed PExh 3 and that its import and meaning was explained to him; when shown the charge document he identified his signature as affixed in that document and that the letter of offer (PExh 2a) expressed the charge to be Kshs 4,000,000; he however insisted that his title was to secure only Kshs 1,200,000/=. He also testified that he showed the bank where to find the 2nd defendant but it failed to follow the 2nd defendant and went on making their demands against him. At that point the plaintiff closed his case and DW1 took the stand.

9. DW1, Charles Macharia stated that he is the Credit Manager of the Nakuru branch of the 1st defendant. He stated that the 2nd defendant applied for a loan of Kshs 4,000,000/= and offered the suit land as security with the plaintiff as a guarantor who guaranteed Kshs 1,200,000/=. However, that was not the only amount that was guaranteed; the borrower provided other securities. According to him, the plaintiff's insistence that Kshs 1,200,000/= was the amount advanced is not correct. He added that it

is the duty of the guarantor to pay to the chargee the amount he has guaranteed in case of the default by the borrower. He stated that all communications on default by the borrower is normally copied to the guarantor; that since the borrower defaulted the loan continues running interest as the chargee seeks payment from the guarantor. Demands were made to the guarantor in this case and he failed to make good the guarantee and so his title could not be discharged and/or released to him and the default continues to date with interest still running. The guarantor had also signed the charge document on 4/10/2006 (DExh 3). The plaintiff requires to discharge his obligation as a guarantor before his title is discharged. The process by the 1st defendant in charging the land was valid and the court should compel the guarantor to pay the guaranteed amount, interest and charges and the costs of the suit.

10. Upon cross-examination by Mr Kariuki DW1 stated that although the plaintiff guaranteed Kshs 1,200,000/=, Kshs 4,000,000 was advanced and other securities were provided. Upon cross-examination by Mr Njuguna DW1 testified that the plaintiff guaranteed only Kshs1,200,000 while the borrower provided the securities to cover Kshs 2,800,000 in form of chattels mortgages. He could not however confirm whether the bank has excised its right against its securities by the borrower and that the statement (PExh 4) can confirm what has been paid by the borrower. According to him Kshs 3,319,274.44 is not the amount paid but the outstanding amount. Though admitting that the guarantee and indemnity is limited to Kshs 1,200,000/= by the charge, he asserted that the bank is not obligated to immediately discharge the plaintiff's title even after the borrower paid over Kshs 1,200,000/=. He admitted that it was the primary obligation of the borrower to repay the loan and that the bank is obligated to take every step to compel him to repay. He admitted that the bank can sue over the chattels mortgage but he did not have any evidence that the bank has taken any action over the chattels mortgage of suing the borrower. He maintained that the bank need not necessarily exhaust the remedies against the borrower before following the chargor and that suit is filed after all the securities have been satisfied. He was not able to say how much the borrower has paid although he came from the branch that dealt with him. He stated that he follows up with the borrower and the guarantor simultaneously and the borrower though having been served with communication has failed to settle. He does not recall the bank's last communication to the borrower; he admitted that the borrower's business is the prominent business in Nakuru town whose offices are located on the same street as his bank. He stated that the bank would release the title upon the guarantor paying Kshs 1,200,000/= in the event the borrower fails to pay. When pressed further by Mr Njuguna in cross-examination DW1 admitted that he cannot explain why the entire amount is sought from the guarantor when the amounts over and above 1.2 million had been guaranteed by other securities. He stated that the proper position is that the bank should demand the amount that the guarantor had guaranteed and that the guarantor is entitled to know the sum owing but admitted that the defendant in the present case had done the contrary by demanding the entire amount owing. He stated that the chattels secured Kshs 4,000,000 but could not tell the amount owing on the amount Ksh 2,800,000 secured by the chattels mortgage or the amount owing on the entire Kshs 4,000,000/= lent. However, he soon contradicted this statement by stating that Kshs 8,092,022.44 is the amount outstanding on the entire loan. He also admitted that the whole repayment is not indicated in the statement. He added that the borrower had other accounts with obligations and that they have now been lamped together. When shown the letter dated 16/9/2020 from Antique Auctions (attached to the supplementary affidavit dated 9/10/2020) he admitted that it is in respect of the suit property and the sum demanded is in excess of Kshs 20,000,000/= which is Kshs 12,000,000 more than that which he had admitted in his earlier oral evidence. He admitted that the total liability of the borrower including some obligations not arising from the transaction subject matter of this suit had been lumped together with the subject of this suit and that it is not lawful to do so.

11. When re-examined by Ms Kimure he admitted that action against the borrower does not exclude the guarantor; the 2nd defendant was supposed to pay Ksh 144,610/= for 36 instalments but defaulted. The bank however failed to notify the plaintiff that the borrower had defaulted in discharging his obligation; he admitted that default began in January 2008. According to him the terms of the guarantee included interest charges. At that juncture the defence case was closed and the court issued directions on the filing and exchange of submissions.

**Determination**

12. It is common ground that the plaintiff executed a guarantee limited to the sum of Kshs 1,200,000/ = to enable the 2nd defendant to enjoy a credit facility from the 1st defendant; that there were two sets of securities, including the plaintiff's land parcel and that the 2nd defendant has defaulted on his obligations to the 1st defendant hence the 1st defendant's attempts to realize security charged by the plaintiff. Lastly, it is not in dispute that the 2nd defendant has since the disbursement of the credit facility to him repaid a sum in excess of the guaranteed sum.

13. The only issues for determination in this matter in my view are whether a declaration should issue declaring that the 1st defendant's right to exercise its power of sale in respect of the Guarantee dated 19/9/2006 has been extinguished, whether the 1st defendant should discharge the charge registered by it over the plaintiff's parcel of land and hand over the original title document for land parcel number Nakuru/Municipality Block 21/66 to the plaintiff.

14. In his submissions the plaintiff submits that the 1st defendant the chargee, explained to him that the words "limited amount" in the letter of guarantee and indemnity meant that his liability could not exceed the loan amount of Kshs 1,200,000/=. The charge also bore this sum. The plaintiff's main grievance is that the 2nd defendant has already repaid a sum in excess of the guarantee sum yet the 1st defendant is intent on exercising its statutory power of sale over the suit property. Citing the provisions of section 85 of the *Land Act* 2012, his argument is that the 2nd defendant has paid a sum equal to the guaranteed sum and so there was no default and he has a right to discharge of his property.

15. The 1st defendant disagrees. It was the evidence of the 1st defendant's chief witness that the 2nd defendant has repaid more than Kshs 1,200,000/= albeit he could not state what exact amount had been repaid by the 2nd defendant in total. He also did not know whether the 1st defendant bank had exercised its power of sale over the other securities owned by the borrower.

16. In the case of *Olkasasi Limited v Equity Bank Limited* [2015] eKLR the court stated as follows:

> " A guarantee constitutes a separate contract from the borrower's simple contract for loan and the liability of a guarantor is separate from that of the borrower; it arises upon the default by the borrower to fulfil the terms of the contract for loan. The guarantor is, therefore, sued and liable on the guarantee except, however, where the guarantee is also given in form of a charge on immovable property of the guarantor, the guarantor will benefit from certain provisions of the law available to a chargor;"

17. The letter of guarantee and indemnity was produced as an exhibit. It is a fearsome document that the plaintiff has admitted to having executed, and which he appears to not have fully understood the terms of. It states that the guarantor will pay to the lender on demand all monies and discharge all obligations and liabilities whether actual or contingent owing from the date of the execution thereof to the lender by the principal debtor. It further states that the amount recoverable from the guarantor under the guarantee shall be limited to the principal sum stated in the particulars set out in the guarantee, interest,

fees, commissions, charges, costs and expenses which shall have accrued or shall accrue and become due to the lender before or at any time after any demand made pursuant to the provisions of the guarantee. Besides, the letter waives the guarantor's rights to subrogation or indemnity from the principal debtor and bars him from claiming any setoff or counterclaim against the principal debtor or to claim or prove in competition with the lender in the bankruptcy or liquidation of the principal debtor or co-guarantor. The same document provides that any statement of account of the principal debtor signed as correct by any duly authorised officer of the lender shall be evidence against the guarantor of the indebtedness of the principal debtor to the lender. Further the failure to exercise or delay in exercising a right or remedy provided by the guarantee does not constitute a waiver of the right or remedy or a waiver of other rights or remedies. The letter of guarantee further states that it shall not be determined or affected by the demise bankruptcy insolvency liquidation or other incapacity of the guarantor.

18. The 1st defendant avers that the 2nd defendant ceased servicing the loan on 13/6/2008 when the outstanding balance was Kshs 3,247,948.44. It relies on the bank statements produced in evidence by the plaintiff. According to the 1st defendant by the time the first notice was sent to the plaintiff on 12/2/2009, the debt had accumulated to Kshs 3,654,243.44. No account for the delay in appraising the plaintiff of the default was given. However, the 1st defendant stated that at that juncture of being notified, the guarantor had the option of determining the guarantee as per clause 5 of the letter of guarantee and indemnity. Had that been done, the 1st defendant stated, then the guarantor's obligations as a guarantor would have been only in respect of the outstanding debt as at the date of cessation. It denies that the plaintiff ever visited it with a view to discharging the land.

19. It is clear that the letter of guarantee is an agreement with the chargee, separate from the chargee's agreement with the borrower. The agreements between the chargor and the principal borrower are relevant to the letter of guarantee and charge executed by the plaintiff only in so far as the amounts lent and debt outstanding are concerned and no more. The letter of guarantee and the charge must be construed independently to find out if the plaintiff's perceptions that his liability is extinguished are correct.

20. It is not in dispute that the borrower is bound to repay the loan monies advanced to him, but the guarantee's contents does not bar the chargee from realising the security placed in its hands by the guarantor on the ground that other securities provided by the principal borrower have not been realised. In this court's view, a wholistic construction of the letter of guarantee and indemnity reveals an instrument that is bound to indemnify the chargee from losses arising out of default and which under any circumstances of default, secures the chargee's receipt from the guarantor a sum not exceeding the guaranteed sum as part of the principal lent plus interest, fees, commissions, charges, costs and expenses which have become due to the lender from the principal debtor. In construing the letter of guarantee and indemnity what is material is, in my view, whether there is any sum outstanding from the principal debtor rather than whether an amount equivalent to or in excess of the guaranteed sum has been paid by the principal debtor.

21. In my view, the 1st defendant's right to exercise its statutory power of sale in respect of the guarantee dated 19/9/2006 can not be and has not been extinguished by the repayment by the principal debtor of a sum equivalent to or in excess of the guaranteed amount. It is also the correct view as taken by DW1 that the bank need not necessarily exhaust the remedies against the borrower before pursuing the chargor, and that suit is normally filed after all the securities have been satisfied. That effectively disposes of the plaintiff's arguments that, firstly, once the principal borrower paid a sum in excess of the guaranteed sum, or a sum equivalent to the guaranteed sum, there was no default that could be construed to affect the guarantor and that he has a right to the discharge of his property, and secondly,

that it should pursue the principal debtor first before embarking on making the guarantor pay on the guarantee.

22. The plaintiff submitted that he could not understand why the 1st defendant was demanding the entire loan from him while he had not guaranteed the entire loan. The 1st defendant gave the plaintiff a demand notice and through auctioneers advertised the property in the newspapers and pasted advertisements on his plot claiming Kshs 3,654,243.44 through a notice (PExh 5a) dated 12/2/2009. It is also quite surprising that, if there was no foul play against the plaintiff, the default having begun in June 2008, the first notice of intention to exercise the chargee's statutory power of sale was addressed to the guarantor six months later in February 2009. Besides, even at a cursory glance of a reasonable man with no expert mathematical background, it is doubtful that the guaranteed sum could have been inflated to that extent between September 2006 and February 2009. It is instructive that DW1 admitted in cross-examination that the total liability of the borrower including some obligations not arising from the transaction subject matter of this suit had been lumped together with the subject of this suit and that it is not lawful to do so. If the credit manager of the 1st defendant can admit that, then one wonders where else proper information as to the exact amount of indemnity owed from the plaintiff to the 1st defendant on account of only the guaranteed sum can be obtained. Regardless of the guaranteed sum, the 1st defendant and the 2nd defendant were entitled to enter into credit agreement for any amount they wished, but the liability of the guarantor would remain constant and only as per the terms of the letter of guarantee. In brief, what this court has observed is that the manner in which the 1st defendant has approached the realisation of the security that is the plaintiff's property lacks bona fides, may have contributed to the plaintiff's perception of being overwhelmed by the sum claimed, and leaves a lot to be desired. It must be stated here that going by the notices from the 1st defendant and its auctioneers which were produced by the plaintiff, I think the 1st defendant attempted to claim the entire outstanding sum owed by the 2nd defendant from the plaintiff rather than seek a prorated sum from him and in my view, that was wrong.

23. What this court must state is that perchance the loan amount outstanding exceeds the guaranteed sum, and in this case, I can see that it does, the guarantor is bound to repay the whole of the guaranteed sum plus any interest fees, commissions, charges, costs and expenses which have already become due to the lender from the principal debtor, but since there was a limit placed on the guaranteed sum, then it follows that there must also be a limit on the interest, fees, commissions, charges, costs and expenses which have already become due to the lender from the principal debtor. This limit can only be realised by way prorating these extra liabilities against the guaranteed sum. They must be prorated on the basis of the outstanding sum against the guaranteed sum by way of expert computations to ensure justice to the guarantor. It is only the sum arrived at from this computation, and not the entire sum of indebtedness of the 2nd defendant, that should be demanded from the plaintiff. That is the only just view that can be taken of the matter because it is obvious that the guarantor did not feature in the subject transaction for the purpose of bearing the total liability of the principal debtor.

24. I think it would be only just and fair for the 1st defendant to sit with the plaintiff and compute the exact amount payable under the guarantee due to default of the 2nd defendant and demand that specific sum, otherwise this dispute will be a sempiternal merry-go-round of sorts that will repeatedly end up in the corridors of justice and attract the same kind of observations I have made in this judgment due to the 1st defendant's apparently deliberate omission to prorate the payments due from the plaintiff.

25. I find that the prior processes and notices that attempted to have the security realised on the basis of demands for payment of the entire outstanding sum instead of the prorated sum to be defective and null and void and they should be corrected by the 1st defendant if it wishes to proceed to dispose of the

plaintiff's land by way of exercise of statutory power of sale. That means that the 1st defendant would have to restart the process by demanding the proper sum from the plaintiff.

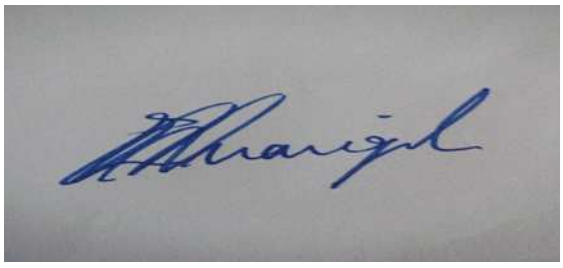
26. From the foregoing I find that the plaintiff is bound to honour the terms of the letter of guarantee dated 19/9/2006; however, the guarantor's parcel of land having been charged, the appropriate notices and all processes required of a chargee by the law must be issued, taking note of what I have stated at the end of paragraphs 22, 23, 24 and 25 herein above.

27. In view of the foregoing, the plaintiff's suit against the defendants partially succeeds. I therefore issue the following orders:

> a. All previous notices issued by the 1st defendant to facilitate the exercise of its statutory power of sale are illegal, null and void and they are hereby quashed.
>
> b. The 1st defendant shall within 3 months of the date of this judgment compute the appropriate amount due from the plaintiff under the letter of guarantee dated 19/9/2006 and in doing so prorate only against the guaranteed sum the outstanding interest, fees, commissions, charges, costs and expenses which are due to the 1st defendant from the 2nd defendant on the basis of the total indebtedness of the principal debtor at the date of the first notice of intention to exercise statutory power of sale issued to the plaintiff under the guarantee and charge instruments he executed.
>
> c. The 1st* defendant shall not under any circumstances in the first 3 months after the date of this judgment exercise or attempt to its statutory power of sale, and in any event, shall not exercise that power of sale thereafter unless the proper amount has been computed and demanded from the plaintiff as ordered in order no (b) above;
>
> d. The plaintiff shall pay the new sum calculated and formally demanded under the guidelines set out above and upon doing so his title LR No LR Nakuru Municipality Block 21/66 shall be discharged.
>
> e. The costs of this litigation shall be borne by the 1st defendant and the 2nd defendant.

It is so ordered.

**Dated, signed and issued at Nakuru via electronic mail on this 29th day of June, 2022.**



**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**